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Court No. - 3

Case :- APPLICATION U/S 482 No. - 5009 of 2021
Applicant :- Ravi And 2 Others
Opposite Party :- State Of U.P. And 2 Others
Counsel for Applicant :- Bipin Kumar,Deepti,Shobhit Dubey,Sudhir Dixit
Counsel for Opposite Party :- G.A.,Ajit Kumar

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Sudhir Dixit, alongwith Sri Anupam Shyam Dwivedi, Sri Utakarsh Dixit and Sri Shobhit Pratap Singh learned counsel for the applicants, Sri Vinod Kant, learned Additional Advocate General assisted by Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party no.1 and Sri Rajneesh Pratap Singh appearing alongwith Sri Ajit Kumar, learned counsel for the opposite party no.3.

2. The present application under Section 482 of the Code of Criminal Procedure, 1973[1] has been filed seeking to quash the entire proceedings of Criminal Case No.2377 of 2020 pending before the Special Judge, POCSO, Aligarh as well as summoning order dated 17.10.2020 arising out of Case Crime No.428 of 2019, under Sections 363, 366, 376D of the Indian Penal Code[2] and Section 5/6 of the Protection of Children from Sexual Offences Act, 2012[3], Police Station Khair, District Aligarh in terms of which learned Judge has summoned the applicant no.1, under Sections 366, 376D IPC and Section 5/6 POCSO Act and also summoned the applicant nos. 2 and 3, under Sections 363, 366, 376D IPC and Section 5/6 POCSO Act, Police Station Khair, District Aligarh.

3. Pleadings in the case indicate that the proceedings were

1 The Code
2 Penal Code
3 POCSO Act

commenced pursuant to an FIR dated 02.09.2019, registered as Case Crime No.428/2019, under Section 363 IPC, Police Station Khair, District Aligarh, whereupon the case was investigated and a police report dated 04.06.2020 was submitted, under section 363 IPC, only against the applicant-no.1. Prior to taking cognizance an application was filed by the opposite party no.3- prosecutrix stating that having regard to the facts of the case, cognizance may also be taken under Section 3/4 POCSO Act and Section 376D, 366, 363 IPC and enclosing therewith her affidavit and her statement recorded under Section 164 of the Code and placing reliance on the decisions of the Supreme Court in **Balveer Singh and Another vs. State of Rajasthan and Another**[4] and **Dharam Pal and Others vs. State of Haryana and Another**[5]**.**

4. The learned Magistrate upon examining the papers, placed alongwith the application filed by the opposite party no.3-prosecutrix, took the view that looking to the offences disclosed in the application the power to take cognizance in the matter would be with the Special Court constituted under the POCSO Act and not with the Magistrate and in view thereof the papers were transmitted to the Special Court, POCSO, Aligarh. The case was thereafter taken up by the Special Judge, POCSO and taking into consideration the facts of the case, hearing the parties concerned and also examining the legal position, the Special Judge, POCSO vide order dated 17.10.2020 directed registration of the case and issuance of summons to the applicants herein. It is at this stage that the present application under Section 482 of the Code has been filed seeking quashing of the entire proceedings of the criminal case and also the summoning order dated 17.10.2020 passed by the Special Judge, POCSO.

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4 (2016) 6 SCC 680
5 (2014) 3 SCC 306

5. Learned counsel for the applicants has sought to assail the order passed by the Special Judge, POCSO in terms of which the applicants have been summoned and also quashing of the proceedings by submitting as under:-

5.1 The learned Magistrate while passing the order dated 16.09.2020 has neither taken cognizance of the offence as per the provisions under section 190 (1) of the Code nor committed the case after following the procedure under Sections 207 and 209 of the Code and in this manner the Magistrate has adopted a procedure which is not provided for under the Code. In this regard he has placed reliance on the judgment in the case of **Minu Kumari and another vs. State of Bihar and others**[6]**.**

5.2. It is pointed out that upon receiving the police report under section 173 (2) of the Code, the options available to the Magistrate were either to: (i) accept the report and take cognizance of the offence and issue process, or (ii) disagree with the report and drop the proceedings, or (iii) direct further investigation under section 156 (3) and require the police to make a further report.

5.3 The police report having been submitted against the applicant no.1 only under Section 363 of the Code, the application moved by the prosecutrix could at best have been treated to be a protest petition and the Magistrate could have treated the same as a complaint case and taken cognizance under section 190 (1) (a) of the Code.

5.4 The judgment of the Hon'ble Supreme Court in the case of **Balveer Singh (supra)** which has been relied upon by the Magistrate has no application to the facts of the present case.

5.5 Referring to sub-section (1) of Section 28 of the POCSO

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6 (2006) 4 SCC 359

Act, it is submitted that the Special Court designated under the sub-section is for the purpose of trying the offences under the Act and in view of the saving clause under section 31, the provisions of the Code would apply to proceedings before a Special Court. Accordingly, it is contended that the procedure adopted by the Special Court being contrary to the Code the same is legally unsustainable.

6. Controverting the aforesaid assertions the learned Additional Advocate General submits as under:-

6.1 A plain reading of the FIR discloses the age of the victim to be less then 18 years. The statement of the victim recorded under Section 164 of the Code supports the FIR version and also discloses the offence under section 376 IPC. The aforementioned material having been placed alongwith the police report, the Magistrate, upon taking notice thereof, has rightly held that the case would be covered within the ambit of the POCSO Act and in view of the procedure provided under section 33(1) the matter would be cognizable by the designated Special Court without the accused being committed to it for trial. In view of the aforesaid, the Magistrate having not been required under law to commit the accused for trial and the matter being cognizable by the designated Special Court under the POCSO Act, the Magistrate rightly transmitted the file to the designated Special Judge.

6.2 Referring to the decision in the case of **Minu Kumari** (supra) it is submitted that upon receiving the police report under section 173 (2) of the Code it was open to the Magistrate to disagree with the report and take the view that there is sufficient ground for proceeding further. Having taken that view and noticing that the offence disclosed would be covered under the special Act i.e. POCSO Act and the procedure

prescribed under section 33 (1) was required to be followed, the Magistrate had no option but to transmit the records to the designated Special Judge inasmuch as the provisions of the Code are applicable only to the extent as provided under Section 31 of the said Act.

6.3 As regards the contention on behalf of the applicant that police report having been submitted against the applicant no.1 only under section 363, the application moved by the first informant could at best be treated to be a protest petition and the Magistrate could have treated the same as a complaint and taken cognizance under section 190(1) (a), reliance is placed on the Constitution Bench decision in the case of **Dharam Pal and Others (supra)** to submit that one of the choices open to the Magistrate upon disagreeing with the report would be to issue process and summon the accused or in case he is satisfied that a case has been made out, which was triable by a Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

6.4 In the instant case, the Magistrate being satisfied that the facts of the case disclosed an offence under the special Act. i.e. POCSO Act and as per terms thereof the case was triable by the designated Special Court, and in view of the procedure under section 33(1) the accused was not required to be committed, the Magistrate has rightly transmitted the records to the designated Special Court. The designated Special Court upon receipt of the police report has thereafter followed the procedure under section 33(1) and acting as a court of original jurisdiction has taken cognizance and summoned the accused.

6.5 In view of the procedure prescribed under section 33(1) of the POCSO Act, which is a special Act, the provision with regard to taking cognizance under section 193 and the necessity

of the case being committed to the Court of Sessions after completing the procedural requirement under sections 207 and 209 of the Code would not be applicable in view of the saving clause under section 5 of the Code.

6.6 The judgments in the case of **Annu alias Smt. Anuradha and Others Vs. State of U.P. and Another**[7] and **Sudhir Kumar Jain and Another vs. State of U.P. and Another**[8] relating to sections 207 and 209 were passed in the context of the general law and not with reference to the provisions of the special Act and therefore, would have no application to the facts of the present case.

6.7 Reliance is placed on the Constitution Bench judgment in the case of **Dharampal** (supra) and also the judgment in the case of **Balveer Singh** (supra) in so far as they lay down the law in the general context that the Magistrate in the event he disagrees with the report has an option to issue process and summon the accused or if he is satisfied that a case is made out, which is triable by the Court of Sessions, he may commit the case to the court concerned to proceed further in the matter.

6.8 As regards the contention that in case of an offence under the POCSO Act the police report ought to have directly been placed before the designated Special Court, it is pointed out that as per the chargesheet submitted by the Investigating Officer the offence under section 363 was only disclosed and accordingly the same was placed before the jurisdictional Magistrate. It was thereafter that the concerned Magistrate upon taking notice of the facts and the material placed before him disclosed commission of offence under the POCSO Act, which is triable by the designated Special Court, transmitted the file to the said Special Court for proceeding further.

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7 (Application u/s 482 No.32910 of 2019, decided on 08.01.2020)
8 (Application u/s 482 No.137 of 2018, decided on 07.02.2018)

7. Sri Rajnish Pratap Singh appearing alongwith Sri Ajit Kumar, learned counsel for the opposite party no.3, has supported the contention raised by the learned Additional Advocate General and points out that the POCSO Act being a special enactment the procedure prescribed therein would be required to be followed and in terms thereof the designated Special Court is fully empowered to take cognizance and issue summons upon receiving of the police report transmitted to him by the jurisdictional Magistrate.

8. The present application brings to fore interesting questions with regard to the manner of taking cognizance in the context of a special Act i.e. the POCSO Act, and its interplay with the general provisions under the Code.

9. The POCSO Act was enacted 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.

10. The statement of objects and reasons refers to Article 15 of the Constitution, which, interalia, confers upon the State powers to make special provision for children. Further, reference is made to Article 39, which, interalia, 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.

11. It also contains reference to the United Nations Convention on the Rights of Children, ratified by India, which 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.

12. Taking note of the data collected by the National Crime Records Bureau which showed an increase in cases of sexual offences against children and also noticing that sexual offences against children were not adequately addressed by the extant laws and a large number of such offences were neither specifically provided for nor adequately penalised, it was felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence and that the interests of the child, both as a victim as well as a witness, needs to be protected.

13. The POCSO Act was therefore enacted as a self contained comprehensive legislation interalia 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 Court for speedy trial of such offences.

14. The procedure for reporting of cases under the POCSO Act is provided for under Chapter V, and the relevant provisions thereunder are being extracted below :-

> **"19. Reporting of offences.** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--
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> (a) the Special Juvenile Police Unit; or
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> (b) the local police.

(2) Every report given under sub-section (1) shall be--
(a) ascribed an entry number and recorded in writing;
(b) be read over to the informant;
(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

20. Obligation of media, studio and photographic facilities to report cases. Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

21. Punishment for failure to report or record a case.- (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or Section 20 or who fails to record such offence under sub-section (2) of Section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

2. Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

3. The provisions of sub-section (1) shall not apply to a child under this Act

22. Punishment for false complaint or false information.-(1) Any person, who makes false complaint or provides false

information against any person, in respect of an offence committed under Sections 3,5,7 and Section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

2. Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

23. Procedure for media.-(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

3. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

4. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both."

15. Chapter VII of the POCSO Act relates to Special Courts, and the provisions thereunder are as follows :-

"28. Designation of Special Courts.-(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

2. While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of

Criminal Procedure, 1973, be charged at the same trial.

3. The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under section 67-B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

2. For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.- In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court.- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

32. Special Public Prosecutors.-(1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

2. A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (1) only if he had been in practice for not less than seven years as an advocate.

3. Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and provision of that Code shall have effect accordingly."

16. It is pertinent to notice that in terms of sub-section (1) of Section 28, for the purposes of providing a speedy trial, for each district, designation of a Court of Session to be a Special

Court to try the offences under the Act, has been provided for. Sub-section (2) of Section 28 makes it clear that while trying an offence under the Act, the Special Court shall also try an offence, with which the accused may, under the Code be charged at the same trial.

17. Section 31 makes the provisions of the Code applicable to proceedings before a Special Court and envisages that for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

18. The procedure and powers of Special Courts and the manner of recording of evidence is provided for under Chapter VIII of the POCSO Act. The procedure and powers of Special Courts is provided under Section 33, which reads as follows :-

> **"33. Procedure and powers of Special Court.-** (1) A Special Court 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.
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> 2. 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.
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> 3. The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.
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> 4. 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.
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> 5. The Special Court shall ensure that the child is not called repeatedly to testify in the court.
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> 6. The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.
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> 7. The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:
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> Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.
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> Explanation.- For the purposes of this sub-section, the identity of

> the child shall 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.
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> 8. In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.
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> 9. Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session."

19. Sub-section (1) of Section 33 provides that a Special Court 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.

20. Sub-section (9) of Section 33 mandates that subject to the provisions of the Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code for trial before a Court of Session.

21. Section 42-A makes it clear that the provisions of the special enactment 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 Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency. Section 42-A reads as follows :-

> **“42-A. Act not in derogation of any other law.**- The provisions of this 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 this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

22. As per the general provisions under the Code after

completion of the stage of investigation and placing of the final report by the police to a competent Magistrate, the stage of trial is to begin. As a precursor of the stage, the steps which are envisaged under the Code are as follows : (i) taking cognizance of the offence; (ii) ascertaining whether any *prima facie* case exists against the accused person; and in case it exists, then (a) to issue process against the accused person in order to secure his presence at the time of his trial, (b) to supply to the accused person copies of police statements; (iii) consolidating different proceedings pertaining to the same case; and (iv) if the case is exclusively triable by a Sessions Court, committing the case to that court.

23. The provisions under the Code contemplate two alternative modes in which the criminal law can be set in motion — by giving information to the police under Section 154 or on receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may be followed by forwarding of a police report under Section 173 on the basis whereof cognizance may be taken by the Magistrate under Section 190 (1) (b). In the case of the latter, the Magistrate may either direct investigation by the police under Section 156 (3) or inquire into the case under Section 202 before taking cognizance of the offence under Section 190 (1) (a) or Section 190 (1) (c), as the case may be. The Magistrate, upon taking cognizance of the offence, may proceed to try the offender except where the case is transferred under Section 191, or commit him for trial under Section 209 if the offence is triable exclusively by a Court of Session.

24. Chapter XIV of the Code relates to conditions requisite for initiation of proceedings. Section 190 provides as to when a Magistrate may take cognizance of any offence. Section 190

reads as follows :-

> **“190. Cognizance of offences by Magistrates.–**
> (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-
> (a) upon receiving a complaint of facts which constitute such offence;
> (b) upon a police report of such facts;
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.”

25. Section 190, as aforestated, sets out the different ways in which a Magistrate can take cognizance of an offence i.e. take notice of an allegation disclosing commission of a crime with a view to setting the law in motion to bring the offender to book. The manner in which cognizance can be taken, of an offence alleged to have been committed, is described in clauses (a), (b) and (c) of sub-section (1) of the Section.

26. The meaning of the expression 'take cognizance', though not defined, has been held to be referable to a stage where the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender. Cognizance is to be in regard to the offence and not the offender. It has also been held that mere application of mind by the Magistrate would not amount to taking cognizance unless the same is done for the purpose of proceeding under Sections 200/204 of the Code.

27. The Magistrate’s power to take cognizance of an offence upon a report forwarded by the police was subject matter of consideration in **Minu Kumari and another Vs. State of**

Bihar and others[6]**,** and it was held that even when police report is filed stating that no offence is made out, the Magistrate can ignore the conclusion arrived at by the Investigating Officer and would be competent to apply its independent mind and take cognizance of the case, if he thinks fit that the facts emerging from the investigation lead to a *prima facie* view that commission of an offence is made out. In such a situation, the Magistrate would not be bound to follow the procedure under Sections 200 and 202 for taking cognizance of the case under Section 190 (1) (a), though it would be open for him to act under Section 200 or Section 202 as well. It was observed that there is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police.

28. The different situations which may arise upon a report being forwarded by the police to the Magistrate under Section 173 (2) (i), were discussed in the aforestated case of **Minu Kumari** and it was observed as follows :-

> "**11.** When a report forwarded by the police to the Magistrate under Section 173(2)(*i*) is placed before him several situations arise: the report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (*1*) accept the report and take cognizance of the offence and issue process, or (*2*) may disagree with the report and drop the proceeding, or (*3*) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he again has option of adopting one of the three courses open i.e. (*1*) he may accept the report and drop the proceeding; or (*2*) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (*3*) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(*b*) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the

6 (2006) 4 SCC 359

> offence complained of and order the issue of process to the accused. Section 190(1)(*b*) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(*b*) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(*a*) though it is open to him to act under Section 200 or Section 202 also. [See *India Carat (P) Ltd.* v. *State of Karnataka* (1989) 2 SCC 132]."

29. It would therefore follow that if on receipt of an information under Section 154 of the Code in regard to a cognizable offence, the concerned police officer proceeds for an investigation and submits a police report under Section 173, the Magistrate may take cognizance and in case the offence is exclusively triable by a Court of Session, he is required to follow the procedure set out in Section 209 which provides that when in a case instituted on a 'police report', as defined in Section 2(r), or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit the case to the Court of Session and remand the accused to custody.

30. It may be worthwhile to take note that certain offences are exclusively triable by the Sessions Court according to Section 26 of the Code read with the First Schedule. However, the Court of Sessions cannot directly take cognizance unless the same is committed to it by the Magistrate. For the purpose of committing such a case to the Court of Sessions, Section 209 prescribes the necessary procedure and in terms thereof, it is provided that when the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall: (i) commit, after complying with the provisions of Section 207 or

Section 208, the case to the Court of Sessions, and subject to the provisions relating to bail, remand the accused to custody until such commitment has been made; (ii) subject to the provisions relating to bail, remand the accused to custody during, and until the conclusion of the trial; (iii) send to that court the record of the case and the documents and articles, if any, which are to be produced in evidence; (iv) notify the Public Prosecutor of the commitment of the case to the Court of Sessions.

31. In terms of aforestated provisions under Section 209, the Magistrate is only to examine the police report and other documents referred to in the section so as to find out whether the facts stated in the report make out an offence triable exclusively by the Court of Sessions and once it appears to him that the said position exists, he is to commit the case to the Court of Sessions. In reaching the said conclusion, the Magistrate is not required to weigh the evidence and the probabilities of the case or to hold an enquiry. The Magistrate, however, would be entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction.

32. Section 193 of the Code which relates to cognizance of offences by Court of Session mandates that except as otherwise expressly provided by the Code or by any other law, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. In order to appreciate the scope of Section 193, the provision as it stands presently and also the provision under the old Code may be taken note of. Section 193, the provision as it exists under the new Code, and as it was

under the old Code, are being extracted below :-

> **Old Code**
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> "**193. Cognizance of offences by Courts of Session.—** (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless **the accused has been committed** to it by a Magistrate duly empowered in that behalf."
>
> **New Code**
>
> **"193. Cognizance of offences by Courts of Session.—** Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless **the case has been committed** to it by a Magistrate under this Code."

33. Section 193 corresponds to sub-section (1) of the old Section 193 with substitution of the words "case" and "under this Code" for "accused" and "duly empowered in that behalf" respectively. The scheme of commitment has been modified as per the recommendations of the report of the **41st Law Commission, Vol. 1, Chapters XV and XVIII**[9].

34. It may be noticed that under the old provision the Court of Session could not take cognizance of an offence as a court of original jurisdiction unless the accused was committed to it whereas under the new provision, as it stands, the expression "accused" has been replaced by the words "the case". As already noticed, under Section 190, cognizance is to be taken of the offence and not the offender; accordingly, Section 193 now provides for committal of the case and not of the offender. Section 209 also speaks of commitment of case to Court of Session, when offence is triable exclusively by it.

35. A combined reading of the aforesaid provisions would show that under the old Code, as per the language of Section 193 (as it then was), the Court of Session could not take cognizance of an offence as a Court of original jurisdiction unless the accused was committed to it. The aforesaid

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9 41st Law Commission, Vol. 1, Chapters XV and XVIII

restriction is now removed, the case having once been committed, under Section 193, as it presently stands.

36. In order to examine as to what would be the import of the expression "taking cognizance of an offence", it would be useful to refer to the decision in **Raghubans Dubey Vs. State of Bihar**[10] where one of the contentions urged was that the Magistrate had taken cognizance of the offence so far as the accused were concerned but not as regards the appellant and it was held that once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons and summoning of the additional accused was held to be part of the proceeding initiated by his taking cognizance of an offence.

37. Considering the provisions of Section 193 read with Section 209 of the present Code in juxtaposition with the provisions under Section 193 and 209 of the Old Code, in **Joginder Singh and another Vs. State of Punjab and another**[11]**,** the earlier decision in the case of **Raghubans Dubey** was referred and it was held that when a case is committed to a Court of Session in respect of an offence, under Section 193 read with Section 209 of the Code, the Court of Session takes cognizance of the offence and not of the accused. It was observed as follows :-

> "6. It will be noticed that both under Section 193 and Section 209 the commitment is of the case and not of 'the accused' whereas under the equivalent provision of the old Code, viz. Section 193(1) and Section 207-A it was 'the accused' who was committed and not 'the case.' It is true that there cannot be a committal of the case without there being an accused person before the Court, but this

10 AIR 1967 SC 1167
11 (1979) 1 SCC 345

> only means that before a case in respect of an offence is committed there must be some accused suspected to be involved in the crime before the Court but once "the case in respect of the offence qua those accused who are before the Court is committed then the cognizance of the offence can be said to have been taken properly by the Sessions Court and the bar of Section 193 would be out of the way and summoning of additional persons who appear to be involved in the crime from the evidence led during the trial and directing them to stand their trial along with those who had already been committed must be regarded as incidental to such cognizance and a part of the normal process that follows it..."

38. The change brought about in Section 193 of the Code from that under the Old Code was taken note of in the case of **S.K. Latfur Rahman and others Vs. The State**[12], and again referring to the decision in **Raghubans Dubey**, it was held that the Court of Session takes cognizance of the case or the offence as a whole and, therefore, would be entitled to summon any one who, on the material before it, appears to be guilty of such offence to stand trial before it. It was reiterated that what is committed to the Court of Session by the Magistrate is the case or the offence for trial and not the individual offender, and to hold otherwise would be again relapsing into the fallacy that cognizance is taken against individual accused persons and not of the offence as such. It was stated thus :-

> “Therefore, what the law under Section 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are prima facie guilty of the crime as well …. Once the case has been committed, the bar of Section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the Court of Session with the fullest jurisdiction to summon any individual accused of the crime.”

39. The question as to whether a Court of Session to which a case is committed for trial by a Magistrate can, without itself recording evidence, summon a person not named in the Police Report presented under Section 173 of the Code to stand trial

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12 1985 CrLJ 1238

along with those already named therein, in exercise of powers conferred Section 319 of the Code, came up for consideration in **Kishun Singh and others Vs. State of Bihar**[13], and it was held that the Court of Session, on committal of a case to it, has jurisdiction to take cognizance of offence and summon persons not named as offenders, whose complicity in the crime comes to light from the material available on record to stand trial along with those already named therein. It was further held that on committal, the restriction on the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. It was stated thus :-

> "16...We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless *the accused* was committed to it whereas under the present Code the embargo is diluted by the replacement of the words *the accused* by the words *the case*. Thus, on a plain reading of Section 193, as it presently stands once *the case* is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record."

40. The view taken in **Kishun Singh** that powers of the Sessions Court under Section 193 of the Code to take cognizance of the offence would include summoning of the person or persons whose complicity in the commission of the offence can *prima facie* be gathered from the materials available on record, was not followed in a three-Judge Bench of the Supreme Court decision in **Ranjit Singh Vs. State of Punjab**[14]**,** wherein it was held that there is no power except that in Section 319 by which Court of Session can array a new

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13 (1993) 2 SCC 16
14 (1998) 7 SCC 149

person as an accused and that there is no intermediary stage in between at which the Court of Session can add to the array of the accused persons. In **Ranjit Singh** it was held that from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court would deal only with the accused referred to in Section 209 and there is no intermediary stage till then enabling the Sessions Court to add any other person to the array of the accused.

41. The matter came up before a three Judge Bench of the Supreme Court in **Dharam Pal and others Vs. State of Haryana and another**[15] which disagreed with the views expressed in **Ranjit Singh** case. Thereafter the case came up for consideration before the Constitution Bench in **Dharam Pal and others Vs. State of Haryana and another**[5] and the questions referred for consideration were as follows :-

> "7.1. Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?
> 7.2. If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?
> 7.3. Having decided to issue summons against the appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?
> 7.4. Can the Sessions Judge issue summons under Section 193 CrPC as a court of original jurisdiction?
> 7.5. Upon the case being committed to the Court of Session, could the Sessions Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?
> 7.6. Was *Ranjit Singh case* [*Ranjit Singh* v. *State of Punjab*, (1998) 7 SCC 149, which set aside the decision in *Kishun Singh case* [*Kishun Singh* v. *State of Bihar*, (1993) 2 SCC 16], rightly decided or not?"

42. On the first question, the Constitution Bench did not accept the contention that on receipt of a police report that the

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15 (2004) 13 SCC 9
5 (2014) 3 SCC 306

case was triable by Court of Session, the Magistrate had no other role, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. It was held that the effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced *de novo* against such persons which would not only lead to duplication of the trial, but would also prolong the same.

43. The view expressed in **Kishun Singh** case was held to be more acceptable in view of the consistent legal position that the Magistrate has ample powers to disagree with the final report that may be placed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached.

44. Taking a view that the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) of the Code, it was held that in the event the Magistrate disagrees with the police report, he has two choices: (i) he may act on the basis of a protest petition that may be filed; or (ii) he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case has been made out to proceed against the persons named in column 2 of the report, the Magistrate may proceed to try the said persons or if he was satisfied that the

case has been made out which was triable by the Court of Session, he may commit the case to a Court of Session to proceed further in the matter.

45. On the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police, the Constitution Bench in the case of **Dharam Pal** held that in such an event, if the Magistrate decided to proceed against the accused persons, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by that Court.

46. On the question as to whether upon the case being committed, the Court of Session could issue summons under Section 193 as a court of original jurisdiction or would be required to wait till the stage under Section 319 was reached in order to take recourse thereto, it was held that the language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. It was further held that the provisions of Section 209 would therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session and there cannot be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.

47. Agreeing with the views expressed in **Kishun Singh** *case*, it was observed that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the

case would be evident from the materials available on record and to summon them to stand trial along with the other accused. Answering the reference, the observations made in the decision in **Dharam Pal** case, were as follows:-

> "**33.** As far as the first question is concerned, we are unable to accept the submissions made by Mr Chahar and Mr Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate has no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(*b*) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.
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> **34.** The view expressed in *Kishun Singh case* [*Kishun Singh* v. *State of Bihar*, (1993) 2 SCC 16, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.
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> **35.** In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.
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> **36.** This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided

to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court.

37. Questions 4, 5 and 6 are more or less interlinked. The answer to Question 4 must be in the affirmative, namely, that the Sessions Judge was entitled to issue summons under Section 193 CrPC upon the case being committed to him by the learned Magistrate.

38. Section 193 of the Code speaks of cognizance of offences by the Court of Session and provides as follows:

> **"193.Cognizance of offences by Courts of Session.—**Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

The key words in the section are that "no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code". The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by Mr Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.

40. In that view of the matter, we have no hesitation in agreeing with the views expressed in *Kishun Singh case* [*Kishun Singh* v. *State of Bihar*, (1993) 2 SCC 16, that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose

> complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.
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> **41.** We are also unable to accept Mr Dave's submission that the Sessions Court would have no alternative, but to wait till the stage under Section 319 CrPC was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session."

48. The powers and duties of a Magistrate in committal proceedings in respect of an offence exclusively triable by Sessions Court and the sustainability of the act of refusal by the Magistrate to take cognizance and consequent discharge/acquittal of the accused relying upon evidence led by the accused even without committing the case to the Sessions Court was examined in **Ajay Kumar Parmar Vs. State of Rajasthan**[16], and it was held that the scheme of the Code and in particular the provisions under Sections 207 to 209 make it clear that committal of a case exclusively triable by the Court of Session in a case instituted by police is mandatory; and once the Magistrate reaches a *prima facie* conclusion that the facts alleged in the report make out an offence triable exclusively by Court of Session, the Magistrate has no jurisdiction to probe the matter any further and evaluate evidence related thereto. The offence upon being seen to be triable by the Sessions Court, the Magistrate has to commit the same to that Court – such committal being mandatory. The observations made in the judgment in this regard are as follows :-

> **"14.** In *Sanjay Gandhi* v. *Union of India*, (1978) 2 SCC 39, this Court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held: (SCC pp. 40-41, para 3)
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> > "*3.* … it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a

16 (2012) 12 SCC 406

> prima facie satisfaction is to frustrate Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report,…the Magistrate has simply to commit for trial before the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect.…If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused."

Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

15. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old CrPC, empowered the Magistrate to exercise such a power. However, in CrPC, 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

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17. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the investigating agency. More so, it is the duty of the court to safeguard the rights and interests of the victim, who does not participate in the discharge proceedings. At the stage of application of Section 227, the court has to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. [Vide *P. Vijayan* v. *State of Kerala*, (2010) 2 SCC 398 and *R.S. Mishra* v. *State of Orissa* (2011) 2 SCC 689]

18. The scheme of the Code, particularly, the provisions of Sections 207 to 209 CrPC, mandate the Magistrate to commit the case to the Court of Session, when the charge-sheet is filed. A conjoint reading of these provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once he reaches the conclusion that the facts alleged in the report, make out an offence

> triable exclusively by the Court of Session, he must commit the case to the Sessions Court.
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> **19.** The Magistrate, in exercise of its power under Section 190 CrPC, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 CrPC, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case."

49. The power of Sessions Court to take cognizance under Section 193 as a court of original jurisdiction in the two situations: (A) when the Magistrate has played an *active role* in taking/refusing cognizance before committing the case under Section 209; and (B) when the Magistrate has played a *passive role* in committing the case under Section 209, was considered in **Balveer Singh and another Vs. State of Rajasthan and another**[4]**.** Distinguishing the two situations, it was held that in situation A i.e. of *active committal*, when the Magistrate has already exercised the power of cognizance, the Sessions Court cannot take cognizance for a second time “as a court of original jurisdiction” under Section 193, as cognizance of an offence can only be taken once – however; in such situation it can exercise its revisional jurisdiction. In situation B i.e. a case of *passive committal*, since Magistrate had not exercised the power of cognizance, the Sessions Court was free to exercise the same for the first time “as a court of original jurisdiction” under Section 193.

50. The provisions under the Code are applicable in respect of investigation, inquiry or trial of every offence under the substantive criminal law i.e. whether such offence is punishable under the IPC or under any special or local law. However, in respect of certain offences covered by a special law which

4 (2016) 6 SCC 680

prescribes a special procedure for the manner or place of investigation, the provisions thereof would prevail. This follows from Sections 4 and 5 of the Code, which are as follows:-

> **"4.Trial of offences under the Indian Penal Code and other laws.-**
> (1) All offences under the Indian Penal Code(45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.
>
> **5.Saving.-**
>
> Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

51. Sub-section (1) of Section 4 provides for investigation, inquiry or trial of all offences under the Penal Code according to provisions of the Code. In terms of sub-section (2) of Section 4, offences even under any other law shall be dealt in accordance with the provisions of the Code subject to any separate procedure having been provided under any other enactment. In the absence of any specific provision made in any other statute indicating that offences would have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same would have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code, which is the parent statute providing for investigation, inquiry and trial of cases by criminal courts of various designations. Section 5 of the Code is a saving clause and saves the special procedure provided by any other law.

52. Section 31 of the POCSO Act provides for application of the provisions of the Code to proceedings before the designated

Special Court under the POCSO Act and for the purposes of the said provisions, the Special court shall be deemed to be a Court of Sessions. Section 31 which makes the provisions of the Code applicable to proceedings under the POCSO Act, however begins with “save as otherwise provided in this Act”, which would imply that the provisions of the Code would be applicable to proceedings before the designated Special Court under the POCSO Act, unless otherwise provided under the said Act.

53. In this regard, it would also be relevant to notice that Section 42-A of the POCSO Act mandates that the provisions of the Act shall be in addition to and not in derogation with the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

54. A conjoint reading of the aforestated provisions under Sections 31 and 42-A would indicate that unless a different procedure is provided under the POCSO Act, the provisions under the Code would be applicable; however, in case of any inconsistency, the provisions of the POCSO Act would have an overriding effect.

55. Sub-section (1) of Section 33 of the POCSO Act empowers the designated Special Court to take cognizance of any offence under the Act 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. It therefore contemplates two contingencies under which the Special Court may take cognizance: (i) upon a complaint of facts constituting an offence under the POCSO being directly received by the Special Court as per the provisions under

Section 19 of the POCSO Act; or (ii) upon a police report under Section 173 (2) (i) of such facts.

56. In terms of the aforestated provisions the designated Special Court is empowered to take cognizance without any committal of the accused. This marks a departure from the general procedure under the Code, and in particular Section 193 which stipulates that the Court of Session cannot take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code. The effect of sub-section (1) of Section 33 of the POCSO Act which empowers the Special Court to take cognizance without the accused being committed to it for trial, would therefore have the effect of waiving the otherwise mandatory requirement of Section 193 of the Code and in a way lifts embargo under Section 193. The procedure provided under sub-section (1) of Section 33 with regard to the power of the Special Court to take cognizance, without any committal of the accused, to the extent of inconsistency, would override the general provisions under the Code, by virtue of Section 42-A read with Section 31 of the POCSO Act. The Special Judge would, accordingly, be empowered to take cognizance straightaway and not to have the committal route through a Magistrate.

57. The effect of sub-section (1) of Section 31 in empowering the Special Court to take cognizance without committal of the accused would lead to the question as to whether the jurisdiction of the Magistrate to take cognizance has been taken away since there is no necessity of committal and the special court can straightaway take cognizance of the offence. In this regard it would be relevant to take notice that sub-section (1) of Section 33 envisages that a special court may take cognizance of any offence without the accused being

committed to it for trial. It therefore gives an option to the special court to take cognizance straightaway and not to have the committal route through a Magistrate; however the general procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences though triable by Court of Session is not done away with.

58. A similar view was taken in **State through Central Bureau of Investigation Chennai Vs. Arul Kumar**[17], in the context of the provisions of the Prevention of Corruption Act, 1988 whereunder in terms of Section 5 (1), the Special Judge is empowered to take cognizance of offence without the accused being committed to it for trial, and it was held that the same has the effect of waiving the otherwise mandatory requirement of Section 193; however, it nowhere provides that cognizance cannot be taken by the Magistrate at all.

59. It may also be taken note of that in terms of Section 31 which makes the provisions of the Code applicable to proceedings before a special court it is provided that for the purposes of the said provision the special court shall be deemed to be a court of sessions. The special court therefore cannot be equated to a Court of Sessions. The special court has been given the position of a Court of Session by a deeming provision and even this deeming provision has been made subject to the condition "as otherwise provided in this Act". The other provisions of the Act to which this deeming provision would be subject, would include Section 33 which empowers the special court to take cognizance upon a complaint or a police report without following the committal route. A question would therefore arise as to whether for the purpose of Section 33 of the Act, the deeming fiction would apply and the Special Court can be treated as a Court of Session.

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17 (2016) 11 SCC 733

60. Sub-section (1) of Section 33 confers power on the Special Court to take cognizance of any offence without the necessity of the accused being committed to it for trial, and in terms of sub-section (9) thereof, the Special Court for the purpose of the trial of any offence under the Act, has been conferred the powers of a Court of Session, and is to try such offence as if it were a Court of Session, as far as may be, in accordance with the procedure specified in the Code for trial before a Court of Session.

61. This creates a situation where the Special Court while taking cognizance may not be deemed to be a Court of Session whereas for the purpose of trial of any offence under the Act it would exercise the powers of a Court of Session and is to follow the procedure specified in the Code for trial before a Court of Session. It would therefore be necessary to examine the position of a Special Judge and to see as to what extent the deeming provision under which the Special Court is to be held to be a Court of Session, would extend.

62. The aforestated question with regard to the position of a Special Judge was examined in the Constitution Bench decision in **A.R.Antulay Vs. Ramdas Sriniwas Nayak and another**[18], in the context of the provisions of the Criminal Law Amendment Act, 1952 and it was held the Court of Special Judge is a court of original jurisdiction and in order to make it functionally oriented some powers were conferred by the statute setting up the court, and except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. It was stated that the view that a Special Judge must fit in the slot of a "Magistrate" or a "Court of Session" is

18 (1984) 2 SCC 500

erroneous. It was stated thus :-

> "27...Shorn of all embellishment, the Court of a Special Judge is a court of original criminal jurisdiction. As a court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a court of original criminal jurisdiction enjoys save and except the ones specifically denied."

63. The aforementioned position with regard to the Special Court enjoying all powers which a court of original criminal jurisdiction enjoys, whether of a Magistrate or a Court of Session, save and except the ones specifically denied, was reiterated in **Harshad S.Mehta and others Vs. State of Maharashtra**[19] in the context of the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. It was held the Special Court enjoys all the powers of court of original jurisdiction and it holds dual capacity and powers both of Magistrate and Court of Session depending upon the stage of the case.

64. On a similar analogy the deeming clause under Section 31 of the POCSO Act would have to be held limited for the purpose specified in the section and the same cannot be held to be a fetter on the powers of the Special Court to take cognizance of any offence, without the necessity of the accused having been committed to it for trial, upon receiving a complaint of facts constituting such offence or upon a police report, as per the mandate of Section 33.

65. The designated Special Court would therefore be empowered to take cognizance of any offence, as per terms of sub-section (1) of Section 33, without the accused being committed to it for trial, in both contingencies i.e. upon receiving a complaint of facts which constitute such offence, or

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19 (2001) 8 SCC 257

upon a police report of such facts.

66. The matter may be examined from another perspective, as to whether the order taking cognizance, if held to be irregular, can be said to have occasioned failure of justice or to have vitiated the proceedings. Chapter XXXV of the Code is in respect of irregular proceedings. Section 465, under Chapter XXXV, which is relevant for the ensuing discussion, is being extracted below :-

> **"465. Finding or sentence when reversible by reason of error, omission or irregularity.**-(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

67. Section 460 pertains to irregularities which do not vitiate proceedings, whereas Section 461 is in respect of irregularities which vitiate proceedings. Section 465 of the Code embodies the principle that the finding, sentence or order passed by the court of competent jurisdiction would not be reversible on account of any error, omission or irregularity unless the same has occasioned a "failure of justice". The section relates to proceedings before trial or any inquiry, and since cognizance is pre-trial or inquiry stage, any irregularity of a cognizance order would be covered under the provision.

68. The object of provisions contained under Chapter XXXV of the Code has been subject matter of consideration in a recent decision of the Supreme Court in **Pradeep S. Wodeyar Vs.**

The State of Karnataka[20]**,** wherein it has been held that the purpose of these provisions is to prevent irregularities, that do not go to the root of the case, from delaying the proceedings. Taking notice of a growing tendency on part of the accused using delaying tactics by seeking to challenge every interlocutory order with a view to prolong the proceedings and prevent the commencement or conclusion of the trial, and referring to the earlier decisions in **A.R.Antulay vs Ramdas Sriniwas Nayak And Another**[18] and **Santhosh De Vs. Archana Guha**[21]**,** it has been observed as follows :-

> "**44.** The overarching purpose of Chapter XXXV CrPC, as is evident from a reading of Sections 460 to 466, is to prevent irregularities that do not go to the root of the case from delaying the proceedings. Sections 462-464 lay down specific irregularities which would not vitiate the proceedings. Section 465 on the other hand is a broad residuary provision that covers all irregularities that are not covered by the above provisions. This is evident from the initial words of Section 465, namely, "Subject to the provisions hereinabove contained". Therefore, irregular proceedings that are not covered under Sections 461-464 could be covered under Section 465. It is also evident that the theme of 'failure of justice', uniformly guides all the provisions in the Chapter. There is no indication in Section 465 and in Sections 462-464 that the provisions only apply to orders of conviction or acquittal. All the provisions use the words "finding, sentence or order". Though one of the major causes of judicial delay is the delay caused from the commencement of the trial to its conclusion, there is no denying that delay is also predominantly caused in the pre-trial stage. Every interlocutory order is challenged and is on appeal till the Supreme Court, on grounds of minor irregularities that do not go to the root of the case. The object of Chapter XXXV of the CrPC is not only to prevent the delay in the conclusion of proceedings after the trial has commenced or concluded, but also to curb the delay at the pre-trial stage. It has been recognized by a multitude of judgments of this Court that the accused often uses delaying tactics to prolong the proceedings and prevent the commencement or conclusion of the trial. The object of Chapter XXXV is to further the constitutionally recognized principle of speedy trial. This was highlighted by Justice Jeevan Reddy while writing for a two judge Bench in **Santhosh De v. Archana Guha** where the learned judge observed:
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> > "15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused so minded can stall the proceedings for decades together, if he has the means to do so. Any and every single interlocutory order is challenged in the superior Courts and the superior Courts, we are

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20 2021 SCC OnLine SC 1140
18 (1984) 2 SCC 500
21 AIR 1994 SC 1229

> pained to say, are falling prey to their stratagems. We expect the superior Courts to resist all such attempts. Unless a grave illegality is committed, the superior Courts should not interfere. They should allow the Court which is seized of the matter to go on with it. There is always an appellate Court to correct the errors. One should keep in mind the principle behind Section 465 Cr. P.C. That any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior Court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself, because such frequent interference by superior Court at the interlocutory stages tends to defeat the ends of Justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system."
>
> **45.** Section 465 would also be applicable to challenges to interlocutory orders such as a cognizance order or summons order on the ground of irregularity of procedure. This interpretation is supported by sub-section (2) to Section 465 which states that while determining if the irregularity has occasioned a failure of justice, the Court shall have regard to whether the objection could or should have been raised at an earlier stage in the proceeding. Therefore, the very fact that the statute provides that the Court is to consider if the objection could have been raised earlier, without any specific mention of the stage of the trial, indicates that the provision covers challenges raised at any stage. The Court according to sub-Section (2) is to determine if the objection was raised at the earliest."

69. The provisions under Section 465 of the Code have also been held to be applicable to challenges to interlocutory orders such as a cognizance order or a summons order, on the ground of any error, omission or irregularity, which has occasioned a failure of justice. The test for establishing if there has been a failure of justice for the purpose of Section 465 is whether the alleged error, omission or irregularity has caused prejudice to the accused. It would therefore be required to be seen whether condoning the irregularity, if any, in taking cognizance and issuing summons, would lead to a "failure of justice".

70. In the facts of the present case what needs to be examined is whether the act of the Magistrate in transmitting the record of the case to the Special Court and the order of cognizance and issuance of process having been passed thereupon by the Special Court can be said to have occasioned

any "failure of justice", even assuming that there was an error or irregularity in the procedure, as alleged on behalf of the applicants. For the aforestated purpose, consideration would have to be accorded to the restricted role assigned to the Magistrate at the stage of commitment under the Code of Criminal Procedure 1973 in contradistinction to the exhaustive procedure under the Code of Criminal Procedure, 1898[22].

71. Section 209 of the Code of 1973 which deals with commitment of case to a Court of Session when an offence is triable exclusively by it reads as follows :-

> "**209.** ***Commitment of case to Court of Session when offence is triable exclusively by it***.—When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—
>
> (*a*) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;
>
> (*b*) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;
>
> (*c*) send to that court the record of the case and the documents and articles, if any, which are to be produced in evidence;
>
> (*d*) notify the Public Prosecutor of the commitment of the case to the Court of Session."

72. Before coming into force of the Code of 1973, Section 207 of the Code of 1898 dealt with committal proceedings. In terms of the Criminal Law Amendment Act, 1955, Section 207 of the principal Act was substituted by Sections 207 and 207-A, which read as under :-

> "**207. Procedure in inquiries preparatory to commitment**.—In every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such court, the Magistrate shall—
>
> (*a*) In any proceeding instituted on a police report, follow the procedure specified in Section 207-A; and
>
> (*b*) In any other proceeding, follow the procedure specified in the other provisions of this Chapter.

22 Code of 1898

207-A. Procedure to be adopted in proceedings instituted on police report.—(1) When, in any proceeding instituted on a police report, the Magistrate receives the report forwarded under Section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than fourteen days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(8) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall be given to him free of cost.

(9) The accused shall be required at once to give in, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on his trial:

Provided that the Magistrate may, in his discretion, allow the accused to give in his list or any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this sub-section shall be deemed to preclude the accused from giving, at any time before his trial, to the clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.

(10) When the accused, on being required to give in a list under sub-section (9), has declined to do so, or when he has given in such list, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session, as the case may be, and shall also record briefly the reasons for such commitment.

(11) When the accused has given in any list of witnesses under sub-section (9) and has been committed for trial, the Magistrate shall summon the witnesses included in the list to appear before the court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the clerk of the State and such witnesses may be summoned accordingly:

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation of delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

(12) Witnesses for the prosecution, whose attendance before the Court of Session or the High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon by the Court of Session or the High Court to give evidence.

(13) If any witness refuses to attend before the Court of Session or the High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or the High Court is required, when the Magistrate shall send him in custody to the Court of Session or the High Court as the case may be.

(14) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the State Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or where the commitment is made to the High Court, to the clerk of the State or other officer appointed in this behalf by the High Court.

> (15) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.
>
> (16) Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody."

73. The necessity to demonstrate "failure of justice" for exercise of powers under Section 465 (1) in the context of challenge to an order of cognizance by the Sessions Court, being the Special Court under the SC and ST (Prevention of Atrocities) Act, without the case being committed by a Magistrate was subject matter of consideration in **State of Madhya Pradesh Vs. Bhooraji**[23] and a view was taken that it was for the accused to show that "a failure of justice" had occasioned on account of such irregularity in the trial proceedings and where the accused fails to show the same the specified court under the special Act would not cease to be a "court of competent jurisdiction" merely because of any procedural lapse. The order passed by the High Court quashing the entire trial proceedings was held to be erroneous and was set aside. The provision with regard to committal to the Sessions Court by the Magistrate prior to enactment of the Code of 1973, and subsequent thereto was examined. It was seen that before enactment of Code of 1973, the committal court could examine witnesses and records before deciding to commit the case to the Court of Sessions; however, after 1973, the committal court, in police charge-sheeted case cannot examine any witnesses at all and the Magistrate has only to commit the cases involving offences exclusively triable by the Court of Sessions. It was therefore held after commencement of the Code of 1973 it is not possible for an accused to raise a contention that by passing the committal proceedings had deprived him of the opportunity to cross-examine witnesses in

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23 (2001) 7 SCC 679

the committal court and that had caused prejudice to his defence. It was stated thus :-

> **"18.** It is apposite to remember that during the period prior to the Code of Criminal Procedure, 1973, the committal court, in police charge-sheeted cases, could examine material witnesses, and such records also had to be sent over to the Court of Session along with the committal order. But after 1973, the committal court, in police charge-sheeted cases, cannot examine any witness at all. The Magistrate in such cases has only to commit the cases involving offences exclusively triable by the Court of Session. Perhaps it would have been possible for an accused to raise a contention before 1973 that skipping committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. But even that is not available to an accused after 1973 in cases charge-sheeted by the police. We repeatedly asked the learned counsel for the accused to tell us what advantage the accused would secure if the case is sent back to the Magistrate's Court merely for the purpose of retransmission of the records to the Sessions Court through a committal order. We did not get any satisfactory answer to the above query put to the counsel."

74. The question as to whether cognizance taken by the Sessions Court directly without commitment of case by Magistrate in accordance with Section 193 would have the effect of vitiating the trial, came to be examined by a three-Judge Bench of the Supreme Court in **Rattiram and others Vs. State of Madhya Pradesh**[24], and on a comparison of the committal proceedings under the Code of 1973 with the procedure under the 1898 CrPC and taking into view the constricted role of Magistrate in committal proceedings under Section 209 of the Code of 1973, it was held that non-commitment of the case, *ipso facto*, would not vitiate the trial by Sessions Court unless failure of justice has in fact been occasioned thereby or the accused can establish that he has been prejudiced as a result thereof. It was observed that obliteration of certain rights of accused at committal stage under the Code of 1973 in contrast to the provisions of the old Code showed the legislative intent that every stage in criminal proceedings was not to be treated as vital and the provisions

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24 (2012) 4 SCC 516

under the Code are to be interpreted to subserve substantive objects of criminal trial. The right to speedy trial was held not to be the exclusive right of the accused but is a collective requirement of society and also the entitlement of the victim. On a comparative analysis of the provisions under the Code of 1973 in juxtaposition with the provisions of the old Code, it was observed as follows :-

> **"53.** On a bare perusal of the abovequoted provisions, it is plain as day that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the Magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Quite apart from the above, the accused was at liberty to cross-examine the witnesses and it was incumbent on the Magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record reasons and discharge him.
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> **54.** Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the committal proceedings *in praesenti*, the Magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Mr Fakhruddin, learned Senior Counsel, would submit that the use of the words "it appears to the Magistrate" are of immense signification and the Magistrate has the discretion to form an opinion about the case and not to accept the police report.
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> **55.** To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(*a*) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the Magistrate is only to verify the nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit".
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> **56.** Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one.
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> **57.** It is worth noting that under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to

examine all the witnesses at this stage itself. In 1955, Parliament by Act 26 of 1955 curtailed the said procedure and brought in Section 207-A to the old Code. Later on, the **Law Commission of India in its 41st Report**, recommended thus:

> "**18.19.** ***Abolition of committal proceedings recommended***.— After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished."

We have reproduced the same to accentuate the change that has taken place in the existing Code. True it is, the committal proceedings have not been totally abolished but in the present incarnation, it has really been metamorphosed and the role of the Magistrate has been absolutely constricted.

58. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance with the same and raising of any objection in that regard after conviction attracts the applicability of the principle of "failure of justice" and the convict appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well-nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial."

75. Further, elucidating on the concepts of speedy trial and treatment of a victim in criminal jurisprudence, it was stated thus :- [**Rattiram** case (SCC p.541, para 59)]

> "**59.** At this juncture, we would like to refer to two other concepts, namely, speedy trial and treatment of a victim in criminal jurisprudence based on the constitutional paradigm and principle.

The entitlement of the accused to speedy trial has been repeatedly emphasised by this Court. It has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality [see ***Hussainara Khatoon (1)* v. *State of Bihar,*** (1980) 1 SCC 81, ***Moti Lal Saraf* v. *State of J&K*** (2006) 10 SCC 560 and ***Raj Deo Sharma* v. *State of Bihar*** (1998) 7 SCC 507].

60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in ***Mangal Singh* v. *Kishan Singh*** (2009) 17 SCC 303 wherein it has been observed thus : (SCC p. 307, para 14)

> "*14*. … Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence."

61. It is worth noting that the Constitution Bench in ***Iqbal Singh Marwah* v. *Meenakshi Marwah*** (2005) 4 SCC 370 (SCC p. 387, para 24) though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.

62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (*quaere* a victim). Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

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64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of

> justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.
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> **65.** We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.
>
> **66.** Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance with Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial..."

76. In the facts of the present case, consequent to the placing of the police report before the Magistrate under Section 363 IPC, only against the applicant no. 1, before the Magistrate could take cognizance, an application is stated to have been filed by the opposite party no. 3-prosecutrix that having regard to the facts of the case, cognizance may also be taken under Sections 3/4 of the POCSO Act and Sections 376D, 366, 363 IPC, and also enclosing therewith her affidavit and statement recorded under Section 164 of the Code and placing reliance on the judgment of the Supreme Court in the case of **Balveer Singh and another Vs. State of Rajasthan and another**[4] and **Dharam Pal and others Vs. State of Haryana and another**[5]**.**

77. It has been pointed out that FIR discloses the age of the prosecutrix to be less than 18 years and her statement recorded under Section 164 of the Code supports the FIR version and is also indicative of the offence under Section 376 IPC. The aforementioned material having been placed along with the police report, the Magistrate, upon taking notice thereof, took

4 (2016) 6 SCC 680
5 (2014) 3 SCC 306

the view that looking to the offences disclosed in the application the power to take cognizance in the matter would be with the Special Court constituted under the POCSO Act and not with the Magistrate, as per the provisions under Section 33 (1) of the POCSO Act which empowers the Special Judge to take cognizance without following the committal route.

78. There cannot be any dispute on the point that on receiving the police report under Section 173 (2) of the Code, the Magistrate was under no obligation to accept the report and it was open to him to disagree with the report and take the view that there was sufficient ground to proceed further. Having taken that view and noticing that the offence disclosed would be covered under the special Act i.e. POCSO Act, and the procedure prescribed under Section 33 (1) thereof was required to be followed, the Magistrate had no option but to transmit the records to the designated Special Judge inasmuch as the provisions of the Code, as per the deeming clause under Section 31 of the Act, would be applicable only to the extent provided therein. The designated Special Court, upon receipt of the police report, transmitted through the Magistrate, was fully empowered to take cognizance of the offence, without the requirement of the accused being committed to it for trial, in view of the procedure prescribed under sub-section (1) of Section 33 of the Act.

79. The POCSO Act being a special enactment the procedure prescribed therein would be required to be followed. The applicability of the provisions of the Code as per the deeming clause under Section 31 of the Act is only to the extent provided therein and in view of Section 42-A the provisions of the Act shall have an overriding effect on the provisions of any such law to the extent of inconsistency. This leads to an inference that unless a different procedure is provided under the

POCSO Act, the provisions under the Code would be applicable; however, in case of any inconsistency, the provisions of the POCSO Act would have an overriding effect.

80. Section 33 (1) of the Act which empowers the Special Court to take cognizance of any offence, without the accused being committed to it for trial, marks a departure from the general procedure under the Code and in particular Section 193 thereof which stipulates that the Court of Session cannot take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code.

81. Sub-section (1) of Section 33 would therefore have the effect of waiving the otherwise mandatory requirement of Section 193 of the Code and in a way it lifts the embargo under Section 193. The procedure provided under Section 33 (1) with regard to the power of the Special Court to take cognizance, without any committal of the accused, to the extent of any inconsistency, would override the general provisions under the Code, by virtue of the provisions under Section 42-A read with Section 31 of the POCSO Act.

82. The police report relating to facts constituting an offence under the POCSO Act having been placed before the Special Court, upon being transmitted by the Magistrate, the Special Court was fully empowered to take cognizance of the offence as per the powers and procedure under Section 33 (1), without the requirement of committal of the accused, and thereafter to summon the accused-applicants to face trial.

83. The diminished role of the committing court under the Code of 1973 while committing the case to the Court of Session; particularly when a case is instituted on the basis of a police report and it appears to the Magistrate that the offence is

triable exclusively by the Court of Session, would also be a reason to arrive at an inference that irregularity in procedure, if any, with regard to committal would not be a cause of injustice or prejudice to the applicants.

84. The order of summoning passed by the Special Judge, POCSO and also the proceedings of the criminal case, of which quashment is sought, being in accord with the scheme of the statutory enactment, cannot be said to suffer from any illegality so as persuade this Court to exercise its inherent jurisdiction under Section 482 of the Code.

85. The application thus fails and is accordingly dismissed.

Order Date :- 16.12.2021
Pratima

(Dr. Y.K. Srivastava, J.)