



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23rd DAY OF APRIL, 2021

PRESENT

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MRS. JUSTICE M.G.UMA

CRIMINAL PETITION No.2951 OF 2020

Connected with

CRIMINAL PETITION No.3000 OF 2020

IN CRIMINAL PETITION No.2951/2020 :

BETWEEN:

HANUMANTHA MOGAVEERA,
AGED ABOUT 29 YEARS,
S/O. PAKIRAPPA,
R/AT SRI MANJUNATHA,
NEAR NOOJI SCHOOL,
KORGI VILLAGE, HESKUTUR POST,
KUNDAPURA TALUK,
UDUPI DISTRICT - 576 231.

... PETITIONER

(BY SRI PAVANA CHANDRA SHETTY H., ADVOCATE)

AND:

STATE OF KARNATAKA BY
WOMEN POLICE STATION,
UDUPI,
REP. BY HIGH COURT SPP,
BENGALURU - 560 001.

... RESPONDENT

(BY SRI V.M. SHEELAVANTH, SPP (THROUGH V/C))

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 OF CR.P.C. BY THE ADVOCATE FOR THE PETITIONER PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO ENLARGE THE

PETITIONER ON BAIL IN CRIME NO.14/2019 OF UDUPI WOMEN P.S., UDUPI FOR THE OFFENCE PUNISHABLE UNDER SECTIONS 376(1), 354(A) OF IPC AND SECTIONS 5, 6, 21(2) OF POCSO ACT AND SECTIONS 3(1) (W) (I) (II), 3(2) (V), 3(2) (V-A) OF SC/ST (POA) ACT.

IN CRIMINAL PETITION No.3000/2020 :

BETWEEN:

HANUMANTHA MOGAVEERA,
AGED ABOUT 29 YEARS,
S/O. PAKIRAPPA
R/AT SRI MANJUNATHA,
NEAR NOOJI SCHOOL, KORGI VILLAGE,
HESKUTUR POST, KUNDAPURA TALUK,
UDUPI DISTRICT - 576 231. ... PETITIONER

(BY SRI PAVANA CHANDRA SHETTY H., ADVOCATE)

AND:

STATE OF KARNATAKA BY
WOMEN POLICE STATION,
UDUPI,
REP. BY HIGH COURT SPP,
BENGALURU - 560 001. ... RESPONDENT

(BY SRI V.M. SHEELAVANTH, SPP (THROUGH V/C))

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 OF CR.P.C. BY THE ADVOCATE FOR THE PETITIONER PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO ENLARGE THE PETITIONER ON BAIL IN CRIME NO.16/2019 REGISTERED BY WOMEN POLICE STATION, UDUPI FOR OFFENCES PUNISHABLE UNDER SECTIONS 376(1), 376(3), 377 AND 506 OF IPC AND SECTIONS 5(f) (o) (p) (i), 6, 21(2) OF POCSO ACT AND SECTIONS 3(1) (w) (i) (ii), 3(2) (v), 3(2) (v-a) OF SC/ST (POA) ACT.

THESE CRIMINAL PETITIONS HAVING BEING HEARD AND RESERVED ON 12.03.2021 AND COMING ON FOR PRONOUNCEMENT OF ORDERS TODAY, **NAGARATHNA J.**, PRONOUNCED THE FOLLOWING:

ORDER

As per the special order of Hon'ble the Chief Justice dated 12.01.2021, this Bench has been constituted to consider the Reference made by the learned single Judge of this Court under the provisions of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act", for the sake of brevity) and Section 164 and other provisions of the Code of Criminal Procedure, 1973 ("Cr.P.C.," for short). Although the petitions have been dismissed, nevertheless, learned single Judge has made a Reference to a Division Bench in the following terms:

"26. At this juncture, it is brought to the notice of this Court that when already the co-ordinate Bench in the case of ***Vinay Vs. State of Karnataka, rep. by Special PP***, (*supra*) and other two co-ordinate Benches have taken a different view and this Court is taking a different view, then under such circumstances, the matter has to be referred to the Larger Bench to consider the aspect of laying down the law. In that light, I am of the considered opinion that the matter requires to be referred

to the Larger Bench to consider the following issues:

i) Whether the evidence which has been recorded under Section 164 of Cr.P.C. can be considered to be an evidence under Section 35 of the POCSO Act?

ii) If the evidence of the child has not been recorded within a period of thirty days of taking cognizance of the offence, and if the Special Court does not complete the trial within a period of one year from the date of taking cognizance, whether accused is entitled to be released on bail holding that it is a default clause which gives a right to the accused?

Registry is directed to place the matter before Hon'ble the Chief Justice for obtaining necessary orders to refer the same before the Larger Bench to decide on the above questions."

BRIEF FACTUAL BACKGROUND:

2. For the purpose of answering the questions extracted above, it is necessary to give a brief factual

background to the reference in these cases. Criminal Petition No.2951 of 2020 and Criminal Petition No.3000 of 2020 were filed by accused No.1 seeking grant of bail in Crime Nos.14/2019 and 16/2019 of Women Police Station, Udupi, for the offences punishable under Sections 376(1), 376(3), 377, 506 of IPC; Sections 5(f)(i)(o)(p), 6, 21(2) of the Protection of Children from Sexual Offences Act, 2012 ('the POCSO Act' for short); and Sections 3(1)(w)(i)(ii), 3(2)(v), 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. The case of the prosecution in brief is that Crime No.14/2019 was registered by the Women Police Station, Udupi, on the basis of the first information lodged by the informant/Warden of the Child Care Institution viz., Spoorthi Adoption and Fit Institution. Further, Crime No.16/2019 was registered by the same Police Station in respect of the same incident on the basis of the first information lodged by the victim against the accused for the aforesaid offences.

4. In Criminal Petition No.3000/2020, the victim filed the complaint and in Criminal Petition No.2951/2020, the Protection Officer/Warden of District Children Protection Unit, Manipal, lodged a complaint alleging that the victim was residing at Spoorthi Adoption and Fit Institution and children therein are given in adoption also. It is further alleged that one Kum.Panchami has been given in adoption, but because of some differences between the adopted child and the family, adoption was cancelled and the child started staying in Spoorthi Institution. It is further alleged that the petitioner-accused No.1 used to enter the institution during night hours and have sexual intercourse with the victims who are staying in the said Institution. It is further stated by the victim herself that the petitioner-accused No.1 and accused No.2 also used to enter the hostel illegally and used to sexually assault them. As stated earlier, on the basis of the complaints filed by the Warden and the victim, cases in Crime Nos.14/2019 and 16/2019 respectively have been registered.

SUBMISSIONS:

5. It was the submission of petitioner/accused No.1 that, in the instant cases, the charge-sheet has already been filed and accused No.1 is in custody. That cognizance of offences was taken by the trial Court on 13.05.2019. As per Section 35(1) of POCSO Act evidence of the child had to be recorded within a period of thirty days of taking cognizance of the offence by the trial Court. If the same is not so recorded, the reasons for the delay has also to be recorded by the said Court. Further, as per Section 35(2) of the POCSO Act, the trial Court, having not completed the trial within a period of one year from the date of taking cognizance of the offences, petitioner/accused No.1 was entitled to be released on bail.

6. In that regard, reliance was placed on the order of this Court in the case of ***Vinay vs. State of Karnataka, represented by Special P.P. [Criminal Petition No.1195/2017*** disposed on ***13/07/2017***

(*Vinay*). It was contended that since the mandatory requirements of Section 35(1) and (2) of the POCSO Act had not been complied with in the instant cases, petitioner/accused No.1 was entitled to be enlarged on bail.

7. In this regard, reliance was also placed on the decision in ***Sushila Aggarwal and others vs. State (NCT of Delhi) and another, [2020 SCC Online SC 98]*** (*Sushila Aggarwal*). It was also submitted that liberty of the petitioner/accused No.1 had to be protected and if he was not going to be released on bail, his personal liberty was under jeopardy and his fundamental right enshrined in Article 21 of the Constitution was in violation. It was contended that if the petitioner/accused No.1 was released on bail on certain conditions being imposed, the same would be complied with and he would abide by the same.

8. *Per contra*, learned High Court Government Pleader (HCGP) submitted that the statement of the victim under Section 161 of the Cr.P.C. had been recorded, before the learned Magistrate, but the said statement

recorded by the learned Magistrate cannot be construed as evidence in terms of Section 35(1) of the POCSO Act. Merely because there was a delay in recording evidence or in the adjudication of the case and evidently Section 35 of the POCSO Act had not been complied with in the instant cases, that would not straight away entitle the petitioner/accused No.1 to be enlarged on bail.

9. Learned single Judge on considering *Vinay* relied upon by the petitioner/accused No.1 has observed that the expression "as far as possible" used in Section 35(2) of the POCSO Act has to be borne in mind and hence, doubting the order of this Court in *Vinay*, the Reference has been made in the aforesaid terms. However, learned single Judge on merits held that no case was made out to release petitioner/accused No.1 on bail and hence, the petition was dismissed. Nevertheless, in order to answer the Reference, a Special Bench has been constituted by Hon'ble the Chief Justice.

POINTS OF REFERENCE:

The points of reference are as under:

1. Whether the evidence which has been recorded under Section 164 of Cr.P.C. can be considered to be an evidence under Section 35 of the POCSO Act?
2. If the evidence of the child has not been recorded within a period of thirty days of taking cognizance of the offence, and if the Special Court does not complete the trial within a period of one year from the date of taking cognizance, whether accused is entitled to be released on bail holding that it is a default clause which gives a right to the accused?

LEGAL FRAMEWORK:

10. Before venturing to answer the points of Reference, it would be useful to recapulate the relevant clauses from the Convention on the Rights of the Child adopted by the General Assembly of the United Nations in November, 1989:

"Convention on the Rights of the Child

**Adopted and opened for signature,
ratification and accession by General
Assembly Resolution 44/25 of 20
November 1989,**

**entry into force 2 September 1990, in
accordance with Article 49**

Preamble

The State parties to the present convention,

x x x

Recognizing that the United Nations has, in the
Universal Declaration of Human Rights and in
the International Covenants on Human Rights,
proclaimed and agreed that everyone is
entitled to all the rights and freedoms set forth
therein, without distinction of any kind, such as
race, colour, sex, language, religion, political
or other opinion, national or social origin,
property, birth or other status,

x x x

Recognizing that the child, for the full and
harmonious development of his or her
personality, should grow up in a family
environment, in an atmosphere of happiness,
love and understanding,

x x x

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

x x x

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

x x x

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

x x x

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

x x x

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and

educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

x x x

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

x x x

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

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11. Article 15(3) of the Constitution states that nothing in this Article shall prevent the State from making any special provision for women and children.

Object of POCSO Act:

12. The Scheme of the POCSO Act is also to be deliniated. In a nutshell, the object of the Act is to protect children from the offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons of the 2012 Act is set out hereunder:

“Statement of Objects and Reasons.—

Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11-12-1992, requires the State parties to undertake all appropriate national, bilateral and

multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the "Study on Child Abuse: India 2007" conducted by the Ministry of Woman and Child Development. Moreover, sexual offences against children are not adequately addressed by the extant laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self-contained comprehensive legislation inter

alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.”

Para 1 of the Statement of Objects and Reasons makes it clear that the Act's reach is only towards the protection of children, as ordinarily understood. The scope of the Act is to protect their “childhood and youth” against

exploitation and to see that they are not abused in any manner."

13. The Preamble of the POCSO Act reads thus:

"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of Article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on 11-12-1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.”

Relevant Supreme Court decisions:

14. The relevant Supreme Court judgments on the Act are referred to as under:

a) In ***Eera through Dr. Manjula Krippendorf vs. State NCT of Delhi and another [(2017) 15 SCC 133]***, the Hon'ble Supreme Court observed on the statement and objects of POCSO Act as under:

"20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well-being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being

had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."

b) ***In Alakh Alok Srivastava vs. Union of India & others, [(2020) SCC Online SC 345]***, it was observed by the Hon'ble Supreme Court as under:

"13. At the very outset, it has to be stated with authority that the POCSO Act is a gender neutral legislation. This Act has been divided into various Chapters and Parts therein. Chapter II of the Act titled "Sexual Offences Against Children" is segregated into five parts. Part A of the said Chapter contains two Sections, namely Section 3 and Section 4. Section 3 defines the offence of "Penetrative

Sexual Assault” whereas Section 4 lays down the punishment for the said offence. Likewise, Part B of the said Chapter titled “Aggravated Penetrative Sexual Assault and Punishment therefor” contains two sections, namely Section 5 and Section 6. The various sub-sections of Section 5 copiously deal with various situations, circumstances and categories of persons where the offence of penetrative sexual assault would take the character of the offence of aggravated penetrative sexual assault. Section 5(k), in particular, while laying emphasis on the mental stability of a child stipulates that where an offender commits penetrative sexual assault on a child, by taking advantage of the child’s mental or physical disability, it shall amount to an offence of aggravated penetrative sexual assault.”

In *Alakh Alok Srivastava*, it was further elaborated as under:

“19. Speaking about the child, a three-Judge Bench in ***M.C. Mehta v. State of T.N. and others, [(1996) 6 SCC 756]***, opined that:-

"... "child is the father of man". To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must receive education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned."

20. In ***Supreme Court Women Lawyers Association (SCWLA) v. Union of India and another, [(2016) 3 SCC 680]***, this Court has observed:-

"In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for unfathomable reasons and it is the obligation of the law and law-makers to cultivate respect for the children and especially the girl children who are treated with such barbarity and savageness as indicated earlier. The learned Senior Counsel appearing for the petitioner has emphasised on the obtaining horrendous and repulsive situation."

Alice Miller, a Swiss psychologist, speaking about child abuse has said:-

"Child abuse damages a person for life and that damage is in no way diminished by the ignorance of the perpetrator. It is only with the uncovering of the complete truth as it affects all those involved that a genuinely viable solution

can be found to the dangers of child abuse.”

21. Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved.

x x x

23. It is submitted by Mr. Srivastava that in both the States, the cases are pending at the evidence stage beyond one year. We are absolutely conscious that Section 35(2) of the Act says “as far as possible”. Be that as it may, regard being had to the spirit of the Act, we think it appropriate to issue the following directions:-

- (i) The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitized in the matters of child protection and psychological response.

- (ii) The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.
- (iii) The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time frame under the Act.
- (iv) The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.
- (v) The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.
- (vi) Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed."

c) ***In Nipun Saxena & Anr vs. Union of India & others, [(2019) 2 SCC 703]***, it was observed as under:

"29. A minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Efforts are made to hush up the crime. It is now recognised that a child needs extra protection. India is a signatory to the United Nations Convention on the Rights of Child, 1989 and Parliament thought it fit to enact POCSO in the year 2012, which specifically deals with sexual offences against all children. The Act is gender neutral and whatever we say in this Part will apply to all children."

d) In ***Mahender Chawla & others vs. Union of India & others, [(2018) SCC Online SC 5679]***, it was observed as under:

"11) The protection of a child witness, who may also be a victim, becomes all the more important. In ***Sakshi vs. Union of India, [(2004) 5 SCC 518]***, the Court stressed that there is a dire need to come up with a legislation for the protection of witnesses. The Court also had issued certain guidelines on the procedure of taking of evidence from a child witness. The Court also pointed out the need for special protection to a victim of sexual abuse at the time of recording her statement in court. The petitioner in that case had given certain suggestions for effectively dealing with the special provisions for testimony in child sexual abuse cases, which were as follows:

- a) The judges shall allow the use of a videotaped interview of the testimony of the child in the presence of a child-support person.
- b) A child could be permitted to testify through closed circuit television or from behind a screen to acquire an honest and frank account of the acts complained of without any fear.
- c) Only the judge should be allowed to cross-examine a minor on the basis of the questions given by the defence in writing after the examination of the minor.

- d) During the testimony of the child, sufficient interval should be provided as and when she requires it."

Scheme of POCSO Act:

15. Chapter II of the Act deals with sexual offences against children, while Chapter III deals with using the child for pornographic purposes and punishment therefor. Chapter VI of the POCSO Act deals with procedure for recording the statement of the child.

(a) Under Chapter VI, Section 24 deals with recording of statement of a child at the residence of the child or at a place where he usually resides or at the place of his choice, as far as practicable, by a woman police officer not below the rank of sub-inspector. There are other conditions stipulated while recording the statement of the child.

(b) Section 25 deals with recording of statement of a child by the Magistrate under Section 164 of Cr.P.C. The said statement must be recorded as spoken by the child. The proviso to sub-section (1) of Section 25 of the said Act states that, the provisions contained in the first proviso to

sub-section (1) of Section 164 of Cr.P.C. shall, so far it permits the presence of the advocate of the accused shall not apply under the POCSO Act. Sub-section (2) of Section 25 states that the Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under Section 207 of Cr.P.C., upon the final report being filed by the police under Section 173 of Cr.P.C. Section 207 of Cr.P.C. deals with supply to the accused of copy of police report and other documents, while Section 173 of Cr.P.C. deals with the report of the police officer on completion of investigation. Sub-section (1A) of Section 173 of Cr.P.C. states that the investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station. The said sub-section was inserted with effect from 31.12.2009. However, POCSO Act has provided for special provisions with regard to offences under the said Act.

(c) Additional provisions regarding statement to be recorded are found in Section 26 of the POCSO Act, under

which provision is made for taking the assistance of a translator or an interpreter, having such qualifications and experience, as may be prescribed, while recording the statement of the child by the Magistrate or the police officer, as the case may be. Similarly, the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications and experience, as may be prescribed, could be taken when the Magistrate or the police officer records the statement of a child having mental or physical disability. Electronic recording of the statement by audio-video means is also permissible when it is recorded by the Magistrate or the police officer, as the case may be.

16. Chapter VIII of the POCSO Act deals with procedure and powers of special courts and recording of evidence.

(a) Procedure and powers of the Special Courts are delineated in Section 33 of the POCSO Act, which may take cognizance of any offence, without the accused being

committed to it for trial, upon receiving a complaint of facts, which constitute such offence, or upon a police report of such facts. As per sub-section (2) of Section 33 of the POCSO Act, the Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court, which shall in turn put those questions to the child. The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court. While the Special Court may, if it considers necessary, permit frequent breaks for the child during the trial, at the same time, it must ensure that the child is not called repeatedly to testify in the court. There cannot also be aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial. Also the Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation

or trial, unless for reasons to be recorded in writing, the Special Court permits such disclosure, if, in its opinion, such disclosure is in the interest of the child. Identity of the child does not mean the name of the child, but shall also include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

b) Subject to the provisions of the POCSO Act, the Special Court shall try the offences under the POCSO Act as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in Cr.P.C. for trial before a Court of Session. Thus, the provisions of POCSO Act would prevail over any other law if the latter is inconsistent with the POCSO Act.

c) The procedure in case of commission of offence by child and determination of age by Special Court is prescribed under Section 34 of the POCSO Act, which is not relevant for the purpose of answering the points of reference in this case.

d) Section 35 of the POCSO Act consists of two parts: firstly, it deals with the period for recording of evidence of the child and disposal of case. Sub-section (1) of Section 35 states that the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. Secondly, Sub-section (2) prescribes the period of one year from the date of taking cognizance of the offence for the purpose of completion of the trial. Of course, the said period prescribed is to be complied with, as far as possible, by the Special Court.

e) Before analysing the object and purpose of Section 35 of the POCSO Act, in respect of which this Reference has been made in the instant case, for the purpose of completion of analysis, it would be useful to refer to Section 36 of the POCSO Act, which states that the child should not see the accused at the time of testifying and that as per Section 37, the trial ought to be conducted in camera; Section 38 of the POCSO Act provides for

assistance of an interpreter or expert while recording the evidence of child. Sub-section (1) of Section 38 states that wherever necessary, the Court may take the assistance of a translator or an interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child. The assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience, as may be prescribed, may be engaged to record the evidence of the child by the Special Court if a child has a mental or physical disability. The guidelines for the child to take assistance of experts and the right of child to take assistance of legal practitioner are provided for under Sections 39 and 40 of the POCSO Act, which are in Chapter IX.

f) Section 42A states that the provisions of the POCSO Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the

POCSO Act shall have an over-riding effect on the provisions of any such law to the extent of the inconsistency.

g) As per Section 45 of the POCSO Act, the Central Government has the power to make Rules. The power to remove difficulties is in Section 46 of the POCSO Act. It empowers the Central Government, by order published in the Official Gazette, to make such provisions not inconsistent with the provisions of the POCSO Act, as found necessary or expedient for removal of the difficulty, but, only after the expiry of a period of two years from the commencement of the POCSO Act, after laying the same before each House of Parliament.

17. A reading of the provisions of the POCSO Act, as highlighted above, would clearly indicate that the said Act is a special legislation for the protection of children from offences of sexual assault, harassment and pornography, etc. The POCSO Act being a special piece of legislation must over-ride the general legislation. In this regard, it would be useful to observe that the POCSO Act is

a combination of both substantive law as well as procedural or adjective law. Substantive criminal offences have been created under various provisions of the POCSO Act and the manner in which the adjudication of said offences ought to take place, namely the procedure to be followed is also provided for under the POCSO Act.

18. The Protection of Children from Sexual Offences Rules, 2012 (hereinafter referred to as 'the POCSO Rules') provide for various aspects, including, care and protection of the victim child of an offence committed under the provisions of the POCSO Act, emergency medical care and for compensation.

FIRST POINT:

19. Re-visiting the points of Reference made in the instant cases, interpretation of Section 35 of the POCSO Act and the meaning of the expression 'evidence' of the child which has to be recorded within a period of thirty days from the date of taking cognizance of the offences by the Special Court have to be given.

20. In this context, it would be useful to *a priori*, refer to Cr.P.C. and particularly, Chapter XII thereof, which deals with information to the police and their powers to investigate.

(a) Under Section 161 of Cr.P.C., any police officer making an investigation into an alleged offence may examine orally any person supposed to be acquainted with the facts and circumstances of the case. The police officer may reduce into writing any statement made to him in the course of an examination under the said Section and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Such a statement may also be recorded by audio-video/electronic means. Provided further that the statement of a woman against whom an offence under certain Sections of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.

(b) Section 164 of Cr.P.C., deals with recording of confessions and statements by any Metropolitan or Judicial Magistrate made to him in the course of an investigation, the same is relatable to Sections 25 and 26 of the POCSO Act.

21. But, Section 35 of the POCSO Act does not deal with recording of **statement** of a child, but recording of **evidence** of the child and disposal of the case. The said Section is relatable to Chapter XXIII of Cr.P.C., which deals with evidence in inquiries and trials, including mode of taking and recording of evidence. But, Section 35 of the POCSO Act, being under a special enactment, would prevail over the general provisions of Cr.P.C., particularly when there is any inconsistency between the said Section and Cr.P.C., as per the provisions of Section 42A of the POCSO Act.

22. Recording of evidence of the child by the Special Court is during the course of trial. Sub-section (1) of Section 35 of the POCSO Act states that the evidence of the child shall be recorded within a period of thirty days of

taking cognizance of the offence by the Special Court and if there is any delay in doing so, the reasons for the delay shall be recorded by the Special Court. The object and purpose of prescribing the period of thirty days for recording the evidence of the victim child are not far to see. As per Sub-section (2) of Section 35 of the POCSO Act, the Special Court has to complete the trial as far as possible within a period of one year from the date of taking cognizance of the offence. The prescription of thirty days from the date of taking cognizance of the offence for recording the evidence of the child is salutary. Further, the victim of the offences, under the POCSO Act, being a child below the age of eighteen years, ought to give his or her evidence before the Special Court as early as possible in order to make the said evidence sacrosanct and free from exaggeration or an under-statement or a departure from the true facts and circumstances of the case. There may be cases where the child, on account of passage of time, would not be in a position to recollect the relevant facts of the case, or due to trauma and being affected mentally or physically may not be in a position to testify

before the Special Court, if there is a delay in recording such evidence. Hence, in order to receive pure and sacrosanct evidence of the child victim, the time stipulated is within a period of thirty days of taking cognizance of the offence and any delay in doing so must be supported by reasons.

23. The first point of reference is, whether the statement which has been recorded under Section 164 of Cr.P.C. could be considered to be an evidence under Section 35 of the POCSO Act. In our considered view, the same cannot be equated as one and the same. As already noted, a statement under Section 164 of Cr.P.C. is during the course of investigation or at any time afterwards before the commencement of the trial. But, the evidence recorded before the Special Court under Section 35 of the POCSO Act is during the course of the trial. The two cannot be equated and neither are they on same plane.

24. On a reading of sub-section (1) of Section 35 of the POCSO Act, it is observed that there is a mandate for the Special Court to record the evidence of the child

within a period of thirty days of taking cognizance of the offence by the Special Court. That is the ideal mandate to be followed. But, if the recording of the evidence does not take place within the stipulated period, it does not mean that the evidence recorded thereafter would lose its sanctity or is to be discarded. This is because, the provision itself speaks that if there is a delay in recording the evidence of the child, the Special Court has to give reasons for the delay. This stipulation would imply that recording evidence of the child beyond a period of thirty days from the date of taking cognizance of the offence by the Special Court is not of any lesser sanctity, but if for any reason, the same is not complied with, then it must be recorded by the Special Court. In other words, the reasons must be beyond the control of the Special Court or the reasons were such, which prevented the recording evidence of the child within the stipulated period. Thus, the reasons must be strong enough for being accepted and sufficient in law to absolve the Special Court for not recording the evidence of the child within the stipulated period. But, if for any reason the evidence of the child is

not recorded within the stipulated period, then the same cannot be discarded only on that score.

25. We have already highlighted the difference between a statement recorded under Section 164 of Cr.P.C. and evidence recorded under sub-section (1) of Section 35 of the POCSO Act. In our view, the recording of statement under Section 164 of Cr.P.C. being prior to the commencement of the trial, it cannot be considered to be evidence under sub-section (1) of Section 35 of the POCSO Act.

26. In this regard reference could be made to Section 3 of the Evidence Act, which is the interpretation clause which defines "Evidence" to mean and include, (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence and (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

27. It is therefore observed that ***the statement recorded under Section 164 of Cr.P.C. made in the course of investigation by the victim child, cannot be considered as evidence recorded under Section 35 of the POCSO Act.***

28. The weightage to be given to a statement made by any person to a police officer in the course of any investigation if reduced to writing and signed by the person making it and the importance of such a statement, is discussed in the case of ***Tahsildar Singh and another vs. State of U.P. (AIR 1959 SC 1012), (Tahsildar Singh)***. In that case, the object and purpose of recording the statement under Section 162 of Cr.P.C. has been discussed. Intention of that provision is to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring

confidence. Both the Section and the proviso thereto intend to serve primarily the same purpose, i.e., the interest of the accused. Thus, the statement made before a police cannot be used for any purpose whatsoever against the accused, but it enables the accused to rely upon it for a limited purpose of contradicting the witnesses in the manner provided in Section 145 of the Evidence Act, 1872 by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness, nor can it be used for contradicting a defence or a Court witness. The only limited use is for the purpose of contradicting the witness, as per Section 145 of the Evidence Act. Section 145 of the Evidence Act indicates the manner in which such contradiction is brought out. The law with regard to recording of statement under Section 162 of Cr.P.C. has been summed up in *Tahsildar Singh* as under:

"26. From the foregoing discussion the following propositions emerge:

- (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose;
- (2) statements not reduced to writing by the police officer cannot be used for contradiction;
- (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement;
- (4) such a fiction is permissible by construction only in the following three cases:
 - (i) when a recital is necessarily implied from the recital or recitals found in the statement ;
illustration: in the recorded statement before the police the

witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word " only " can be implied, i.e., the witness saw A only stabbing B;

- (ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and
- (iii) when the statement before the police and that before the Court cannot stand together;

Illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

27. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case after comparing the part or parts of the statement recorded by the police with that made in the witness-box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law."

29. In ***Rama Kishan Singh vs. Harmit Kaur and another, [AIR 1972 SC 468]***, the Hon'ble Supreme Court has opined that the statement under Section 164 Cr.P.C. is not substantive evidence. It could be used to

corroborate the statement of a witness or to contradict a witness. In ***Ram Charan vs. State of U.P., [AIR 1968 SC 1270]***, also, it has been observed that the evidence of witnesses whose statements are recorded under Section 164 Cr.P.C. has to be approached with caution.

30. In ***Balak Ram and another vs. State of U.P., [AIR 1974 SC 2165]***, it was observed that witnesses whose statements are recorded under Section 164 feel tied to their previous statements and have but a theoretical freedom to depart from their earlier version. A prosecution for perjury could be the price of that freedom. It is, of course, open to the Court to accept the evidence of a witness whose statement was recorded under section 164, but the salient rule of caution must always be borne in mind. That is all the more necessary when almost all the eye witnesses are subjected to this tying-up process.

31. In ***Dhanabal and another vs. State of Tamil Nadu, [AIR 1980 SC 628]***, one of the legal contention raised by the learned counsel was that the High Court was in error in taking into account the statements recorded

from the witnesses under Section 164 Cr.P.C. in coming to the conclusion that the evidence given by them in the Committal Court could be relied upon. According to the Hon'ble Supreme Court, though the statements made under Section 164 Cr.P.C. is not evidence, it is corroborative of what has been stated earlier in the Committal Court vide ***State of Rajasthan vs. Kartar Singh, [(1971) 1 S.C.R. 56]***. It was further observed that the statement of witnesses obtained under Section 164 Cr.P.C. can be relied upon for corroborating the statements made by witnesses in the committal court. Hence, the mere fact that the witnesses statement was previously recorded under Section 164 Cr.P.C. will not be sufficient to discard it. It was observed that the court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses, it can be acted upon. It is for the Court to consider, taking into account all the circumstances including the fact that the witness had resiled, in coming to the conclusion as to whether the witness should be believed or not.

32. Recently, the Hon'ble Supreme Court in ***Somasundaram @ Somu vs. State Reptd. by the Deputy Commissioner of Police, [(2020) 7 SCC 722]***, (*Somasundaram*) has discussed the purpose and value of statement of confession recorded under Section 164 Cr.P.C. and in the context of whether such a statement recorded under Section 164 Cr.P.C. constitutes substantial evidence. It was observed that it cannot be used as substantive evidence and it can only be used for contradicting or corroborating the maker of the statement. While placing reliance on ***George vs. State of Kerala, [(1998) 4 SCC 605]***, and while referring to ***R.Shaji vs. State of Kerala, [(2013) 14 SCC 266]***, it was observed that the statement of witnesses recorded under Section 164 Cr.P.C. has two-fold object: firstly, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164 Cr.P.C. It was also categorically observed that if a statement of witness is recorded under Section 164

Cr.P.C., his evidence in Court should be discarded, is not at all warranted, *vide Jogendra Nahak vs. State of Orissa, [(2000) 1 SCC 272]*.

33. It was also observed that Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence, *vide CCE vs. Duncan Agro Industries Limited, [(2000) 7 SCC 53]*. Ultimately, in paragraph No.84 in *Somasundaram*, the Hon'ble Supreme Court observed as under:

"84. Thus, in a case where a witness, in his statement under Section 164 Cr.P.C., makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under

Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the Court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164 Cr.P.C.”

34. In this context, we would like to refer to **State of Karnataka, by Nonavinakere Police vs. Shivanna @ Tarkari Shivanna, [(2014) 8 SCC 743]**, wherein a suggestion has been made to Union of India for introducing necessary amendment to the Criminal Procedure Code, 1973 involving trial for the charge of rape by directing that all the witnesses who are examined in relation to the offence and incident of rape cases should be straightway produced preferably before a Lady Judicial Magistrate for recording their statement to be kept in sealed cover and thereafter, the same be treated as evidence at the stage of trial by producing the same on record in accordance with law which may be put to test by subjecting it to cross-examination. That the statement of victim should, as far

as possible, be recorded preferably before a Lady Judicial Magistrate under Section 164 Cr.P.C. skipping over the recording of statement by the Police under Section 161 Cr.P.C. which in any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded under Section 313 Cr.P.C. It was further observed that the accused then can be committed to the appropriate Court for trial whereby the trial court can straightway allow cross examination of the witnesses whose evidence were recorded earlier before the Judicial Magistrate; while also holding that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. It was observed that the "evidence" recorded for the first time itself before the Judicial Magistrate under Section 164 Cr.P.C. be kept in a sealed cover to be produced and treated as "deposition of the witnesses" and hence admissible at the stage of trial with liberty to the defence to cross- examine them with further liberty to the accused to lead his defence witness and other evidence with a right to cross-examination by the

prosecution, which cuts short and curtail the protracted trial. That this should be introduced at least for trial of rape cases which would result in speedy justice.

35. On considering the suggestions offered before the Court and exercising powers under Article 142 of the Constitution, the interim directions in the form of mandamus to all the police stations in charge in the entire country to follow the direction of this Court were issued, which are as follows:

"9. x x x

- (i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any

person till charge sheet/report under Section 173 Cr.P.C. is filed.

- (ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.
- (iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.
- (iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.
- (v) Medical Examination of the victim: Section 164 A Cr.P.C. inserted by Act 25 of 2005 in Cr.P.C. imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the

report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Cr.P.C.”

36. Although, learned counsel for the petitioner placed reliance on *Shivanna @ Tarakari Shivanna* to contend that the statements made under Section 164 of Cr.P.C. has to be construed as substantive evidence, we do not think that the said contention can be accepted in view of the judgments of the Hon'ble Supreme court referred to above and particularly the latest judgment in *Somasundaram @ Somu* wherein the earlier judgments on the point have been considered. We have also already noted, evidence *stricto senso* is what is recorded by the Special Court before itself and cannot be equated with the statement of the victim under Section 164 of Cr.P.C.

37. In this context, it would be useful to refer to one of the earlier judgments of the Privy Council on the point in the case of ***Mamand and others vs. Emperor, [AIR 1946 PC 45]***, wherein it has been observed that a

statement under Section 164 Cr.P.C. cannot be treated as substantive evidence of the facts stated. Such a statement can be used to discredit the evidence of the witness but not for any other purpose. Further, where the Court in view of the statement under Section 164 Cr.P.C., considers the witness to have been won over by the defence, the correct attitude for the Court to adopt is to entirely ignore his evidence.

38. In view of the aforesaid discussion, **we answer question No.1 by holding that the statement recorded under Section 164 of Cr.P.C. cannot be considered to be evidence under Section 35 of the POCSO Act.**

SECOND POINT:

39. As far as the second point of reference is concerned, the same relates to sub-section (2) of Section 35 of the POCSO Act which mandates that the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. The reasons for prescribing a period of one

year for completion of the trial are not far to see. The main reason being, the victim child must not only be rendered speedy justice but, at the same time, it is necessary to get over the legal proceeding at the earliest, so that the child could concentrate on rehabilitation and get on with his or her life. Prolonging the trial before the Special Court for years together, like any other sessions case, would be futile and frustrate the intention of the parliament as well as the object of POCSO Act. It must be remembered that the object and purpose of the said Act being child-centric, all efforts must be made by all stakeholders under the said Act, including the Special Court, to complete the trial within a period of one year from the date of taking cognizance of the offence under the said Act. But, the Parliament, while having such a noble intention, at the same time, has not lost sight of the reality and technical difficulties faced by criminal courts including the Special Courts, in particular and criminal justice system, in general. Therefore, the use of the expression, "*as far as possible*" in the provision. But, the said expression does not in any way permit any recalcitrant

attitude, nor does it countenance a slow and tardy trial or envisage a re-living of the trauma by the victim child for years together. The expression "*as far as possible*", is used by the Parliament, having regard to the genuine difficulties faced in the conclusion of a trial concerning a victim child under the provisions of the POCSO Act. If the evidence of the child is to be recorded within a period of thirty days from the date of taking cognizance of the offence, the trial under the provisions of the POCSO Act being a sessions trial, would mean that all provisions of Cr.P.C. which are not inconsistent with the provisions of the POCSO Act would apply and hence, there may be reasons beyond the control of the Special Court, for not being able to complete the trial under the POCSO Act within a period of one year from the date of taking cognizance of the offence.

40. The reasons for the delay could be enumerated as under, which are only illustrative and not exhaustive:

- Recording the evidence of the victim may not be easy, for, the victim may be,
 - deaf and/or dumb,

- of tender age who may not be in a position to explain the incident,
- Child with mental or physical disability;
- Victim child may cry during recording of evidence or have other emotional syndromes; hence, the case needs to be adjourned at that point/stage;
- Appointment of Special Educators: The victims and their parents may require special attention and education in respect of the incident and the proceedings in the trial as the victim may be emotionally charged;
- Appointment of Psychiatrists: They may not be available in District Head quarters during the trial to provide counselling to the victim;
- Shortage of man power and lack of qualified persons as counsellor;
- Provisions made under the Act are not properly implemented;
- Lapses on the part of the prosecution as these cases are not viewed seriously, and by ignoring that it would affect the childhood of the victims in particular and society in general;

41. Be that as it may. The second point of reference is, whether, the accused is entitled to be released on bail if the evidence of the child has not been recorded within a period of thirty days of taking cognizance

of the offence or if the Special Court does not complete the trial within a period of one year from the date of taking cognizance. Such an interpretation would be an additional clause under the said provision and giving an additional right to the accused. Even under Section 309 of Cr.P.C., the trial of the proceedings has to be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for the reasons to be recorded. The proviso thereto has been amended with effect from 03.02.2013 and the proviso thereto deals with trial relating to offence under Section 376 and related Sections of the Indian Penal Code, wherein the trial has to be completed within a period of two months from the date of filing of the charge-sheet, as far as possible. Thus, the expression '*as far as possible*' is also found in proviso to sub-section (1) of Section 309 of Cr.P.C. Section 309 of Cr.P.C., also speaks about the circumstances under which no adjournment could be granted. The use of the expression "*as far as possible*" is also on account of the fact that under Section 37 of the

POCSO Act, the trial has to be conducted in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence. But, if the Special Court is of the opinion that the child needs to be examined at the place other than the Court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of Cr.P.C. In such a case, the circumstances under which commission for examination of witness is issued under Section 284 of Cr.P.C., would apply, namely that if the child cannot be procured without an amount of delay, expense or inconvenience, but in the circumstances of the case, would be unreasonable, then the Special Court may dispense with such attendance and may issue a commission for the examination of witness in a place other than the Court. The provisions dealing with Commission for the examination of witness *mutatis mutandis* apply when the Special Court orders examination of the child at a place other than the Court. Therefore, in such circumstances, there may be delay in recording the evidence of the child within a period of thirty days of taking cognizance of the offence by the Special Court or

even delay in completion of trial within a period of one year from the date of taking cognizance of the offence. In such an event, it cannot be treated to be a default, which would enure to the benefit of the accused so as to give the accused a right to be released on bail.

42. It is observed that the object and purpose of Section 35 of the POCSO Act is for the benefit of the child victim and is not to be considered as an additional clause for the purpose of granting bail to the alleged perpetrator or the accused.

43. As discussed above, there may be various reasons and circumstances beyond the control of the Special Court under which the conclusion of the proceedings within a period of one year may not happen. As already noted, the reasons for the same have been discussed above. Under such circumstances, the accused cannot enforce the right to be released on bail. No such right is envisaged under the said provisions of the Act and the same cannot be read into it by way of an interpretation which may go against the interest of the child victim. If

the aforesaid interpretation is to be made then, there would be every attempt made to delay the proceedings before the Special Court beyond the period of one year and seek release of accused on bail. Such a position cannot be encouraged nor is it envisaged under the POCSO Act.

44. Hence, any order passed by following the dictum in *Vinay* with regard to grant of bail to the accused on the premise there has been a delay in recording evidence or for that matter, non-conclusion of the proceedings within a period of one year from the date of taking cognizance by the Special Court, is not good law and it cannot be a precedent for future cases. In the circumstances, we hold that the order passed in *Vinay* cannot be treated as a judicial precedent in future cases.

45. Next, it would be necessary to consider the following judicial precedent concerning Section 35 of the POCSO Act and to answer the reference accordingly.

Vinay:

a) In the aforesaid case, this Court noticed the accused therein was procured before the Special Court on

19.03.2016 and the case was posted for four hearings 'for framing of charges and plea' and thereafter, for evidence and again on 15.04.2017, it was posted 'for framing of charges and plea'. Considering the omission on the part of the Special Court in that case in not recording the evidence of the victim child within a period of thirty days from the date of taking cognizance, in compliance of the provisions of Section 35(1) of the Act, the petitioner therein was granted interim bail and the Registrar General of this was directed to make an enquiry about the non-compliance of the provisions of Section 35(1) of the Act by the concerned Special Court and submit a report before this Court as expeditiously as possible. The Registrar General submitted his report. The same was perused and it was found that several steps were taken in the matter from 05.03.2016 onwards in that case and it was found that the evidence of the child had not been recorded as per Section 35(1) of the Act and the importance of recording evidence as per that provision was emphasized, despite heavy load of work, lack of time, non-production of properties, etc., before the Special Court. It was observed that even if the

investigating officer failed to produce the properties on the date called for, that would not stop the Special Court from recording the evidence of the victim child and adjourn the case to fix the next date of hearing. It was also emphasized that the Special Courts must comply with the mandate of Section 35(1) of the Act in its true letter and spirit.

b) However, in the said case, the accused was enlarged on bail on certain terms and conditions as he was already enlarged on interim bail during the pendency of the said petition.

c) The said order seems to have been understood as paving the way to grant bail to the accused in the event the evidence of the victim child is not recorded in terms of Section 35(1) of the Act. In fact, that is the tenor of the submission of the learned counsel for the petitioner herein also. We think the judgment in *Vinay* cannot be a precedent to be followed so as to enlarge the accused on bail when the mandate of Section 35 are not followed.

d) Reliance has been placed on the order passed by this Court at Dharwad Bench in ***Aslam vs. State of Karnataka***, (Criminal Petition No.100713 of 2020 disposed of on 13.08.2020), wherein reference was made to the order in *Vinay* and it was also observed that there was no material placed on record to show that there was non-compliance of Section 35(1) of the Act. Despite the said fact the accused was enlarged on bail.

e) In ***Lakkappa vs. The State of Karnataka*** (Criminal Petition No.100135/2020, disposed of on 02.06.2020), the facts noted were that when the minor girl willingly joined the company of accused/petitioner and there was no specific allegation that the accused/petitioner forcibly had sexual intercourse with the victim girl. Under these circumstances, this Court was persuaded to agree with the contention of the counsel for the accused/petitioner that the victim/prosecutrix has voluntarily gone along with the petitioner without there being any pressure or threat. This Court also noted that the accused had married the victim girl. There was also no

material forthcoming to infer that in the event of the accused/petitioner being enlarged on bail, he may flee away from justice or tamper the prosecution witnesses. In the aforesaid circumstances, the accused/petitioner therein was enlarged on bail.

f) In ***Wilson vs. the State of Karnataka***, (Criminal Petition No.201591/2019 connected with Criminal Petition No.201592/2019 disposed of on 07.01.2020) bail was granted to accused Nos.4 and 5 even though the allegation against them was they arranged marriage of the victim girl with accused No.1 and the entire case was as such against accused No.1, under the provisions of the Indian Penal Code as well as the POCSO Act.

46. It is unnecessary to multiply the orders relied upon by the learned counsel for the petitioner, as, a reference to the judgment of the Hon'ble Supreme Court, in ***Neeru Yadav vs. State of Uttar Pradesh and another, [(2016) 15 SCC 422]***, which deals with the facts to be considered while granting bail would clearly be

the guiding factors while considering the case even under the provisions of the POCSO Act. The factors are:

- (i) The nature of accusations and the severity of the punishment, in case of the accusation entails a conviction and the nature of evidence in support of the accusations;
- (ii) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant;
- (iii) *Prima facie* satisfaction of the court in support of the charge.

Of course, this would depend on (i) whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence; (ii) danger of the accused absconding or fleeing, if released on bail; (iii) reasonable apprehension of the witnesses being influenced; and ultimately, (iv) danger of justice being thwarted by grant of bail. The emphasis of learned

counsel for the petitioner is to uphold the rights of the accused when the provisions of Section 35 of the POCSO Act are not complied with and therefore, to release accused on bail. That is not the object and purpose of Section 35.

47. In this context, we would refer to a recent decision of the Hon'ble Supreme Court in ***Varinder Kumar vs. State of Himachal Pradesh, [(2020) 3 SCC 321]***, (*Varinder Kumar*), wherein it has been observed that individual rights of the accused as well as the societal interest for bringing the offender to book and for the system to send the right message to all in the society—be it the law-abiding citizen or the potential offender, have to be balanced. "Human Rights" are not only of the accused but also of the victim, the symbolic member of the society.

In the aforesaid case, the Hon'ble Supreme court clarified the judgment in ***Mohan Lal vs. State of Punjab, [(2018) 17 SCC 627]***, (*Mohan Lal*), to be effective prospectively from the date of judgment and not being applicable to criminal prosecutions, trials and appeals prior

to the law laid down in it. It was observed that the judgment in *Mohan Lal* cannot also be allowed to become a springboard by an accused for seeking acquittal irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was unclear. In *Mohan Lal*, it was observed that it was impermissible for an informant acting as an investigating officer and it was held to vitiate the conviction irrespective of all other issues. While distinguishing the judgment in *Mohan Lal*, the Hon'ble Supreme Court observed that the criminal justice delivery system cannot be allowed to veer exclusively for the benefit of the offender making it unidirectional exercise. A proper administration of criminal justice delivery system requires balancing the rights of the accused and the prosecution.

48. It would be useful to refer to **Arvind Kumar K.S. vs. The State of Karnataka** (Criminal Petition No.3672/2020 disposed of on 01.09.2020), wherein it has been held by this Court that the main object of holding trial is to ascertain the truth by the Court by recording

evidence, assessing the same in the scale of balance and decide the case on merits.

Hence, point of reference No.2 is answered accordingly.

49. If for reasons beyond the control of the Special Court, the evidence of the child is not recorded within the period of thirty days of the Special Court taking cognizance of the offence, or if the trial itself is not completed within a period of one year from the date of cognizance of the offence, the same cannot lead to the accused being released on bail. The object and purpose of Section 35 of the POCSO Act is to ensure that the victim child is secured from the trauma of trial of the case at the earliest so that she or he could be rehabilitated and reintegrated into society at the earliest. The said provision is not to be interpreted in favour of the accused so as to mandate release of the accused, if for any reason, evidence is not recorded within a period of thirty days of taking cognizance of the offence or the Special Court not completing the trial

within a period of one year from the date of taking cognizance of the offence.

50. In our view, non-compliance of Section 35 of the POCSO Act cannot be the basis for releasing the accused on bail as that would be a misreading of the provision. One has to bear in mind the fact that the docket explosion under the POCSO Act is not commensurate with the sufficient number of Special Courts being constituted with the requisite human resources as well as infrastructure. It may be practically impossible for the trial court to conclude the trial within one year from the date of cognizance by the said Court in a majority of the cases. But, that does not give a right to the accused to seek bail for the reason that the mandate under Section 35 of the POCSO Act has not been completed.

In the circumstances, ***we answer the questions referred to against the petitioner*** and accordingly, ***dispose of*** this reference.

51. While we have answered the questions referred, against the petitioner, at the same time, we would like to observe that there should be a healthy co-ordination between all the stake-holders involved in the implementation of the POCSO Act. All assistance must be given to the Special Court for timely adjudication of the cases involving a child victim under the provisions of the POCSO Act. In this regard, we observe that the Presiding Officer of the Special Court under the POCSO Act must have the capacity to co-ordinate between the concerned stake-holders, namely, the prosecution, investigating officer, counsel, accused, victim, support persons, etc., so that no stake-holder, on account of the vested interest or otherwise, would be able to procrastinate the matter and thereby prolong the trial and defeat the object and purpose of the POCSO Act. In this regard, we emphasize that the Special Court, prosecution, investigating officer and the counsel for the accused all have their roles cut out and hence, must discharge their duties under the Act in the most effective manner.

52. The Special Public Prosecutor who are appointed to handle the cases under the POCSO Act must be trained and be competent and develop the capacity to handle such cases. It is needless to observe that the Special Public Prosecutor has a vital and significant role to play which has a bearing on the result of the case. Therefore, competent Special Public Prosecutors have to be appointed by the State to handle cases under POCSO Act.

53. According to Ms.Jyoti Mathur, Director of '*Kailash Satyarthi Children's Foundation*', "a victim of sexual abuse is not a victim of one abuse but multiple abuses – physical abuse, emotional abuse, mental abuse, stigma, neglect and overall deprivation of the right to live with dignity. While a time-bound legal process and child-centric jurisprudence is non-negotiable, the role of experts in helping him walk this arduous journey is equally essential." (Source: "*Ensuring Justice for Every Child*", *Deccan Herald, Bengaluru Edition, dated 13.04.2021*).

54. Before parting with this case, we would like to observe that the Central Government has issued directions to the State Governments for setting up of Special Courts with requisite infrastructure for disposal of the cases arising under the POCSO Act in accordance with the said provisions, following the directions of the Hon'ble Supreme Court to set up Fast Track Court and exclusive POCSO Courts.

55. No doubt, in the State of Karnataka, additional Courts have been set up, but the requisite infrastructure, including the child witness room and other procedural requirements mandated under the Act for establishing a child friendly Court have to be complied with by the State Government.

56. In this context, we also note that apart from rendering justice to the child victim, concomitant support service systems have also to be provided, as the child victim faces a two-fold trauma—physical injury and psychological trauma. Insofar as the medical treatment for physical injuries is concerned, it should be preferably

free and in Government Hospitals. Hence, there is need to improve medical facilities for the victims of child abuse by notifying a dedicated unit in every District Hospital and further, where medical complications have to be treated urgently, provisions must be made for enabling the doctors at the District Hospitals to refer the victim to a private hospital for providing proper medical treatment to the victim. In the context of mental trauma, we note that the role of the mental health professionals is of critical importance. There is need to provide such services at a reasonable cost to be borne by the Government. Hence, the State must identify mental health professionals available throughout the State so that the victim child could avail all the said services.

57. More importantly, there is a mandate under Section 32(1) of the POCSO Act to appoint a Special Public Prosecutor for every Special court. Initially, the public prosecutor attending the Court which was conferred with the jurisdiction as Special Court to handle such cases under the POCSO Act, was also appointed as the Special Public Prosecutor. It is not known whether the said

practice is continuing. We think that the time has now come to discontinue the said practice and appoint competent Special Public Prosecutors exclusively attached to the Special Courts dealing with matters under the POCSO Act, so that the time-frame under Section 35 of the POCSO Act in recording evidence and concluding with the trial and adjudication is as per the said provision.

58. Also, support persons have to be provided to the victim child, as mandated under the POCSO Act throughout the process of investigation and trial to act as a link between the child and the Special Court dealing with the adjudication of the cases. The support person has to prepare the child for Court proceedings and ensure that the child's views are heard and are taken into account at every stage of the proceedings. The State has to appoint adequate number of support persons on a priority basis if real justice is to be done to the victim during the course of investigation and trial.

59. In the above context, we issue the following directions:

- (I) We direct the State to take steps for setting up of the requisite number of Special Courts to try cases under the POCSO Act;
- (II) Further, the State is directed to provide the necessary infrastructure and man power for the Special Courts under POCSO Act;
- (III) The appointment/posting of exclusively trained prosecutors to handle the cases before the Special Courts under the provisions of the POCSO Act shall be made forthwith wherever such prosecutors are not yet appointed;
- (IV) We direct that a dedicated unit is set up in every District Hospital to attend to the child victim and provide proper medical facilities and whenever necessary referral to a private hospital be permitted;
- (V) The State is also directed to make available mental health professionals to every child to overcome the trauma and for rehabilitation and reintegration, the cost of which is to be borne by the State;
- (VI) Further, the State is also directed to appoint adequate support persons to the child victims and to conduct a study, whether, they are discharging their duties effectively and take immediate measures as per the recommendations of the study.

60. It is needless to observe that the aforesaid directions should be complied with on a timely basis, lest the object and purpose of the POCSO Act stand diluted on account of the non-implementation of the provisions of the POCSO Act in its true letter and spirit by the State and other stake-holders.

61. Last but not the least, we direct the Presiding Officers of all Special Courts to comply with Section 35 of the POCSO Act in the matter of recording of evidence of the victim child and the conclusion of the trial within the time stipulated under the said provision so that the justice delivery system does not in any way contribute to the trauma, mental disturbance and anxiety of the victim child, which could lead to severe impact on the behaviour and personality of the Child.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

S RK/-*