2022 LiveLaw (SC) 301

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

INDIRA BANERJEE; J.K. MAHESHWARI, JJ.

MARCH 21, 2022

CRIMINAL APPEAL No. 451 OF 2022 (Arising out of SLP (Criminal) No. 8662 of 2021)

Gangadhar Narayan Nayak @ Gangadhar Hiregutti *Versus* **State of Karnataka & Ors.**

Protection of Children from Sexual Offences Act, 2012; Section 23 - Code of Criminal Procedure, 1973; Section 155(2) - Whether Section 155(2) Cr.P.C. will apply to the investigation of an offence under Section 23 of POCSO Act - Divergent views by judges in the Division Bench - Registry directed to place the matter before CJI for assignment before an appropriate Bench.

(Arising out of impugned final judgment and order dated 17-09-2021 in CRLP No. 101420/2020 passed by the High Court of Karnataka Circuit Bench at Dharwad)

For Petitioner(s) Mr. Devadatt Kamat, Sr. Adv. Mr. Nishanth Patil, AOR Mr. Rajesh Inamdar, Adv. Mr. Javedur Rahman, Adv. Ms. Malvika Kala, Adv.

For Respondent(s) Mr. Shubhranshu Padhi, AOR Mr. Ashish Yadav, Adv. Mr. Rakshit Jain, Adv. Mr. Vishal Banshal, Adv.

J U D G M E N T

Indira Banerjee, J.

Leave granted.

2. This appeal is against a judgment and order dated 17th September 2021 passed by the Dharwad Bench of the High Court of Karnataka, dismissing Criminal Petition No.101420/2020 filed by the Appellant under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C."), and upholding an order dated 19th April 2018 passed by the Principal District Judge, Uttar Kannada, Karwar, taking cognizance against the Appellant of offence under Section 23 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO").

3. The short question of law involved in this appeal is, whether Section 155(2) of the Cr.P.C. applies to the investigation of an offence under Section 23 of POCSO? Is the Special Court debarred from taking cognizance of an offence under Section 23 of POCSO and obliged to discharge the accused under Section 227 of the Cr.P.C., only because of want of permission of the jurisdictional Magistrate to the police, to investigate into the offence?

4. The Appellant is the Editor of Karavali Munjavu Newspaper. On or about 27th October 2017, a news report was published in the Newspaper, Karavali Munjavu,

regarding the sexual harassment of a 16 year old girl. The victim was named in the said report.

5. Section 23 of POCSO provides as follows:-

*"**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."

6. On or about 30th October 2017, the victim's mother lodged a complaint, inter alia, against the Appellant under Section 23 of POCSO in the Siddapur Police Station, pursuant to which a criminal case being Case No.203/2017 was started against the Appellant.

7. After investigation, the Police filed a report under Section 173 of the Cr.P.C. in the Court of the Principal District Judge, Uttar Kannada, Karwar, on 31st December 2017. By an order dated 19th April 2018, the Court of the Principal District Judge, Uttar Kannada, Karwar, took cognizance of the offence alleged and directed that summons be issued to the Appellant.

8. Thereafter, the Appellant filed an application for discharge under Section 227 of the Cr.P.C. on the purported ground that an offence under Section 23 of POCSO being non-cognizable, the police could not have investigated the offence without obtaining an order of the Magistrate under Section 155(2) of the Cr.P.C. The Trial Court dismissed the application of the Appellant, whereupon the Appellant filed a Criminal Petition in the High Court under Section 482 of the Cr.P.C.

9. By the impugned judgment and order dated 17th September 2021, the High Court has dismissed the Criminal Petition, holding that the non obstante provision of Section 19 of POCSO overrides the provisions of the Cr.P.C., including Section 155 thereof. The High Court refused to quash the proceedings initiated against the Appellant under Section 23 of POCSO.

10. Mr. Devdutt Kamat, Senior Counsel appearing on behalf of the Appellant submitted that the provisions of the Cr.P.C. are applicable to all offences punishable by any law for the time being in force, except where a special law provides for a special procedure, overriding the general procedure under the Cr.P.C.

11. In support of his aforesaid submissions, Mr. Kamat referred to Section 2(n) of the Cr.P.C., which defines 'offence' to mean any act or omission made punishable by any law for the time being in force. Referring to Section 4 of the Cr.P.C. particularly sub-section (2) thereof, Mr. Kamat emphasized that all offences, including an offence under Section 23 of POCSO have to be investigated and tried in accordance with the Cr.P.C.

12. Section 4 of the Cr.P.C. reads:

"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."

13. Mr. Kamat further submitted that an offence under Section 23 of POCSO, which is punishable with maximum imprisonment which may extend to one year, is a non-cognizable and bailable offence, as per Section 2(l) read with Part II of the First Schedule of the Cr.P.C., extracted hereinbelow for convenience:

"2(l) "non-cognizable offence" means an offence for which, and "noncognizable case" means a case in which, a police officer has no authority to arrest without warrant;"

"II-CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS"

Offence	Cognizable or noncognizable	Bailable or nonbailable	By what Court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable	Non-Bailable	Court of Session
If punishable with imprisonment for 3 years and upwards but not more than 7 years.	Ditto	Ditto	Magistrate of the first class
If punishable with imprisonment for less	Non-cognizable Bailable	Any Magistrate	If punishable with imprisonment for less

than 3 years or with fine only.			than 3 years or with fine only.

14. Mr. Kamat submitted that the mandatory provision of Section 155(2) of the Cr.P.C. makes it obligatory on a Police Officer to investigate a non-cognizable case with prior permission of the Magistrate, failing which the proceedings are liable to be quashed. The police, therefore, have no jurisdiction to investigate into an offence under Section 23 of POCSO, without prior sanction of the jurisdictional Magistrate.

15. Mr. Kamat took this Court through Section 155 of the Cr.P.C., set out hereinbelow:

"155. Information as to non-cognizable cases and investigation of such cases.—(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

16. Mr. Kamat emphatically argued that no Police Officer could investigate a non-cognizable offence, without the order of a Magistrate having power to try such case, or commit the case for trial, in view of the express bar of Section 155(2) of the Cr.P.C.

17. Mr. Kamat argued that, from the language and tenor of POCSO read with the Cr.P.C., it is patently clear that Legislature has intended that the provisions of the Cr.P.C. would have to be followed in respect of an offence under POCSO and more so in respect of an offence under Section 23 of POCSO. Mr. Kamat submitted that unlike Section 19, Section 23 of POCSO does not exclude the application of the provisions of the Cr.P.C.

18. Mr. Kamat submitted that Section 31 read with Section 33(9) of POCSO categorically makes the provisions of the Cr.P.C. applicable to proceedings under POCSO before the Special Court. In the context of his submissions, Mr. Kamat referred to Section 31 and Section 33(9) of POCSO extracted hereinbelow:

"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.

…

***33. Procedure and powers of Special Court**.- (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. Mr. Kamat emphatically argued that the finding of the High Court that the provisions of the Cr.P.C. were excluded for the purpose of Section 23 of POCSO by reason of Section 19 of POCSO, was erroneous. He emphatically argued:

(i) Section 23 of POCSO does not exclude the provisions of Cr.P.C. Section 19 of POCSO, which excludes the Cr.P.C., in respect of reporting of an offence, does not apply to an offence under Section 23 of POCSO.

(ii) Section 31 of POCSO makes the Cr.P.C. applicable to proceedings before the Special Court under POCSO, unless specifically excluded. This provision has not been noticed by the High Court.

(iii) Section 33 (9) of POCSO provides that the trial of offences is to be conducted in accordance with the procedure specified in the Cr.P.C. This Provision has also not been noticed by the High Court.

20. In support of his argument that proceedings against the Appellant were liable to be quashed for want of permission of the jurisdictional Magistrate under Section 155(2) of the Cr.P.C., Mr. Kamat cited **Keshav Lal Thakur v. State of Bihar**, (1996) 11 SCC 557 where this Court held:

"3. …On the own showing of the police, the offence under Section 31 of the Act is non-cognizable and therefore the police could not have registered a case for such an offence under Section 154 CrPC. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) CrPC but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen…"

21. Mr. Kamat argued that in **Keshav Lal Thakur** (supra) the facts and circumstances were similar to the facts and circumstances of this case where the chargesheet had been filed without any order of the competent Magistrate under Section 155 (2) of the Cr.P.C. and cognizance had also been taken. This Court categorically held that the entire investigation was vitiated by want of permission under Section 155(2) of the Cr.P.C.

22. Mr. Kamat also cited **State of Punjab v. Davinder Pal Singh Bhullar and Others**, (2011) 14 SCC 770 where this Court held:

*"**107.** It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact situation, the legal maxim sublato fundamento cadit opus meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.*

***108.** In Badrinath v. Govt. of T.N. [(2000) 8 SCC 395 : 2001 SCC (L&S) 13 : AIR 2000 SC 3243] and State of Kerala v. Puthenkavu N.S.S. Karayogam [(2001) 10 SCC 191] this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.*

***109.** Similarly in Mangal Prasad Tamoli v. Narvadeshwar Mishra [(2005) 3 SCC 422] this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.*

***110.** In C. Albert Morris v. K. Chandrasekaran [(2006) 1 SCC 228] this Court held that a right in law exists only and only when it has a lawful origin. (See also Upen Chandra Gogoi v. State of Assam [(1998) 3 SCC 381 : 1998 SCC (L&S) 872] , Satchidananda Misra v. State of Orissa [(2004) 8 SCC 599 : 2004 SCC (L&S) 1181] , SBI v. Rakesh Kumar Tewari [(2006) 1 SCC 530 : 2006 SCC (L&S) 143] and Ritesh Tewari v. State of U.P. [(2010) 10 SCC 677 : (2010) 4 SCC (Civ) 315 : AIR 2010 SC 3823] **111.** Thus, in view of the above, we are of the **considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/ orders/FIR/ investigation stand automatically vitiated and are liable to be declared non est**."*

23. Relying on the aforesaid judgment, Mr. Kamat emphatically argued that the initial action of investigation against the Appellant, of offence under Section 23 of POCSO, being illegal, all subsequent actions would be vitiated.

24. Mr. Padhi, appearing for the State of Karnataka, submitted that POCSO had been enacted by Parliament with the laudatory object of punishing sexual offences against children. Section 23 of POCSO prevents publication of the identity of the victim. In this case, the name of the victim had been published in the news report.

25. Mr. Padhi next argued that POCSO being a special enactment, it overrides the general procedural law. Moreover, Section 19 of POCSO begins with a non obstante clause which reads "Notwithstanding anything contained in the Code of Criminal Procedure, 1973….". This clearly shows that Sections 154 and 155 of the Cr.P.C. have no application to an offence under Section 23 of POCSO. The police has duty under Section 19(1) and 19(2)(c) of POCSO to record the information given by any person having knowledge that a crime under POCSO is likely to be committed or has

been committed. Mr. Padhi submitted that Section 19 of POCSO applies to any offence under POCSO. Section 19 of POCSO does not exclude offence under Section 23 of POCSO.

26. Mr. Padhi further submitted that the case had gone beyond the stage of investigation and chargesheet had been filed. The Court had taken cognizance. Mr. Padhi argued that even assuming, for the sake of argument, that the police were required to take prior permission of the concerned jurisdictional Magistrate before proceeding with the investigation, that in itself does not vitiate the order of the Court taking cognizance and framing charges. The accused has to demonstrate grave prejudice, which the Appellant has not been able to do.

27. Mr. Padhi cited **Fertico Marketing and Investment Private Limited and Others v. Central Bureau of Investigation and Another**, (2021) 2 SCC 525 where this Court held:

"22. …

"9. … If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in Parbhu v. King Emperor [Parbhu v. King Emperor, 1944 SCC OnLine PC 1 : (1943-44) 71 IA 75 : AIR 1944 PC 73] and Lumbhardar Zutshi v. R. [Lumbhardar Zutshi v. R., 1949 SCC OnLine PC 64 : (1949-50) 77 IA 62 : AIR 1950 PC 26]

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

It could thus be seen that this Court has held that the cognizance and the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about miscarriage of justice. It has been held that the illegality may have a bearing on the question of prejudice or miscarriage of justice but the invalidity of the investigation has no relation to the competence of the court."

28. Mr. Padhi submitted that it is settled law that an order taking cognizance of an offence alleged is not vitiated by any defect in investigation. Section 462 read with Section 465 of the Cr.P.C. protects the trial from any defect in investigation.

Distinguishing **Keshav Lal Thakur (supra)** cited by Mr. Kamat, Mr. Padhi argued that the same does not deal with the earlier judgment of this Court in **H. N. Rishbud and Others v. State of Delhi**, (1955) 1 SCR 1150. Mr. Padhi submitted that the judgment in **Davinder Pal Singh Bhullar** (supra) cited by Mr. Kamat has no application in the facts and circumstances of this case since the issue was as follows:

"2. The appeals herein raise peculiar substantial questions of law as to whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 of the Code of Criminal Procedure, 1973 (hereinafter called "CrPC") and as to whether in exercise of its inherent jurisdiction under Section 482 CrPC the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of CrPC."

29. In his reply, Mr. Kamat argued that this is not a case of defective investigation as sought to be argued on behalf of the State, but a case of investigation without jurisdiction. Distinguishing **Fertico Marketing and Investment Private Limited** (supra) cited on behalf of the State, Mr. Kamat argued that defective investigation may not vitiate a trial unless there is miscarriage of justice. In **Fertico Marketing and Investment Private Limited (supra)** consent under Section 6 of the Delhi Special Police Establishment Act 1946 had subsequently been granted to the CBI after registration of the FIR.

30. Mr. Kamat also argued that Sections 462 and 465 of the Cr.P.C., cited by Mr. Padhi are not attracted in this case. Section 462 relates to inquiry or trial or other proceedings in the wrong place and Section 465 saves an order of a Court of competent jurisdiction in case of any error or irregularity in any sanction for the prosecution, unless the Court is of the opinion that a failure of justice had, in fact, been occasioned.

31. Unlike Section 4(1) of the Cr.P.C., which requires all offences under the Indian Penal Code, 1860 (hereinafter referred to as the "the IPC") to be investigated, inquired into, tried or otherwise dealt with according to the Cr.P.C., Section 4(2) of the Cr.P.C. requires all offences under any other law to be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Cr.P.C., subject to any enactment for the time being in force, regulating the manner and place of investigating, inquiring into, trying or otherwise dealing with offences.

32. Section 5 of the Cr.P.C. categorically states that nothing in the Cr.P.C. shall, in the absence of a specific provision to the contrary, affect any special 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. POCSO is a special

law for protection of children against sexual abuse. Section 5 of the Cr.P.C. is set out hereinbelow for convenience: -

"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."

33. On a combined reading of Sections 4(1) and (2) with Section 5 of the Cr.P.C., all offences under the IPC are to be investigated into, tried or otherwise dealt with in accordance with the provisions of the Cr.P.C. and all offences under any other law are to be investigated, inquired into, tried or otherwise dealt with, according to the same provisions of the Cr.P.C., subject to any enactment for the time being in force, regulating the manner of investigating, inquiring into, trying or otherwise dealing with such offences.

34. Section 19 of POCSO is set out hereinbelow for convenience:

*"**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,--*

(a) the Special Juvenile Police Unit; or

(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 subsection (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).”

35. The language and tenor of Section 19 of POCSO and subsections thereof makes it absolutely clear that the said Section does not exclude offence under Section 23 of POCSO. This is patently clear from the language and tenor of Section 19(1), which reads “…. any person who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed……”. The expression “offence” in Section 19 of POCSO would include all offences under POCSO including offence under Section 23 of POCSO of publication of a news report, disclosing the identity of a child victim of sexual assault.

36. Moreover, sub-section (5) of Section 19 of POCSO provides that 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 it shall, after recording reasons in writing, make immediate arrangements to give the child such care and protection including admitting the child into a shelter home or hospital within 24 hours of the report. Action under sub-section (5) of Section 19 of POCSO has to be taken with utmost expedition. Such action obviously involves investigation into whether an offence has been committed and whether the child requires special care.

37. Sub-section (6) of Section 19 of POCSO requires the Special Juvenile Police Unit or local police, as the case may be, to report information to the Child Welfare Committee and the Special Court or where no Special Court has been designated to the Court of Sessions without unnecessary delay, within 24 hours from the receipt of information. The report is to include need, if any, of the concerned child for care and protection and steps taken in this regard. A child, whose identity is disclosed in the media may very well be in need of care and protection. Disclosure of the identity of the child in the media may also expose the child victim of sexual offence to vindictive retaliation by the perpetrators of the crime or their accomplices.

38. Section 31 of POCSO, relied upon by Mr. Kamat provides that the provisions of the Cr.P.C., including provisions as to bail and bonds are to 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 prosecution before a Special Court shall be deemed to be a Public Prosecutor. The said Section has nothing to do with reporting or investigation of an offence. Section 33(9) of POCSO extracted hereinabove, which confers powers of a Court of Sessions on the Special Court to try offences under POCSO, also has nothing to do with the reporting

or investigation of an offence. Subject to the provisions of POCSO, the Special Court is to try an offence under POCSO, as if it were a Court of Sessions "**as far as may be"**, in accordance with the procedure specified in the Cr.P.C. for trial before a Sessions Court. Neither Section 31 nor Section 33(9) of POCSO makes any reference to investigation.

39. It is well settled that legislative intent is to be construed from the words used in the statute, as per their plain meaning. Had Legislature intended that the Cr.P.C. should apply to investigation of an offence under Section 23 of POCSO, would specifically have provided so. The expression "investigation" would, as in Section 4(1) or (2) of the Cr.P.C., have expressly been incorporated in Section 31 or Section 33(9) or elsewhere in POCSO.

40. In our society, victims of sexual offence are, more often than not, treated as the abettor, if not perpetrator of the crime, even though the victim may be absolutely innocent. Instead of empathizing with the victim people start finding fault with the victim. The victim is ridiculed, defamed, gossiped about, and even ostracized.

41. Section 228A of IPC makes disclosure of the identity of any person, against whom the offence of rape or any related offence is found to have been committed, punishable with imprisonment of either description for a term which may extend to two years and also liable to fine.

42. Sub-section (2) of Section 327 of the Cr.P.C. requires that the trial of rape be conducted in camera and sub-section (3) of the said Section prohibits the printing or publishing of any matter in relation to proceedings under Sections 376, 376A to 376E of the IPC.

43. Section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the "JJ Act") prohibits disclosure of the name, address, school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication, regarding any inquiry or investigation or judicial procedure, unless for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

44. The entire object of provisions such as Section 228A of the IPC, 327(2) of the Cr.P.C., Section 74 of the JJ Act and Section 23 of POCSO is to prevent disclosure of the identity of the victim. The identity of the victim should not be discernible from any matter published in the media.

45. The Charter of the United Nations reaffirms the faith of the peoples of the United Nations in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.

46. As stated in the Preamble to the Universal Declaration of Human Rights, adopted by the United Nations on 10th December 1948, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, is the foundation of freedom, justice and peace in the world. Human Rights should be protected by the Rule of Law.

47. As per the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Nobody is to be subjected, inter *alia*, to degrading treatment.

48. Article 12 of the Universal Declaration of Human Rights says that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his or her honour and reputation. Everyone has the right to protection of the law against such interference or attacks.

49. Every child has the inalienable human right to live with dignity, grow up and develop in an atmosphere conducive to mental and physical health, be treated with equality and not be discriminated against. The inalienable rights of a child include the right to protection of privacy. The Constitution of India guarantees the aforesaid inalienable and basic rights to all, including children. The right to live with dignity, the right to personal liberty, the right to privacy, the right to equality and/or the right against discrimination, the right against exploitation, are Fundamental Rights guaranteed by Part III of the Constitution of India.

50. The Directive Principles of State Policy and in particular Article 39(f) casts an obligation on the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. For the full and harmonious development of his or her personality, the child should grow up in an atmosphere of happiness, love and understanding and be brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

51. The United Nations Convention on the Rights of the Child, ratified by India on 11th December 1992, was based on the basic principles, inter alia, of non-discrimination against a child, the best interest of the child, the right of a child to survival and development. The Convention on the Rights of the Child also requires States to undertake all appropriate national, bilateral and multilateral measures to prevent exploitation of children. POCSO not only protects children from sexual offences but also protects the interests of children in general, as victims as well as

witnesses. The right of a child to dignity not only requires that the child be protected from offences of sexual assault, sexual harassment and pornography but also requires that the dignity of a child be safeguarded. Disclosure of the identity of a child who is a victim of sexual offences or who is in conflict with the law is in fundamental breach of the right of the child to dignity, the right not to be embarrassed.

52. Article 16 of the Convention on the Rights of the Child provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy. The child has the right to the protection of the law against such interference. India has ratified the Convention on the Rights of the Child. The J.J. Act and POCSO are in furtherance of the obligations of India under the Convention. The provision of Section 23 of POCSO which protects child victims of sexual abuse from unwarranted intrusion into privacy, harassment and mental agony has to be strictly enforced. The provision cannot be allowed to be diluted.

53. In **Nipun Saxena v. Union of India**, 2019 (2) SCC 703 this Court held:-

*"**38.** No doubt, it is the duty of the media to report every crime which is committed. The media can do this without disclosing the name and identity of the victim in case of rape and sexual offences against children. The media not only has the right but an obligation to report all such cases. However, media should be cautious not to sensationalise the same. The media should refrain from talking to the victim because every time the victim repeats the tale of misery, the victim again undergoes the trauma which he/she has gone through. Reportage of such cases should be done sensitively keeping the best interest of the victims, both adult and children, in mind. Sensationalising such cases may garner television rating points (TRPs) but does no credit to the credibility of the media."*

54. In **Nipun Saxena** (supra), this Court directed: -

"50. In view of the aforesaid discussion, we issue the following directions:

50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large. "

55. The judgment of this Court in **Keshav Lal Thakur** (supra) is clearly distinguishable, in that this Court was dealing with investigation into an offence under Section 31 of the Representation of People Act, 1950. The Representation of People Act, 1950 does not contain any provision regulating the manner or place of investigation, or inquiry into any crime, or otherwise dealing with any offence under the said Act.

56. There can be no dispute with the proposition of law laid down in paragraphs 107 to 111 of **Davindar Pal Singh Bhullar** (supra) cited by Mr. Kamat. In this case for the reasons discussed above, it cannot be said that the impugned order of the Special Court taking cognizance of the complaint against the Appellant suffers from any such

illegality that strikes at the root of the said order. The legal maxim "sublato fundamento cadit opus" is not attracted.

57. Mr. Kamat's argument that Section 19 of POCSO does not include offence under Section 23 of POCSO is unsustainable in law and not supported by any cogent reasons. As observed above, the words "offence under this Act" in Section 19(1) of POCSO makes it clear that Section 19 includes all offences under POCSO including offence under Section 23 of POCSO. It is reiterated at the cost of repetition that a child against whom offence under Section 23 of POCSO has been committed, by disclosure of her identity, may require special protection, care and even shelter, necessitating expeditious investigation for compliance of sub-sections (5) and (6) of Section 19 of POCSO.

58. I am unable to accept the argument of the Appellant that the proceedings were vitiated and liable to be quashed or the Appellant was liable to be discharged without trial, only because of want of prior permission of the jurisdictional Magistrate to investigate into the alleged offence. The Appellant would have to defend the proceedings initiated against him under Section 23 of the POCSO on merits.

59. For the reasons discussed above, I do not find any infirmity with the impugned judgment and order of the High Court which calls for interference by this Court. The appeal is, accordingly, dismissed.

J.K. Maheshwari, J.

I have the benefit of going through the opinion of my esteemed sister Justice Indira Banerjee, however I am unable to agree to the view taken in the judgment for the reasons to follow.

2. Leave granted.

3. The facts as succinctly stated in the order and on perusal of those, the first core question that arises is that "*In absence of any classification provided in the Protection of Children from Sexual Offences Act, 2021 (in short POCSO Act) regarding offences being cognizable or non-cognizable, can all the offences under the Act may be categorized as cognizable in view of the non-obstante clause specified under Section 19 of POCSO Act?" . The another question is "Whether Section 19 of the POCSO Act have overriding effect to the provisions of Cr.P.C., in particular Chapter 12 titled as 'Information to the police and their powers to investigate' in the context of the provision of Section 4 and 5 of Cr.P.C.?". The last question is "In the case at hand, by virtue of mandate of Section 4(2) of Cr.P.C., in absence of having any provision in Special Enactment i.e. POCSO Act for investigation, to try an offence under Section 23 of POCSO Act, the mandate of Section 155(2) of Cr.P.C. shall be required to be followed ?*"

4. Before adverting to answer the aforesaid questions, the backdrop of the issue in the instant appeal is described here. As per allegations, the appellant allegedly committed an offence under Section 23 of POCSO Act for disclosing the identity of the victim. Mother of the victim lodged the complaint on 30.10.2017 against the appellant. The matter was reported by the police to the Special Court. Thereafter, investigation was completed and challan was filed on 31.12.2017. The Special Court in-turn took cognizance on 19.04.2018. The appellant then moved an application for discharge before the Special Court, which was rejected vide order dated 28.08.2020. The order taking cognizance and consequential proceedings were assailed by the appellant in a petition under Section 482 of Cr.P.C. before the High Court seeking quashment inter-alia on the ground that offence under Section 23 of POCSO Act being non-cognizable, investigation conducted by police authorities without the order of the magistrate as mandated in Section 155(2) of the Cr.P.C and filing the challan, completing investigation vitiates trial, and all the proceedings deserve to be quashed.

5. The Special Court while rejecting the application for discharge observed that in view of Section 19 of POCSO Act, all offences under the Act are cognizable after taking guidance by the judgment of Delhi High Court in the case of **Santosh Kumar Mandal vs. State,** 2016 SCC OnLine Del 5378. It was held the police have power to register the case and investigate without obtaining permission from the magistrate. The Court also observed that sufficient material is available against the appellant to frame charge under Section 23 of POCSO Act and directed to frame the charges.

6. The High Court by the impugned order held that Section 19 of POCSO Act provides for reporting of offence and does not classify cognizable or non-cognizable offence. It is said, sub-section (1) of Section 19 of POCSO Act starts with 'non-obstante' clause which overrides the provisions contained under Sections 154 and 155 of Cr.P.C. However, the provisions of Sections 154 and 155 of Cr.P.C. are specifically excluded from application to the provisions of the POCSO Act. Therefore, obtaining the order from the Magistrate under Section 155(2) of Cr.P.C. to investigate a non-cognizable case is not necessary.

7. All the aforesaid questions are interlinked to each other, therefore, it is being adverted commonly. In this respect, POCSO Act does not clarify regarding cognizable and non-cognizable offences. However, the definition of the cognizable and non-cognizable offence under Sections 2(c) and 2(l) of Cr.P.C. may be relevant and quoted for ready reference –

2. Definitions. — In this Code, unless the context otherwise requires —

**

(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

**

(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

8. On perusal of the aforesaid, it is clear that on commission of the cognizable offence, a police officer may in accordance with First Schedule of Cr.P.C. or under any other law may arrest the accused without warrant. While in a non-cognizable offence, a police officer has no authority to arrest without warrant obtained by an order of the Court.

9. The First Schedule of Cr.P.C. provides for classification of offence which is in two parts. Part first of the said Schedule specify punishment; cognizability or noncognizability; bailable or non-bailable; and triable by which court. Part second of First Schedule deals with the offences committed under any other law and specify the description of the offences; cognizability – noncognizability; bailable – non-bailable; and triable by which Court. In para 14 of the judgment above, part second of the First Schedule has been quoted. We can take advantage of it and on perusal of the same, it is clear that the sentence with imprisonment for less than 3 year or with fine if prescribed in that law, then commission of such offence under any other laws will be non-cognizable, bailable and triable by any magistrate. In the present case, an offence under Section 23 of POCSO Act has been allegedly committed in contravention of sub-sections (1) and (2) thereof, which is punishable with imprisonment for a period not less than 6 months but it may extend to 1 year or with fine or with both. Under the POSCO Act, it is not clear all the offences under the said Act are cognizable or some are non-cognizable. However, the Court may have to take the assistance from the provisions of Cr.P.C. on the said issue. In this regard, Section 4 of Cr.P.C. quoted in para 13 of the judgment above can be profitably looked into. As per sub-section 1 of Section 4 of Cr.P.C., trial of offences under Indian Penal Code, and as per sub-section (2) of Section 4 of Cr.P.C. under any other laws shall be investigated enquired into, tried and otherwise dealt with as specified in sub-section (1), subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Section 5 of Cr.P.C. is a 'savings' clause whereby the procedure prescribed in any special or local law for the time being in force shall remain unaffected from the procedure provided in Cr.P.C. So, the provisions specified in any special enactment along with its procedure shall override the provisions of Cr.P.C. and be followed . In other words, the provisions of Cr.P.C. would not tinker with the provisions of special enactment and they are saved to such extent as specified in Section 5 of Cr.P.C. and would be applicable as per Section 4(2) of the Cr.P.C.

10. As per the findings recorded by Special Court as well the High Court, the shelter of Section 19 of POCSO Act has been taken relying upon the judgment of Delhi High

Court in the case of **Santosh Kumar Mandal** (supra). However, the scope, context, applicability of Section 19 of POCSO Act after the said judgment is required to be seen, and to find out whether special enactment deals with investigation after reporting. In para 36 of the judgment above, Section 19 has been quoted which is part of Chapter V of the POCSO Act and provide a procedure for 'reporting' of the cases. It says that 'when any person including the child has apprehension that an offence under the POCSO Act is likely to be committed or has knowledge of commission of the offence, he shall provide such information to the Special Juvenile Police Unit (in short "SJPU") or local police. On reporting the offence under the Act, every such report shall be ascribed an entry number and be recorded in writing; after reading over to the informant; and shall be entered in a book to be kept by the Police Unit. Sub-section (2) prescribes a procedure for ascribing the report made under sub-section (1). As per sub-section (3) , while ascribing the report, it should be in simple language so the child can understand its contents being recorded as it is. As per subsection (4), if necessary, the translator/interpreter may be provided to the child. Looking to the language of sub9 sections (3) and (4), it clearly applies in a case where the report has been lodged by the child and not by the family members. Section 19(5)(6) prescribes special procedure on reporting to the SJPU or local police, and also cast duty on them that if child is in need of care and protection, after recording the reasons in writing, immediate arrangements of such care and protection including admitting the child into shelter home or nearest hospital within 24 hours of report, ought to have been made. Simultaneously, they are supposed to report the matter to the Child Welfare Committee, (in short "CWC") and also to the Special Court or the Court of Sessions, as the case may be. Sub-section (7) confers protection on a person reporting such offence under sub-section (1) in good faith.

11. Looking to the language of Section 19, it does not specify all the offences under the POCSO Act are cognizable. Simultaneously either Section 19 or other provisions of the POCSO Act also do not specify how and in what manner the investigation on reporting of commission of offence under sub-section (1) of Section 19 of POCSO Act be made by the police. Indeed, looking to the language of Section 19, it is true that the provisions of the POCSO Act override the provisions of Cr.P.C. being special enactment only to the extent of having corresponding provision. But POCSO Act does not specify how and in what manner the investigation on reporting of the offences ought to be made. In contrast, Chapter XII of Cr.P.C. deals with investigation also after receiving information in a cognizable or non-cognizable offences. The power of investigation has been given to the police officer as per Section 156 and the said officer shall make the investigation following the procedure as prescribed under Section 157 in case of cognizable offences. In noncognizable offences, the information may be recorded under Section 155(1) of Cr.P.C. by an officer in-charge of a police station within whose limit the offence is committed. He shall enter the

substance of information in a book to be kept by such officer in such form as State Government may prescribe in this behalf, and shall refer the informant to the Magistrate having power to try such case. The said Magistrate may pass an order for investigation which shall be abided by the police officer and shall exercise the same power except the power of arrest without warrant, as he may exercise in investigation of cognizable offences. Otherwise, in a non-cognizable offence, the police officer is not supposed to investigate without the order of Court. Thus, in absence of having any procedure for investigation under the POCSO Act, either for cognizable or noncognizable offences, as mandated by sub-section (2) of Section 4 of Cr.P.C., the procedure prescribed in Cr.P.C. ought to be followed in the matter of investigation enquiring into and trial. Section (5) of Cr.P.C. is a saving clause by which the procedure prescribed in the special enactment will prevail otherwise in absence of the provision and the procedure specified in Cr.P.C. may be applicable.

12. After the discussion to the basic provisions of Cr.P.C. and POCSO Act, the order passed by the Trial Court, relying upon the judgment of Delhi High Court in the case of **Santosh Kumar Mandal (supra)** in paragraph 10 is required to be examined. On perusal of the said judgment of Delhi High Court, it reveals Hon'ble Single Judge made a sweeping observation while dealing with the case of Section 12 in reference to Section 19 and said all the offences punishable under the POCSO Act are cognizable in nature. The said observation does not appear to be in consonance to the language of Section 19 of POCSO Act. After perusal of the facts and findings of the said case, it is suffice to say that the Delhi High Court dealt with a case in which the sentence extendable up to three years was there and weighed with the principle that the sentence maximum so prescribed can be looked into to decide the cognizability or non-cognizability. Therefore, under the said impression, the observation made by the High Court that all the offences under the POCSO Act are cognizable, which, in my opinion, can not be said to be correct view.

13. The matter with respect to cognizability or noncognizability, the Division Bench judgment of Rajasthan High Court in Criminal Reference No. 1 of 2020, titled **Nathu Ram & Ors. vs. State of Rajasthan & Anr.,** 2021(1) RLW 211 may be relevant, wherein the question posed for answer was as under:

"What would be the nature of an offence (whether cognizable or non-cognizable) for which imprisonment "may extend to three years" is provided and no stipulation is made in the statute regarding it being cognizable/non-cognizable."

14. The High Court, considering all the provisions and also the judgments of this Court in the cases of **Rajiv Chaudhary vs. State (NCT) of Delhi,** AIR 2001 SC 2369 and **Rakesh Kumar Paul vs. State of Assam,** (2017) 15 SCC 67, has answered the reference as under:

"21. ... .

Thus, the classification made as aforesaid, for determination of nature of offence whether it is cognizable or noncognizable, the maximum punishment that may be awarded for particular offence, is relevant and not the minimum sentence.

25. Accordingly, the reference is answered in terms that unless otherwise provided under the relevant statute, the offences under the laws other than IPC punishable with imprisonment to the extent of three years, shall fall within the classification II of offences classified under Part II of First Schedule and thus, shall be cognizable and non-bailable. Consequently, the offence under Section 91(6)(a) of the Act of 1956 shall be cognizable and non-bailable."

15. Thus, as per the discussion made hereinabove, it is to conclude that the Delhi High Court's judgment of **Santosh Kumar Mandal** (supra) deals with an offence of Section 12 wherein maximum sentence prescribed was extendable up to 3 years, however the said offence was found cognizable. It is to state that the observation made in the said judgment that all offences under POCSO Act are cognizable, is in my humble opinion not justified without taking note of the provisions of Cr.P.C. It is true that to decide the cognizability and non-cognizability, the maximum sentence prescribed for the offence would be taken into consideration, but if the sentence prescribed for the offence is less than 3 years then those offences of POCSO Act would be non-cognizable. It is clarified, Section 19 of the POCSO Act overrides the provisions of Cr.P.C. only to the extent of reporting the matters to the police or SJPU and other ancillary points so specified in Section 19.

16. As per above discussion, the offence under Section 23 is non-cognizable and Section 19 or other provisions of POCSO Act do not confer power for investigation except to specify the manner of reporting the offence. However, as concluded as per sub-section 2 of Section 4 and applying Section 5 savings clause of Cr.P.C., in absence of having any provision in special enactment, the Cr.P.C. would apply.

17. In the said context, it is required to be seen, what may be the mode of investigation as per the provisions of Cr.P.C. in non-cognizable cases. As per Chapter XII of Cr.P.C., under Section 154, the F.I.R. in a cognizable offence may be registered by the in-charge of the police station and reduce so in writing. Section 155 prescribes the information as to non-cognizable cases and manner of investigation of such cases. Section 156 provides the power to investigate a cognizable case to a police officer while Section 157 specifies a procedure for investigation. On perusal thereto, it is apparent that the officer in-charge of the police station is having power to investigate any cognizable case without the order of the Magistrate and while investigating the same, he shall forthwith report the same to the Magistrate who is having power to take cognizance of such offence and he may also relegate the said investigation as prescribed in the Cr.P.C. or as per the notification issued by the State Government. Therefore, it is clear that in the cases where the commission of cognizable offence is there, the officer in-charge of the police station is competent

without the order of Magistrate, but in case of non-cognizable offences, after taking the report, the officer in-charge shall refer the informant to the Magistrate as per section 155(1). The language of Section 155(2) makes it clear and in terms it is mandatory that no police officer shall investigate a noncognizable case without the order of the Magistrate. Therefore, the said provision is mandatory and required to be complied with prior to investigating a non-cognizable offence. Learned counsel for the appellant has placed reliance on the judgment of this Court in **Keshav Lal Thakur vs. State of Bihar,** (1996) 11 SCC 557. In the said case, offence under Section 31 of Representation of People's Act, 1950, was alleged to have been committed. After investigation, a final report was submitted praying for discharge by police on which Magistrate took cognizance, which was challenged before High Court under Section 482 and the petition was dismissed, which was assailed before this Court. This Court observed as thus:

"3. We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence under Section 31 of the Act is non cognizable and therefore the police could not have registered a case for such an offence under Section 154 Cr.P.C. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155 (2) Cr.P.C., but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the explanation to Section 2(d) Cr.P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report a relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that related to a case where the police initiates investigation into a cognizable offence – unlike the present one – but ultimately finds that only a non-cognizable offence has been made out.

On perusal of the said, it is clear that the view taken by High Court upholding the order taking cognizance by Magistrate was not found justified on the ground that the police was not entitled to investigate into the offence and upon such a report of the police officer taking cognizance after completion of investigation by the Magistrate was also not justified. The Court observed that the offence being non-cognizable, the police is entitled to investigate such offence pursuant to an order of competent Magistrate specified under Section 155(2) of Cr.P.C. But admittedly, no such order was passed in the case, therefore, this Court said that the recourse as taken is not justified and quashed the impugned proceedings. Learned counsel distinguishing the judgment of

Fertico Marketing and Investment Private Limited & Ors. vs. Central Bureau of Investigation & Anr., (2021) 2 SCC 525**,** has relied upon the judgment of **State of Punjab vs. Davinder Pal Singh Bhullar,** (2011) 14 SCC 770 to contend that if initial action itself is illegal, all subsequent actions emanating from that act are also a nullity, however, prayed for quashment of proceedings.

18. Per contra, learned counsel for the respondent State relied upon the judgment of **Fertico** (supra) to contend that seeking consent of the State Government under Section 6 of Delhi Special Police Establishment Act, 1946 to investigate the offence, if not taken would not be an impediment to vitiate the trial unless there is a miscarriage of justice. After perusal of the said judgment, it is revealed that the said judgment relies upon the judgment of 3-Judge bench of this Court in **H.N. Rishbud & Inder Singh vs. State of Delhi,** AIR 1955 SC 196 wherein paras 9 and 10 embark upon the niceties of the law relating to the said issue and those are reproduced as thus:

"9. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 of the Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of Section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 of the Code of Criminal Procedure which is in the following terms is attracted:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge,

proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in Prabhu v. Emperor [AIR 1944 Privy Council 73] and Lumbhardar Zutshi v. King [AIR 1950 Privy Council 26] . These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.

10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under Section 537 of the Code of Criminal Procedure of making out that such an error has in fact occasioned a failure of justice. It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to Section 537 of the Code of Criminal Procedure indicates that the fact of the objection having been raised at an early stage of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused. It is true that the peremptory provision itself allows an officer of a lower rank to make the investigation if permitted by the Magistrate. But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause

prejudice. When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of Section 5-A of the Act. It is in the light of the above considerations that the validity or otherwise of the objection as to the violation of Section 5(4) of the Act has to be decided and the course to be adopted in these proceedings, determined.

19. On perusal thereto, it is clear that the 'trial flows cognizance and cognizance is preceded by investigation ', which is the basic scheme for the Court to cognizable cases. It is observed that, it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Then Court proceeded to decide the breach of mandatory provisions regulating the competence or procedure of the Court as regards cognizance or trial. In the said context, in reference to Sections 190 and 537 of Cr.P.C., the Court said that, for breach of mandatory provision relating to investigation, it cannot be set-aside unless the illegality in the investigation can be shown to have been brought miscarriage of justice as it does not affect the competence and jurisdiction of trial court. The Court further observed that, if the breach of mandatory provision is brought to the knowledge of Court at sufficiently early stage, the Court while not declining cognizance will have to take necessary steps to get illegality cured and the defect rectified by ordering such reinvestigation looking into circumstances of case. If the attention of the Court is called to such illegality at very early stage, it would be fair to the accused not to obviate the prejudice that may have been caused thereby, by passing the appropriate orders at that stage and not leave him to ultimate remedy of waiting till conclusion of trial. The Court said that granting of such permission is not to be taken by Magistrate as a matter of routine but it is in exercise of his judicial discretion having regard to the policy underlying it. The Court observed that when such a breach is brought to the notice of court at early stage of trial, the Court has to consider the nature and extent of the violation and pass appropriate order for re-investigation as may be called for, wholly or partly or whatever is appropriate.

20. It is not out of place to mention that judgments of **Fertico** (supra) and **H.N. Rishbud** (supra) are the cases in which this Court has dealt with the violation of the procedure of investigation in the case of cognizable offences, while in the case at hand, the offence is noncognizable. Therefore, to investigate such an offence, the order as mandated under Section 155 (2) of Cr.P.C. is necessary, prior to investigating the offence. It is made clear here that, as per Section 155(2), for non-cognizable offence, the order is required to be taken from the Magistrate but in the

light of Sections 2(l) and 28 of POCSO Act, the Special Courts are required to be designated to deal with offences under POCSO Act and they have been authorized under Section 33, conferring a power to such Special Courts to take cognizance. Therefore, the word used in Section 155(2) be read as "Special Courts" in place of "Magistrate", which may take cognizance of any offence under POCSO Act. Therefore, the procedure of Section 155(2) is required to be followed in an offence of POCSO Act under Section 23 which is non-cognizable and the Special Court is required to look into the procedure followed in the investigation. The order of taking cognizance passed by the Special Court after filing the charge-sheet passed on 19.04.2018, merely reflect that after perusal of documents as per list which is verified, the Court has taken cognizance. The Court has not looked into the vital aspect of following the procedure of Section 155(2) of Cr.P.C. Therefore, at the earliest when the application for discharge was filed, it was dismissed by order impugned dated 28.08.2020 with the incorrect notion regarding overriding effect to the provision of Section 19 of POCSO Act, confirmed by High Court. In my considered opinion, the order taking cognizance and to pass consequential order rejecting the application for discharge is not in accordance with law. The view taken by this Court in case of **Keshav Lal Thakur** (supra) relating to a case of noncognizable offence, is aptly applicable in the facts of the present case.

21. In view of the above, this appeal is allowed. Order impugned taking cognizance and consequential orders passed by the Trial Court which is affirmed by the High Court are hereby set-aside. The Special Court is at liberty to follow the procedure prescribed in the matter of investigation of non-cognizable offences.

O R D E R

Hon'ble Ms. Justice Indira Banerjee pronounced her judgment dismissing the appeal in terms of the signed reportable judgment.

Hon'ble Mr. Justice J.K. Maheshwari pronounced a separate judgment, disagreeing with the view expressed by Hon'ble Ms. Justice Indira Banerjee and allowed the appeal.

Since the Bench has not been able to agree, the Registry is directed to forthwith place the matter before Hon'ble the Chief Justice of India, for assignment before an appropriate Bench.