

DELHI COMMISSION FOR PROTECTION OF CHILD RIGHTS

Government of NCT of Delhi

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PUBLIC NOTICE

The Hon'ble Supreme Court of India in Barun Chandra Thakur v/s Master Bholu & Anr. Crl. Appeal No.950/2022 vide its judgment dated 13.07.2022 has directed the Central Government, NCPCR and SCPCRs to consider issuing the guidelines or directions which may assist and facilitate the Juvenile Justice Board in making the Preliminary assessment under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

Therefore, Delhi Commission for Protection of Child Rights(DCPCR) held series of consultation with different stakeholders including representation from Delhi State Legal Services Authority (DSLISA), Institute of Human Behaviour & Allied Sciences (IHBAS), Juvenile Justice Boards (JJBs), advocates, civil society organizations etc and formulated the draft guidelines for conducting Preliminary Assessment under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

The Commission seeks the valuable inputs/ comments on the draft guidelines from the public which may be sent to the Commission at dcpcr@hotmail.com on or before **10.03.2023** with the subject "Comments on draft JJ Section 15 guidelines". The guidelines are annexed herewith for your reference.


24/02/23

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***Please quote the Reference No. mentioned above in your reply.**

Delhi Commission For Protection of Child Rights (DCPCR)
Government of NCT of Delhi

Draft Guidelines
For
Conducting Preliminary Assessment Under Section 15 of the Juvenile
Justice (Care and Protection of Children) Act, 2015

1. Introduction

Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter referred as “JJ Act”) provides for the possibility of trial of children aged between 16 to 18 years who are alleged to have committed heinous offences as adults subject to specific conditions. The section of the JJ Act is produced below:

“Section 15- 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:(2 of 1974):*

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”.

Considering the section is applicable only if the offences alleged are of heinous nature, the definition of the “heinous offence” becomes critical. The section 2(33) of the JJ Act defines this as follows:

“(33) “heinous offences” includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;”

The Rule 10A(1) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 provides further guidance with respect to implementation of section 15 of the JJ Act. The rule states,

“10A. Preliminary assessment into heinous offences by Board.”-(1)
The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.

(2) For the purpose of 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. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

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

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith”.

2. Context of Guidelines: The Hon'ble Supreme Court in Barun Chandra Thakur v/s Master Bholu & Anr. CrI. Appeal No.950/2022 vide its judgement dated 13.07.2022 cast an obligation for drafting of the guidelines or directions to facilitate the Board in making the

preliminary assessment under section 15 of the Act, 2015. The relevant para of the judgement is as follows:

“87. “Before concluding, we may indicate that the task of preliminary assessment under section 15 of the Act, 2015 is a delicate task with requirement of expertise and has its own implications as regards trial of the case. In this view of the matter, it appears expedient that appropriate and specific guidelines in this regard are put in place. Without much elaboration, we leave it open for the Central Government and the National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights to consider issuing guidelines or directions in this regard which may assist and facilitate the Board in making the preliminary assessment under section 15 of the Act, 2015.”

Therefore, after holding extensive consultations with experts, advocates, activists, Juvenile Justice Boards, Delhi State Legal Services Authority officials, other government officials, and children, the Commission issues following guidelines and directions.

- 3. Aim of Preliminary Assessment:** The aim of the preliminary assessment is limited. It is to assess whether the child aged 16 to 18 years has the
- a. mental and physical capacity to commit the alleged offence,
 - b. ability to understand the consequences of the alleged offence and
 - c. the circumstances in which the alleged offence was allegedly committed.

The adjudication is to be done by the Juvenile Justice Boards constituted under section 4 of the JJ Act. The Boards are at liberty to engage psychologists, psycho-social workers or other experts for the assistance they wish to seek, however, the responsibility and the onus of the Preliminary Assessment lies with the Boards.

- 4. General Principles For Preliminary Assessment:** Considering the preliminary assessment is carried out in accordance with section 15 of the JJ Act, all the general principles outlined in the section 3 of the JJ Act shall apply for this process as well.

5. What Preliminary Assessment is Not: Dispelling Myths Around It-

There are many prevailing confusions and misunderstandings about preliminary assessment which have been clarified by the very provision that provides for preliminary assessment, other statutory provisions, or different Court orders and judgments. Hence, the clarifications:

5.1 Preliminary Assessment is Not A Tool or Process to Extract

Confession: Preliminary assessment is neither meant to seek confession from the child nor to reach a conclusion with respect to the guilt of the child regardless of the information the child may or may not have supplied as part of the Social Investigation Report or any other interaction. Relying on any confession by the child is antithetical to the right against self-incrimination guaranteed under Article 20(3) of the Constitution of India. This means a complete prohibition on reliance of any material, in any format whatsoever, consciously or inadvertently is placed before the Juvenile Justice Board. The same has been observed by the High Court of Delhi in order dated 19 September 2022 passed in *Vikas Sangwan vs State*, CRL. REV.P. 696/2018, wherein the Court stated its concerns regarding how the Social Investigation Report (SIR) is not to be used against the child in conflict with law. The observation of the High Court is produced below:

“... 3. ... the questionnaire at Sl. Nos. 42 and 43 in Form No.6 which relates to preparation of Social Investigation Report (in short SIR) for children in conflict with law under Section 8 of the Juvenile Justice (Care and Protection) of Children Act (in short, the J.J. Act) is incorrect as a presumption is raised at the pre-trial stage itself that the child has committed the offence for the reason it note in Sl. No. 42.

4. Learned counsel appearing on behalf of the NGO/HAQ, Intervener in the CRL.Ref. 3/2016 has placed before us, a copy of the preliminary assessment report prepared by a psychologist in the format supplied by the Department. Under Clause 3 of the said report, it can be clearly noted that a confession is sought to be extracted from the child as to the manner in which the offence was committed and the reasons thereof. This manner of seeking a confession from the child is unconstitutional and beyond the scope of a report of

preliminary assessment to be prepared under Section 15 of the J.J. Act. ...”

Therefore, the preliminary assessment is not a tool or the process to extract confession. It would be a miscarriage of justice and violative of constitutionally recognised principles to do so.

5.2 Preliminary Assessment Is Not a Trial: Preliminary assessment is not a trial and this has been repeatedly clarified by the statute as well as different Judgements of the High Court and Supreme Court. A plain reading of the “explanation” provided in the statute itself specifies that. It is reproduced below (highlighted)

“Section 15- 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.

....”

In *Mumtaz Ahmed Nasir Khan and Ors. Vs The State of Maharashtra & Ors.*, MANU/MH/1902/2019. The Bombay High Court has stated and reiterated that the preliminary assessment is not a trial. The relevant excerpts are produced below:

“33. As Section 15 permits the Board may, during the preliminary assessment, take the assistance of experienced

psychologists or psycho-social workers or other experts. **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. On inquiry, 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. Then, if the Board is "satisfied on preliminary assessment that the matter should be disposed of", it will follow "the procedure, as far as may be, for trial in summons case under Cr PC." The Board's order is appealable under sub-section (2) of Section 101.

In Pradeep Kumar Vs. State (NCT of Delhi) 2019, SCC OnLine Del 8251, High Court of Delhi held that preliminary assessment is not a trial too. The relevant para is reproduced below:

*"9. The proviso attached to Section 15 of the Act, provides that the JJ Board may take the assistance of experienced psychologist or psycho-social worker or other experts. **Further, the explanation to the Section provides that preliminary assessment is not a trial** but is to assess the capacity of such CCL to commit and understand the consequences of the alleged offence."*

It must be noted that since it is not a trial, few principles immediately emerge. They are:

- a. **The Preliminary Assessment cannot be a tool to make comments, or draw conclusions or inference about the merits of the case or the guilt of the child.**
- b. **There cannot be an adversarial approach from the State,** and the prosecutor. Any such approach adopted would defeat the purpose, contradictory to the section 15 of the JJ Act, and repeated clarifications from different High Courts.
- c. **Limited reliance on prosecution documents:** The Board can rely on the First Information Report (FIR) and the Preliminary Inquiry Report (PIR) only to the limited extent

they enable the Boards to examine whether the offence alleged is of heinous nature so as to decide the very applicability of the section 15 of the JJ Act. We reiterate that the principles of natural justice are sacrosanct, and all documents relied by the Boards to conduct preliminary assessment shall be mandatorily shared with the child, his/her family and his/her counsel enabling them to examine, scrutinise, dispute, discard, or disprove those documents or claims or even opinions of the psychologist, psycho-social workers and experts engaged, if needed.

5.3 Experts Opinion Is Not Binding On Juvenile Justice

Boards: The section 15 of the JJ has a very progressive provision of use of experienced psychologists or psycho-social workers or other experts. The opinion and expertise of these professionals is valuable input and insights for the Board. However, the decision eventually and solely belongs to the Juvenile Justice Board which retains the right to accept, or reject the opinion of these professionals. The same has been reiterated by High Court of Delhi in CRL. REV.P. 246/2019 and CRL.M.As. 4756-57/2019 titled Pradeep Kumar v. State NCT Of Delhi. The High Court stated,

*“10. There is no doubt that the JJ Board may seek the opinion of an expert regarding the mental and physical capacity of a CCL to commit an offence and it is not necessary that if an expert opined that the mental and physical capacity of a CCL and his ability to understand the consequence of the offence are positive, then the JJ Board is bound by the expert opinion. **It is well within the jurisdiction of the JJ Board to agree or disagree with the preliminary assessment report of the CCL submitted by such a psychologist to the JJ Board.** But the circumstances, in which the alleged offence was committed has to be considered by the JJ Board independently, in which the alleged offence was committed and the JJ Board has to apply a judicial mind.*

5.4 Engagement of “psychologists or psycho-social workers or other experts” Not Mandatory: This is clear from a plain reading of the statutory provision itself which is reproduced below:

“Section 15- 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.*

The statute uses the word **“may”** leaving it to the discretion of the Juvenile Justice Boards to decide whether they require their assistance.

The same question has been called into question multiple times in different Courts. For instance, in CRL.RP 327/2020 titled H.S. Poornesh v. State by Mallandur Police, the Karnataka High Court observed,

“10.

...

In order to do such a preliminary assessment, the Board may take the assistance of experienced psychologists or psycho-social workers experts or other experts. By that itself, it cannot be construed that the J.J. Board under all circumstances of the case and necessarily take the assistance of the experts. If the materials placed before the J.J. Board and the circumstances of the case themselves helps it to arrive at a proper assessment, then, non-taking of any experts opinion or non-taking the assistance of any expert would not take away the validity of its opinion or finding.”

Further, the Supreme Court in Barun Chandra Thakur vs Master Bholu & Anr. judgement also acknowledges that the Board may have necessary expertise itself and in those instances the external experts are not warranted.

5.5 Natural justice principles & Right to Defend applicable even during the process of Preliminary Assessment: The statute, and the different Court judgments reinforce that the Preliminary Assessment is not a trial. However, it does not mean that the child can be deprived of the documents relied on by the Board for its adjudication, or be deprived of an opportunity to disprove, dispute, and examine the documents being relied on by the Board. The section 99 of the JJ Act provides clarity in this regard:

99. (1) All reports related to the child and considered by the Committee or the Board shall be treated as confidential:

*Provided that the Committee or the Board, as the case may be, may, if it so thinks fit, communicate the substance thereof to another Committee or Board or to the child or to the child's parent or guardian, and may give such Committee or the Board or the child or parent or guardian, **an opportunity of producing evidence as may be relevant to the matter stated in the report.***

(2) Notwithstanding anything contained in this Act, the victim shall not be denied access to their case record, orders and relevant papers.

The Supreme Court in *Barun Chandra Thakur vs Master Bholu & Anr.* judgement has categorically stressed that the child should have had access to different documents for adequate time during the preliminary assessment. The Court has held that all documents that can be relied upon by the Board for preliminary assessment have to be provided to the child or parent or guardian of the child [Paras 40 and 50 to 58]. The different statutory provisions such as Rule 10(5) of JJ Act have also outlined similar right.

Supply of the documents will strengthen the cause of justice by enabling the child or his/her counsel to call into question the opinion or even credentials of the psychologist, psycho-social worker or experts, as the case may be.

5.6 Pendency of Preliminary Assessment is NOT Ground to Deny Bail: In accordance with section 14(3) of the JJ Act, the Juvenile Justice Boards shall dispose of the Preliminary Assessment within 3 months from the date of first production. Considering the relevance and stakes of the Preliminary Assessment on the life of the child, the question of bail assumes significance for this time period. The section 12 of the Juvenile Justice (Care and Protection of Children) Act 2015 deals with the question of bail for children in conflict with law. It states,

*“12. (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person **shall**, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, **be released on bail** with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person’s release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.”

The statutory provision makes three things abundantly clear.

- Firstly, bail is the norm. This has been reiterated by High Courts, and Supreme Court in several judgments even for adults.
- Secondly, the gravity of the offence is not a ground for determination of the bail.
- Thirdly, there are limited grounds to deny the bail.

- *“release is likely to bring that person into association with any known criminal”* : This likelihood must be borne out by evidence, and cannot be mechanical and generically expressed apprehension. This provision exists not to deprive the child of his or her liberty but to protect his/her interests.
- *expose the said person to moral, physical or psychological danger*: This is a fair provision considering protection of the children is of paramount importance. This provision also exists not to deprive the child of his or her liberty but to protect his/her interests.
- *The person’s release would defeat the ends of justice*: The phrase has been defined by the High Court of Delhi in *Dev Vrat Vs. Govt of NCT of Delhi* (criminal revision petition no. 588 of 2006). The Court stated, “

“4. The facts for determining as to what amounts to defeat of the ends of justice must be construed in the context of the purpose of the Act.

...

It is only if the developmental needs of the child require that he be kept in custody or that keeping him in custody is necessary for his rehabilitation or care or protection that his release would defeat the ends of justice, not otherwise”

Therefore, the bail may be denied on the statutory provision basis only and not for convenience of the preliminary assessment.

6. Process of Conducting Preliminary Assessment: The process of conducting preliminary assessment is crucial, and begins from the date of first appearance of the child in conflict with law before the Juvenile Justice Board. In case the child is apprehended, the child must be produced within 24 hours before the Juvenile Justice Board in accordance with section 10(1) of the JJ Act.

However, in case the child is not apprehended, even then the production of the child before the Board is mandatorily to be done within 24 hours of the child becoming subject of the processes under JJ Act. This was held by the High Court of Delhi in Court on its own Motion vs State, CRL. REF. 1/2020 & W.P. (CRL.) 1560/2017, Order dated 29.09.2021. The Court stated,

“13(i)

.....

*And since section 14 says that the period of 04 months shall run from the date of first production of the child before the JJB, we direct that in consonance with the spirit of section 10, the child must be so produced before the JJB, **whether or not apprehended or otherwise detained, without any loss of time but in any case within a period of twenty-four hours of the child becoming subject of processes under the JJ Act;***”

The High Court further Ordered that,

“13(ii)

.....

*Since even age determination is required to be made, in the first instance, by the obvious appearance of the subject, **it is inconceivable that the production before the JJB itself can be delayed beyond the 24 hour period stipulated in section 10.***”

Considering the first production of the child must happen within 24 hours of the child becoming subject of the processes under JJ Act, all timelines under the JJ Act will start from the next day itself.

6.1 First Production: Rule 10(1(i)) of the Juvenile Justice (Care and Protection of Children) Model Rules 2016 as notified by the Government of India casts an important responsibility and power over the Juvenile Justice Board on the date of first production. The rule is reproduced below (the relevant portion is highlighted):

“10. Post-production processes by the Board.- (1) On production of the child before the Board, the report containing the social background of the child, circumstances of apprehending the child and offence alleged to have been committed by the child as provided

by the officers, individuals, agencies producing the child shall be reviewed by the Board and the Board may pass such orders in relation to the child as it deems fit, including orders under sections 17 and 18 of the Act, namely:

(i) disposing of the case, if on the consideration of the documents and record submitted at the time of his first appearance, his being in conflict with law appears to be unfounded or where the child is alleged to be involved in petty offences;”

.....

(2) In all cases of release pending inquiry, the Board shall notify the next date of hearing, not later than fifteen days of the first summary inquiry and also seek social investigation report from the Probation Officer, or in case a Probation Officer is not available the Child Welfare Officer or social worker concerned through an order in Form 5.

Rule 10 (1) (i) gives the option to the Juvenile Justice Board to dispose of the case at the stage of first appearance itself if the case appears to be unfounded. This is a very substantive power and the responsibility on the Board.

Further Rule 10(2) casts an important obligation on the Boards to mandatorily conduct summary inquiry as the next date of the hearing is contingent on that.

6.2 Order Social Investigation Report (SIR): If the Board has not exercised its powers under Rule 10(1)(i) to dispose off the case, the Board shall direct the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days in accordance with section 8(e) of JJ Act. The SIR is a crucial document to help ascertain the circumstances in which the alleged offence was committed.

6.3 Decide the question of bail if the child is apprehended: The section 12 of the Juvenile Justice (Care and Protection of Children) Act

2015 deals with the question of bail for children in conflict with law. Therefore, unless *“release is likely to bring that person into association with any known criminal”* or bail will *“expose the said person to moral, physical or psychological danger”* or *“release would defeat the ends of justice”*, the bail should be immediately granted to the child in conflict with law without awaiting for the application from legal counsel.

The section 12 of the JJ Act states granting the bail *“with or without surety”*. Further, in case the child in conflict with law is unable to fulfil the conditions of the bail order, the section 12(4) mandates that the *“child shall be produced before the Board for modification of the conditions of the bail”*.

6.4 Age Determination: Considering the applicability of any and every provision in the JJ Act is predicated on the person being a child, the age determination, therefore, becomes crucial. Therefore, the age of the child in conflict with law produced before the Juvenile Justice Board must be determined in accordance with the section 94 of the JJ Act. The Rule 10A(1) provides for clarity in this regard. It states,

“The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.”

Further, attention is drawn to the judgement of the High Court of Delhi in Court on its own Motion vs State, CRL. REF. 1/2020 & W.P. (CRL.) 1560/2017, Order dated 29.09.2021 in which the Court mandated timelines for age determination. The Court stated,

“13(ii) It is to be noted that the proviso to section 94(2)(iii) stipulates that age determination by an ossification test conducted on the orders of JJB, shall be completed within 15 days from the date of such order, from which it is only logical that age determination by other methodologies contemplated in section 94(1) and 94(2) cannot take months-on-end.”

6.5 Legal Counsel: The Legal Service Advocates or the private counsel, as the case may be, shall have unrestricted access to the child in conflict with law and the right to be present at every interaction during the course of preliminary assessment.

The Supreme Court in *Barun Chandra Thakur*, the High Court and the Supreme Court have held that all documents that can be relied upon by the Board for preliminary assessment have to be provided to the child or parent or guardian of the child [Paras 40 and 50 to 58]. The different statutory provisions such as Rule 10(5) of JJ Act have also outlined similar right.

Therefore, the legal aid counsel or the private counsel, as the case may be, shall, mandatorily, be supplied statements of witnesses recorded and other documents prepared during the course of investigation by the Child Welfare Officer. These documents shall separately be made available to the child and his family.

These documents include every document placed before the Juvenile Justice Board including psychologist opinion. Further, these documents ought to be provided to the child and his family as well as his legal counsel as soon as the same is placed before the Board enabling them adequate and reasonable time for necessary action at their end.

In case the child is in the Observation Home or Place of Safety, as the case may be, the Board's order pertaining to bail and adjudication with respect to section 15 of the JJ Act shall be additionally supplied to the Superintendent as well with the directions to explain the child/family in simple terms the content of the documents.

These documents include every document placed before the Juvenile Justice Board including psychologist opinion. Further, these documents ought to be provided to the child and his family as well as his legal counsel as soon as the same is placed before the Board enabling them adequate and reasonable time for necessary action at their end.

Further, the Legal Services Authority Counsel must scrupulously adhere to directions passed by the High Court of Delhi in W.P(c) 8889/2011.

6.6 Basis of Adjudication by Board: The preliminary assessment of the child aged 16 to 18 years accused of committing heinous offence is based on the following:

- a. mental and physical capacity to commit the alleged offence,
- b. ability to understand the consequences of the alleged offence and

- c. the circumstances in which the alleged offence was allegedly committed.

6.6.1 Physical & Mental Capacity to Commit the Alleged Offence: It is crucial for Boards to note that physical and mental capacity does not always mean disability. The disability, except in extreme circumstances, does not mean lack of physical capacity. This distinction is important to avoid any confusion, and erroneous conclusions.

The physical capacity needs to be seen in the context and the nature of the act involved in the offence and described rather than looking for categorical or dichotomous answers in the form of yes or no.

Mental Capacity is a term used to describe a person's ability to make decisions. This includes a range of cognitive abilities including intelligence, memory and information processing, comprehension, judgement, and reasoning.

Mental Capacity is thus an index of 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 or has entered.

It is pertinent that there are conditions which have bearings on the mental capacity such as intellectual disability and severe mental disorders. However merely absence or presence of these does not indicate mental capacity or incapacity.

Intellectual disability and mental health disorders are important and worthy aspects for examination and can help as important input to the conclusion on this statutory condition, there is a need to interpret it narrowly, and as closely to the facts as possible.

The psychologist while assessing mental capacity must consider the cognitive abilities in the context of the circumstances of the offence and the possible factors that temporarily impair the process of decision making such as extreme trauma or stress, intense rage, sudden and unexpected onset of events etc.

However, just because a person has one of these health conditions does not always mean they lack the mental capacity to make a specific decision for themselves. It could be that whilst they lack the capacity to make more complex decisions (for example, regarding financial issues)

they still can have the capacity to make other decisions (for example, how to dress and make general day to day decisions)

Mental incapacity, where you lack capacity to make a decision, is normally defined if you are unable to:

- understand information given to you relevant to the decision (comprehension)
- retain the information given to you for long enough to be able to make the required decision (information processing)
- use or weigh up all your options before making your decision (judgement); and/or
- to communicate your decision (whether by talking, using sign language or any other means).

This must also be seen in the context of the circumstances of the offence. Extreme trauma, rage, suddenness of the events may momentarily impair cognitive functions and even cause interim physical incapacitation.

The Supreme Court in *Barun Chandra Thakur vs Master Bholu & Anr.* the judgement quotes the framework and guidance notes given by the Department of Child & Adolescent Psychiatry, NIMHANS which is reproduced below for reference:(page 79):

“In actual fact, everyone, except someone with serious physical disability (the type that severely impacts locomotor skills) or with intellectual disability, has the mental and physical capacity to commit offence. So, to ask whether a given child has the mental and physical capacity to commit offence, in simplistic terms, is likely to elicit the answer ‘yes’ in most cases. And just because someone has the physical and mental capacity to commit an offence, does not mean that they will or that they have. Therefore, a dichotomous response as elicited by this question posed by the JJ Act is of little use in making decisions regarding a child who has come into conflict with the law. Thus, in response to the problems resulting from a simplistic dichotomous response to the physical-mental capacity question, we have adopted a more detailed, descriptive and nuanced interpretation”

The Juvenile Justice Boards must examine, therefore, the question of physical capacity and mental capacity linked to circumstances as well.

Further, the Boards must also resist the reliance on IQ score for mental capacity for two reasons:

- Firstly, often the preliminary assessment is carried out weeks or months after the alleged incident and therefore it is not feasible to measure IQ retrospectively.
- Secondly, mere reliance on IQ muddles the possibility of temporary or interim impairment of cognitive functions because of a sequence of events.

Further, if the psychologists or psycho-social workers or any other experts decides to administer any test on the child, it must be done so only after written consent of the parent which must be preceded by the child and his family being informed of the nature, and purpose of the test along with the intended use of the test results. It is reiterated that the child, his family and his counsel must immediately be supplied the test results.

6.6.2 Ability to Understand Consequences of Alleged Offences: The ability to understand the consequences of alleged offences has to be interpreted multi-dimensionally. Often, there is a narrow view limited to a child's understanding of legal consequences that may follow.

This is important, however, there is a difference between knowledge and understanding. The legal consequences must not be understood to be limited to “jail” or “punishment” but also include social consequences including impact on career, family, future, dignity in society, friendships, reputation, livelihood, etc.

The ability to understand the consequences needs to also include the child's ability to understand the medical or physical or emotional harm to the victim, and how that may unfold for the victim in the immediate and long-term period.

The Supreme Court judgement (para 67 to 71) of the *Barun Chandra Thakur vs Master Bholu Criminal Appeal No.950/2022 (arising out of SLP(CrL.) No.10123 of 2018)* defines the ability to understand the consequences of an offence, immediate and long term, of the offences on the victim. The Supreme Court has extensively dealt with the

consequences of the offence point. Para 67 to 71 can be referred to in this regard. Extract of the same are given here for reference:

“67. We are in agreement with the reasoning given by the High Court that further assessment ought to have been carried out once the psychologist had recommended so and had also suggested the name of the institute. The Board and the Children’s Court apparently were of the view that the mental capacity and the ability to understand the consequences of the offence were one and the same, that is to say that if the child had the mental capacity to commit the offence, then he automatically had the capacity to understand the consequences of the offence. This, in our considered opinion, is a grave error committed by them.

68. The language used in section 15 is “the ability to understand the consequences of the offence”. The expression used is in plurality i.e., “consequences” of the offence and, therefore, would not just be confined to the immediate consequence of the offence or that the occurrence of the offence would only have its consequence upon the victim but it would also take within its ambit the consequences which may fall upon not only the victim as a result of the assault, but also on the family of the victim, on the child, his family, and that too not only immediate consequences but also the far reaching consequences in future. Consequences could be in material/physical form but also affecting the mind and the psychology of the child for all times to come. The consequences of the offence could be numerous and manifold which cannot be just linked to a framework; and, for this purpose, the overall picture as also future consequences with reference to the facts of the case are required to be consciously analysed by the Board.

69. Consequences for the victim could be his death, or permanent physical disability, or an injury which could be repaired or recovered; the impact of the offence on the mind of the victim may be prolonged and continue for his lifetime; the impact on the family and friends of the victim, both mental and financial; consequence on the child going into

incarceration; mental impact on the child, it could be repentance or remorse for life, the social stigma cast on the child and his family members; the consequences of litigating and so many other things which would be difficult to adumbrate.

70. A child with average intelligence/IQ will have the intellectual knowledge of the consequences of his actions. But whether or not he is able to control himself or his actions will depend on his level of emotional competence. For example, risky driving may result in an accident. But if emotional competence is not high, the urge for thrill seeking may get the better of his intellectual understanding.

71. Children may be geared towards more instant gratification and may not be able to deeply understand the long term consequences of their actions. They are also more likely to be influenced by emotion rather than reason. Research shows that young people do know risks to themselves. Despite this knowledge, adolescents engage in riskier behaviour than adults (such as drug and alcohol use, unsafe sexual activity, dangerous driving and/or delinquent behaviour). While they do consider risks cognitively (by weighing up the potential risks and rewards of a particular act), their decisions/actions may be more heavily influenced by social (e.g. peer influences) and/or emotional (e.g. impulsive) tendencies. In addition, the lack of experience coupled with the child's limited ability to deeply understand the long term consequences of their actions can lead to impulsive/reckless decision making."

6.6.3 Circumstances in which the alleged offence is allegedly committed: This aspect too deserves detailed examination by the Boards, both immediate circumstances, and the ones that built up overtime.

The relevant issues under which the alleged offence was committed are outlined in Paragraph 72 of the Supreme Court's Barun Thakur verdict.

72. Coming to the last count, i.e., the assessment regarding the circumstances in which the offence is alleged to be committed is again an attribute which could have many factors to be considered before such an assessment could be made. There could be a number of reasons for a person to commit a crime. It could be enmity, it could be poverty, it could be greed, it could be perversity in mind and many others. There could be coercion. There could be threat to one's life and property. There could be allurements in terms of the material and physical gains. Crime could be committed on account of stress or depression also. It could be on account of the company that one keeps. One could commit crime in order to help his family and friends. All these and many more could be termed as circumstances leading to the commission of crime.

To understand the circumstances in which the alleged offence was allegedly committed, the Boards must rely on section 8(3)(e) of the JJ Act which states the following:

"(e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report 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;"

7. Preliminary Assessment Order by Juvenile Justice Board: Based on examination on the aforementioned criteria through the aforementioned process and principles, the Juvenile Justice Board within the stipulated time period shall pass the judicial order to decide whether the child is to be tried as an adult.

Given the significance of the judicial order, each member of the Juvenile Justice Board, namely the Principal Magistrate and the Members (Social Workers) may write their own opinion assigning reasons for their conclusion to ensure greater application of the mind.

The final order shall be one in accordance with the section 7(4) of the JJ Act, the views of the majority would prevail. Dissent, if any, must be recorded.

7.1 If the Board decides for trial of the child as an adult, then:

a. Order to be Supplied Immediately:

- i. In accordance with the Rule (10A(4) of the JJ Model Rules 2016, the child, his family, and his counsel shall be supplied the copy of the Order. This must be done within 3 days by email (if applicable), WhatsApp (if applicable) and by post.

The Counsel of the child must within 48 hours of the receipt of the Order meet the child along with his family and explain the content, consequences, and next steps of the Order.

- ii. Within 3 days of the Order, the Board must provide a copy of the Order to the Superintendent of the Observation Home or Place of Safety, as the case may be, with the directions to inform the child and his family of the content of the Order.

- b. **Legal Remedies & Right to Defend:** Right to formidable defence is a constitutionally guaranteed right under Article 21, and therefore every stakeholder must adhere to this principle in letter and spirit. To honour this, the first step is the appointment of the legal counsel for filing an appeal against the Order of the Juvenile Justice Board. The section 8(3)(c) of JJ Act 2015 makes Juvenile Justice Boards responsible for providing legal aid. The rule (8)(3) (vii) of the JJ Model Rules 2016 casts the obligation of providing free legal aid to the Delhi State Legal Services Authority. Therefore,

- i. The Order passed by the Juvenile Justice Board must explicitly mention the right of the child to file an appeal against the Order, the timelines to be followed, the State/District Legal Services Authority's address, email, and phone number enabling the child to file an appeal promptly.
- ii. The order passed by the Juvenile Justice Board must categorically pass directions to the counsel to read out the right and the process of the appeal to the child.
- iii. The Order must also be communicated to the State/District Legal Services Authority with the directions to appoint the advocate to aware, guide and assist the child in filing appeal in case the child

does not have a private advocate.

- iv. The Legal Services Authority must appoint the advocate within 2 days of the receipt of the Order. The copy of the order of appointment must immediately be communicated by speed post, email and WhatsApp to the child or his/her family, Superintendent of the Observation Home or the Place of Safety, as the case may be.
- v. The advocate so appointed shall meet and interact with the child and his/her family starting within 3 days of the appointment and start the preparation of filing the appeal if there is no private advocate of the child or the family. In case the child is in an Observation Home or the Place of Safety, as the case may be, the Superintendent must coordinate with the advocate so appointed and ensure optimal time, opportunity and interaction between the child and the advocate.
- vi. If the child was represented by the legal aid counsel at the Board, he/she shall within 2 days of the Order being passed communicate the next steps, process and opinion to the family as well as the advocate appointed to file the appeal. The legal aid counsel who represented the child at the Board must facilitate the first interaction between child and the advocate appointed by the Legal Services Authority for appeal and make necessary introductions.
- vii. The Authority must take an adverse view if the advocate so appointed does not file an appeal within 21 days of the appointment. Such a lapse shall be mandatorily recorded in his or her annual appraisal report.
- viii. The Department of Women & Child Development shall take an adverse view of the Superintendent should he/she fail to do the necessary coordination for filing the appeal of the child. Such a lapse shall be mandatorily recorded in his or her annual appraisal report.

7.2 If the Board decides for trial of the child as a child, not adult, then:

- a. In accordance with the Rule (10A(4) of the JJ Model Rules 2016, the child, his family, and his counsel shall be supplied the copy of the Order.

This must be done within 24 hours by email (if applicable), WhatsApp (if applicable) and by post.

The Counsel of the child must within 48 hours of the receipt of the Order meet the child along with his family and explain the content, consequences, and next steps of the Order.

- b. Within 3 days of the Order, the Board must provide a copy of the Order to the Superintendent of the Observation Home or Place of Safety, as the case may be, with the directions to inform the child and his family of the content of the Order.

8. Role of Delhi State Legal Services Authority: The Authority through its counsels has a central role in ensuring the implementation of these guidelines in letter and spirit as it, in most cases, represents the children in conflict with law before the Board through its legal counsels. Therefore, the Authority must:

- a. ensure strict adherence to timelines and these guidelines with respect to promptness to filing of the appeal against the Order of Juvenile Justice Board's decision to transfer the trial to children's court for trial of the child as adult, wherever applicable.
- b. Also ensure the questions of the bail of the children in conflict with law is taken up on priority, and the convenience of preliminary assessment is not allowed for grounds of rejection of bail as it lies outside the scope of the statutory permission.
- c. Ensure the legal aid counsel is provided the optimal and adequate sittings, time and interaction period with the child in conflict with law, his family, and the other people involved that can help the cause of the child. Therefore, there should be no limitation on their number of sittings or interactions with the child, where necessary. This includes any cap on with respect to the number of sittings that are payable by the Authority.
- d. Conduct periodic, and at least annually, training and capacity building workshops of all its legal aid counsels on these guidelines.

Note: The Legal Services Authority must file appeals against decisions of denial of bail, or transfer of the child to Children's Court for trial as adults even if the

family does not prefer an appeal. The well-being of the children is aided, assisted, and enabled by the families, but cannot be subservient to them.

9. Awareness, Reporting, Training, and Monitoring: These guidelines can be implemented by means of modes such as awareness, reporting, training and monitoring. Hence, different bodies have been assigned responsibilities accordingly.

- a. **Awareness:** The Delhi Commission For Protection of Child Rights (DCPCR) shall conduct awareness campaigns, and outreach programmes to ensure the wide dissemination of the guidelines. This includes but not is limited to display boards at every legal aid clinic or centre and Juvenile Justice Boards clearly stating, in simple Hindi and English, the rights of the children in conflict with law along with necessary contact details and information about different related processes.

The Department of Women & Child Development, being the nodal department for implementation of JJ Act, must also conduct awareness campaigns, and outreach programmes for wide dissemination of these guidelines.

- b. **Reporting:** Juvenile Justice Boards shall file quarterly information in the following format:

Total Children Aged 16-18 years in Conflict With Law (Heinous Offences) Pending With Board	Age Determination (all timelines from the date of DD/FIR since production is mandatory within 24 hours)				Preliminary Assessment (all timelines from the date of DD/FIR since production is mandatory within 24 hours)			
	Pending For less than 1 month	Pending for 2 months	Pending for 3 months	Pending for 3+ months	Pending For Less than 3 months	Pending for 3-5 months	Pending for 5-6 months	Pending for more than 6 months

The information in the table must be quarterly filed with the Delhi Commission For Protection of Child Rights (DCPCR), Deputy Commissioner/District Magistrate, Department of Women & Child Development, Delhi State Legal Services Authority, Chief Metropolitan Magistrates, and the District Judges.

The Delhi State Legal Services Authority shall quarterly information in the following format:

Number of Preliminary Assessment Cases Received	Number of Preliminary Assessment Cases Disposed of		Number of children whose appeal has been filed in Court of Sessions against the order of the Board			
	No. of children whose case is transferred to Children's Court for trial as adults	No. of children to be tried as a child	No. of cases in which appeal has been filed within 21 days	35 days	49 days	49 Days +

The information in the table must be quarterly filed by Delhi State Legal Services Authority with the Delhi Commission For Protection of Child

Rights (DCPCR), Deputy Commissioner/District Magistrate, Department of Women & Child Development, and Secretary (Law).

- c. **Training:** Delhi Commission For Protection of Child Rights in consultation with Delhi Judicial Academy, Delhi State Legal Services Authority and Department of Women & Child Development must organise periodic, at least annual, workshops and trainings on these guidelines for Juvenile Justice Boards, District Child Protection Units, Deputy Commissioners/District Magistrates or Sub-Divisional Magistrates, Public Prosecutors, Legal Aid Counsels, Special Juvenile Police Unit or any other stakeholder involved. Assistance from organisations such as Institute of Human Behaviour and Allied Sciences or any other experts may be sought for the training.
- d. **Monitoring:** In exercise of its powers conferred under section 13(1) of the Commission For Protection of Child Rights Act 2005 and the section 109 of the JJ Act, the Delhi Commission For Protection of Child Rights shall conduct annual review of the implementation of these guidelines and submit a report to the State Government, Executive Chairperson, Delhi State Legal Services Authority, and Juvenile Justice Committee of High Court of Delhi.

A copy of this report shall be provided to the Chief Metropolitan Magistrate, Principal Secretary (Home), Secretary (Department of Women & Child Development), State Selection Committee constituted under rule 87 of the JJ Model Rules 2016 as well enabling them to undertake remedial measures.

The report thus prepared by the Commission shall be placed in public domain by means of its website as well as form part of its Annual Report.