2024 INSC 716

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 2161-2162 OF 2024

(ARISING OUT OF SPECIAL LEAVE PETITION (CRL) NOS. 3665-3666 OF 2024)

JUST RIGHTS FOR CHILDREN ALLIANCE & ANR. **...APPELLANT(S)**

VERSUS

S. HARISH & ORS. **...RESPONDENT(S)**

J U D G M E N T

Signature Not Verified
Digitally signed by
Sanjay Kumar
Date: 2024.09.23
16:48:37 IST
Reason:

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX

A. FACTUAL MATRIX 4

B. IMPUGNED ORDER 10

C. SUBMISSIONS OF THE PARTIES 16

i. Submissions on behalf of the Appellants. 16

ii. Submissions on behalf of the National Commission for Protection of Child Rights (NCPCR). 18

iii. Submissions on behalf of the respondent no. 1 / the Sole Accused. 20

iv. Submissions on behalf of the respondent nos. 2 & 3 / the State. 22

D. ISSUES FOR DETERMINATION 24

E. ANALYSIS 25

i. Relevant Statutory Scheme and Provisions. 25

a. Legislative History and Scheme of the POCSO. 25

b. Relevant Provisions of the IT Act. 38

ii. Scope of Section 15 of the POCSO and Section 67B of the IT Act. 40

a. Contradictory Views of different High Courts on the subject. 40

b. Three distinct offences punishable under Section 15 of the POCSO. 55

I. Concept of an Inchoate Crime – The 'Actus Reus' and 'Mens Rea' required under Section 15. 60

II. Concept of 'Possession', 'Constructive Possession' and 'Immediate Control' under Section 15 of the POCSO. 78

c. Pornographic Material must *prima facie* appear to involve a Child. 86

d. Scope of Section 67B of the IT Act 95

iii. Presumption of Culpable Mental State under Section 30 of the POCSO. 108

a. Concept of Statutory Presumption and Principle of Foundational Facts 110

b. Foundational Facts required under Section 15 of the POCSO 126

c. Whether the Presumption under Section 30 of the POCSO can be resorted to in a Quashing Proceeding? 130

iv. Whether the case at hand was one fit for the High Court to quash?..... 141

a. Plea of Ignorance of Law: Ignorance of Law viz-a-viz Incognizance of Law. . 147

v. Summary of our conclusion..... 161

F. FEW MEANINGFUL SUGGESTIONS. 167

i. The Lingering Impact of Child Pornography on the Victimization & Abuse of Children. 167

a. Obligation to report under Section(s) 19 & 20 respectively of the POCSO and Role of the Society and all Stakeholders. 180

ii. Suggestions to the Union of India and to the courts. 195

G. FINAL ORDER 198

1. Since the issues raised in both the captioned appeals are same and the challenge is also to a self-same judgment and order passed by the High Court those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. The present appeals arise out of the final judgment and order passed by the High Court of Judicature at Madras dated 11.01.2024 in Criminal Original Petition (Crl. O.P.) No. 37 of 2024 ("**Impugned Order**") filed by the respondent no. 1 (accused) herein under Section 482 of the Code of Criminal Procedure, 1973 (for short, the "**Cr.P.C.**") by which the High Court allowed the petition and thereby quashed the chargesheet dated 19.09.2023 filed for the offences punishable under Section 67B of the Information Technology Act, 2000 (for short, the "**IT Act**") and Section 15(1) of the Protection of Children from Sexual Offences Act, 2012 (for short, the "**POCSO**") arising out of the FIR No. 03 of 2020, P.S. Ambattur, Chennai. As a consequence, the criminal proceedings in Special Sessions Case No. 170 of 2023 stood terminated.

3. It may be necessary to clarify that the appellant no. 1 herein, 'Just Rights for Children Alliance' is a collation comprising of five different NGOs that work in unison against child trafficking, sexual exploitation and other allied causes. Whereas the appellant no. 2 is a child rights organization working

towards protecting children from exploitation and one of the partner NGOs to the aforesaid collation. The appellants herein were not a party to the proceedings before the High Court. However, having regard to the serious issue of public importance involved in the matter they sought leave of this Court to challenge the impugned judgment of the High Court. The respondent nos. 2 & 3 are the State of Tamil Nadu and the Inspector of Police, All-Women's Police Station Ambattur, Chennai, respectively.

A. FACTUAL MATRIX

4. On 29.01.2020, the All-Women's Police Station Ambattur, Chennai, Tamil Nadu i.e., the respondent no. 3 herein, received a letter from the Additional Deputy Commissioner of Police (Crime against women and children Branch) wherein it was mentioned that as per the Cyber Tipline Report of the National Crimes Record Bureau (NCRB), the respondent no. 1 herein is an active consumer of pornography and has allegedly downloaded pornographic material involving children in his mobile phone.

5. Accordingly, in view of the aforesaid letter an FIR was registered against the respondent no. 1 herein on the very same day i.e., 29.01.2020 at the All-Women's Police Station Ambattur, Chennai, Tamil Nadu as Crime No. 03 of 2020 for the offence punishable under Section(s) 67B of the IT Act and 14(1) of the POCSO. The relevant portion of the FIR reads as under: -

"Today on 29.01.2020 at 12.00 noon, I, the Inspector of W28, All Women Police Station was on duty, received letter RC. No. 03/ADC CWC/West/Camp/2020 dated 28.01.2020 from Thirumathi S. Megalina, Additional Deputy Commissioner of Police, Prevention of Crimes against Women and Children Division, Chennai, West Zone. On perusal of the same, 4 References were mentioned therein viz.

Ref: 1. DO.Lr.No.05/ADGP-CWC/NCMEC/2020

2. C. No.30/COP/CO/2020

3.R.C. No. 228 VIII/DC CWC/Genl/2020 (CTR No. 49303278)

4. RC No. 68 /Japu – ii/NCMEC/2020

As per the notice issued in CTR No. 49303278 by National Crime Record Bureau, it is seen that Harris, resident of Door No.2, 1st Main Road, VPC Nagar, Kallikuppam, Ambattur, Mobile No. 99406 87836, has for the past more than two years, been watching child pornographic films. Details have also been obtained with regard to child pornographic films which were made by using children who have been exploited, children who have gone missing, and by collecting information from centres which deal with missing children, and details have been provided with regard to the persons who have downloaded such child pornographic films. When those notices were perused, it was seen that the above said person had downloaded those films through Old Site ID-KALLI/OLD/ Chm ID-CHM2307, with a view to indulge in sexual activities, and these films were made at the address 'Gopalsamy, No.2, Gangai Amman Kovil 3rd Main Road, Kallikuppam, Ambattur' by exploiting children in this area. Since this bad activity is a crime against good social order, it was directed to take appropriate action against the said person, and therefore, Crime No. 03/2020 U/S 67B IT ACT r/w 14(1) POCSO Act 2012 was registered, and the original FIR has been sent to the concerned Court of learned Judicial Magistrate, and copies have been sent to the concerned superior officers of police without any delay, and investigation has been taken up.

13. Action Taken: Since the above information reveals commission of offence(s) u/s as mentioned at Item No. 2, registered the case and took up the investigation.

FIR read over to the complainant/Informant, admitted to be correctly recorded and a copy given to the Complainant/Informant free of cost."

6. During the course of the investigation, the mobile phone belonging to the respondent no. 1 was seized and sent to the Forensic Science Laboratory for analysis. The respondent no. 1 was also questioned whether he had ever viewed any pornographic content, to which the respondent no. 1 admitted that he used to regularly view pornography while he was in college.

7. As per the Computer Forensic Analysis Report dated 22.08.2020 it was found that the mobile phone of the respondent no. 1 contained two video files relating to child pornography depicting two underage boys involved in sexual activity with an adult woman. The Computer Forensic Analysis Report further stated that more than hundred other pornographic video files were downloaded and stored in the said mobile phone. The relevant portion of the said Computer Forensic Analysis Report reads as under: -

*"**COMPUTER FORENSIC ANALYSIS REPORT***

Received from	***:***	*The Sessions Judge, Mahalir Neethi Mandram, (Fast Track Mahila Court) Tiruvallur.*
Crime No. & P.S.	***:***	*03/2020 of Ambattur AWPS*
Organization Report No.	***:***	*CF/52/2020*
Case received Date	***:***	*28.02.2020*
Case received through	***:***	*WHC 43450, Tmt. Poornima*
Seals status	***:***	*Correct & Intact*

Nature of crime	***:***	*67(B) IT Act and 14(1) of POCSO Act 2012*
Tools used	***:***	*UFED 4 PC.*
Report date	***:***	*22.08.2020*
Head of the Division	***:***	*A. Visalakshi, M.Sc, PGDCA*
Examiner	***:***	*S. Hemalatha, M.Sc., (FS), M.Sc., (CS)*

RECEIVED DEVICE DESCRIPTION

One (1) sealed cloth-lined paper parcel marked, "PI No. 5/2020. Cr. No. 3/2020, Ambattur AWPS ..." containing the following item:

Marked as	***Name of the Item received***	***Details of the Item***	***Packing / Labelling details***
1	*Mobile phone*	*Make: MOTO* *Model: XT 1804* *IMEI1: 356477088126073* *IMEI2: 356477088126081*	*Kept in a plastic box marked, "PI No: 05/2020".*
	SIM 1	*Airtel 4G 128K* *ICCID: 8991000902533662473U*	
	Memory Card	*Strontium 16 GB*	
	Battery	*Inbuilt*	

Objective

The above item was examined with a view to find if there is any facility of viewing video files using YouTube application and the details. And also to find if any media files pertaining to pornography were found accessed/downloaded/saved.

EXAMINATION

Mobile Phone : [MOTO]

*The internal memory of the mobile phone was acquired using file system extraction and examined using the forensic software tool "UFED 4 PC". The retrieved details such as contacts, call logs, SMS messages and media files are generated as a report and the report (in pdf) is copied on to a Compact Disc marked as "**CF 52/20**". Selected pages from the report are given as **Annexure-I**. Some of the findings from the report are as follows: - [...]*

[...] ***Above findings indicated that the mobile phone was found to be equipped with the facility of viewing videos through YouTube Application.***

*4. (a) Video files pertaining to pornography (more than 100 Nos.) were found downloaded and stored in different paths, the details of the same are given as **Annexure – II**. [...]*

*(b) Some of the vide files pertaining to pornographic nature were found stored under the path "**Motorola GSM_XT1806 MotoG5SPlus.zip/sdcard/ProgramData/Android/Language/.fr/Videos/wat up pono**". [...]*

(c) Under the same path two video files which could be accounted for Child Pornography content were found stored. In the videos boys (under-teen) were found involved in sexual activity with a adult woman/girl. The details of the same are pasted below: -

S. No.	***File Info***	***Additional File Info***
1.	*Name: VID-20190614-WA0006.mp4* *Path: Motorola GSM_XT1806 MotoG5SPlus.zip/sdcard/Program Data/Android/Language/.fr/Videos/ wat up pono/ VID-20190614-WA0006.mp4*	*Size (bytes): 11256288* *Modified: 6/14/2019 15:44 (UTC +5:30)*
2.	*Name: Unmayal sollungal Ennodu sellungal with Vadivel Balaji in AIE 4-8-2012 – Youtube.3GP* *Path: Media/Internal shared storage/trending/adhu idu/Unmayal sollungal Ennodu sellungal with Vadivel Balaji in AIE 4-8-2012 – Youtube.3GP*	*Size (bytes): 20467994* *Modified: 9/5/2016 23:12 (UTC +5:30)*

[...]

Memory Card: [Strontium 16 GB]

*The memory card was acquired and examined using the forensic software tool "UFED 4 PC". The retrieved details such as document, image and video files are generated as a report and the report (in pdf) is copied on to a Compact Disc marked as "**CF 52/20**". The full report is given as **Annexure-III**.*

On perusing the medial files, multiple video snapshot images and video files were found related to pornography. The representative samples of the same are copied onto the CD mentioned earlier under a specified folder. [...]"

8. Upon completion of the investigation, chargesheet dated 19.09.2023 was filed against the respondent no. 1 for the offences punishable under Section(s) 67B of the IT Act and 15(1) of the POCSO respectively. It may not be out of place to state at this stage, that although the FIR was registered for the offence punishable under Section 14(1) of the POCSO yet in light of the materials collected in the course of the investigation and the findings recorded in the Computer Forensic Analysis Report, the chargesheet was ultimately filed for the offence punishable under Section 15(1) of the POCSO. The relevant portion reads as under: -

> *"**Final Report***
>
> ***Before the Hon'ble Mahila Fast Track Mahila Court, Tiruvallur***
>
> *Police Final Report under 173(i) W28 Ambattur All Women Police Station Crim no- 3/2020 U/s 67(B) IT ACT & 14 (1) of POCSO ACT 2012 @67 (B) IT ACT 15(1) of POCSO ACT 2012. [...]*
>
> ***Nature of the case***
> *Mrs. Megallina, Additional Deputy Commissioner of Police, Women and Child Crime Branch, Chennai, West Zone LETTER RC.NO. 03/ADC CWC/West/Camp/2020 Dated: 28.01.2020 in that mentioned Ref: 1. Do. Lr. No. 05/ ADGP- CWC/ camp/ NCMEC/ 2020, 2. C.No.30/ COP/ CO/ 2020, 3. R.CNO. 228 VIII/ DC CWC/ Genl/ 2020 (CTR No. 49303278), 4. RC.No. 68/ japu- ii/ NCMEC/ 2020 as per the detail, Haris residing at 1st Main Road, Door No.03, VPC Nagar, Kallikuppam, Ambattur has reported to NCRB (National Crime Record Bureau) that he had seen child pornography on his mobile phone number 99406 87836 for more than two years at CTR No. 49303278 has been obtained and a report on child exploitation and missing persons and details of those who have downloaded child pornography against children banned by the data collection system has been obtained. Aforesaid person OLD Size ID- KALLI 4/OLD Chm Id- CHM2307 Downloaded from the address No.2 Gopalsamy, 3rd Main Road, Gangaiyamman Temple, Ampathur, Kallikuppam, with the malicious intention of viewing children's pornographic films for sexual purposes. As this evil act is considered to be a crime of*

disturbance of social morals, after being instructed to take appropriate action against the said person, the All Women Police Station registered a case in CRIME NO. 03/20 U/ S 67B IT ACT r/ w 14(1) POCSO Act 2012 and the copy of the same was sent to the concerned court and the copies to the higher police officers without delay for investigation. [...]

In the investigation conducted so far, crime scene no. 2, VPC Nagar to Main Road Kallikuppam Ambattur, Chennai is within the jurisdiction of Ambattur All Women Police Station.

On 28.01.2000 Additional Deputy Commissioner, Women and Child Prevention Division, Chennai West Zone gone through the case received from (NCMEC) According to the National Center for Exploited Children in this case accused Harish AGE 24/S/o. Santhanam No. 2 VPC Nagar First Main Road Kallikuppam Ampathur Chennai has been using his phone number (99406 87836) for more than two years from his mobile phone number OLD Size ID-KALLI 4/OLD Chm Id- CHM2307 Downloaded from the address No.2 Gopalsamy, 3rd Main Road, Gangaiyamman Temple, Ampathur, Kallikuppam, with the malicious intention of viewing children's pornographic films for sexual purposes As this evil act is considered to be a crime of disturbance of social morals, as per CTR NO 49303278 a report of the crime has been received by NCRB.

Therefore, the accused in this case is considered to have committed an offense of disturbing public morals and therefore has committed a cognizable offense under Section 67 (B) IT ACT & 15 (1) of the POCSO Act 2012. [...]"

B. IMPUGNED ORDER

9. Aggrieved by the aforesaid, the respondent no. 1 went before the High Court of Judicature at Madras by way of a quashing petition being the Criminal Original Petition (Crl. O.P.) No. 37 of 2024 for the purposes of getting the aforesaid chargesheet and the criminal proceedings arising therefrom quashed.

10. The impugned judgment of the High Court is in three-parts. In other words, the High Court quashed the criminal proceedings essentially on three grounds: -

(i) ***First,*** the High Court was of the view that to constitute an offence under Section 14(1) of POCSO, a child must have been used by the person accused for pornographic purposes. It observed that although the two videos depicting children engaged in a sexual activity were found to have been downloaded and stored in the mobile phone belonging to the respondent no. 1, and assuming that the accused had watched the same yet the same would not constitute an offence under Section 14(1) of the POCSO. The relevant observations read as under: -

> *"9. To make out an offence under Section 14(1) of Protection of Child from Sexual Offences Act, 2012, a child or children must have been used for pornography purposes. This would mean that the accused person should have used the child for pornographic purposes. Even assuming that the accused person had watched child pornography video, that strictly will not fall within the scope of Section 14(1) of Protection of Child from Sexual Offences Act, 2012. Since he has not used a child or children for pornographic purposes, at the best, it can only be construed as a moral decay on the part of the accused person."*

(ii) ***Secondly,*** the High Court held that, to constitute an offence under Section 67B of the IT Act, the person accused must have published, transmitted or created material depicting children in sexually explicit

act or conduct. It held that although the respondent no. 1 had admitted that he was addicted to watching pornography, yet mere watching or downloading of child pornography without any transmission or publication of the same does not fall within the purview of Section 67B of the IT Act. The relevant portion reads as under: -

> *"6. This Court enquired the petitioner and he stated that his date of birth is 13.11.1995 and that he has an elder brother. After a lot of persuasion, the petitioner admitted that during his teens, he had the habit of watching pornography. However, the petitioner made it clear that he had never watched child pornography. That apart, he also stated that he had never attempted to publish or transmit any of the pornographic materials to others. He had merely downloaded the same and he had watched pornography in privacy.*
>
> *xxx xxx xxx*
>
> *10. In order to constitute an offence under Section 67-B of Information Technology Act, 2000, the accused person must have published, transmitted, created material depicting children in sexual explicit act or conduct. A careful reading of this provision does not make watching a child pornography, per se, an offence under Section 67-B of Information Technology Act, 2000. Even though Section 67-B of Information Technology Act, 2000, has been widely worded, it does not cover a case where a person has merely downloaded in his electronic gadget, a child pornography and he has watched the same without doing anything more."*

(iii) ***Lastly,*** the High Court in light of its aforesaid discussion and by placing reliance on Section 292 of the Indian Penal Code, 1860 (for short, the "**IPC**") took the view that although the pornographic content was found to have been downloaded and stored in the mobile phone

of the respondent no. 1 yet in the absence of any material to show that the respondent no. 1 had transmitted or published the same, no offence whatsoever could be said to have been made out either under the POCSO, IT Act or the IPC and thus quashed the criminal proceedings. The relevant observations read as under: -

> *"8. This Court had the advantage of going through the entire CD file. The mobile phone that was seized from the petitioner did contain pornographic materials. However, for the purposes of this case, only two videos were identified as child pornography. Those two videos contain boys (under teen) involved in sexual activity with an adult woman/girl. Admittedly, those two videos were downloaded and available in the mobile phone belonging to the petitioner and it was neither published nor transmitted to others and it was within the private domain of the petitioner.*
>
> *xxx xxx xxx*
>
> *11. The Kerala High Court had an occasion to deal with the scope of Section 292 IPC. That was a case where a person was caught watching porn videos and a First Information Report came to be registered against him. While dealing with this issue, the Kerala High Court held that, watching an obscene photo or obscene video by a person by itself will not constitute an offence under Section 292 IPC. This is in view of the fact that this act is done by the concerned person in privacy without affecting or influencing anyone else. The moment the accused person tries to circulate or distribute or publicly exhibits obscene photos or videos, then the ingredients of the offence starts kicking in.*

11. Thus, the High Court *vide* its impugned judgment and order dated 11.01.2024 allowed the petition and thereby quashed the criminal

proceedings in Spl. S.C. No. 170 of 2023 on the ground that no offence could be said to have been made out against the respondent no. 1 either under Section 14(1) of the POCSO or Section 67B of the IT Act. The operative portion of the Impugned Order reads as under: -

> *"12. In the considered view of this Court, the materials that have been placed before this Court does not make out an offence against the petitioner under Section 67-B of Information Technology Act, 2000 and Section 14(1) of Protection of Child from Sexual Offences Act, 2012.*
>
> *xxx xxx xxx*
>
> *18. In the light of the above discussion, the continuation of the proceedings against the petitioner will amount to abuse of process of Court. That apart, it will be a stumbling block for the petitioner's career in future. Therefore, this Court is inclined to quash the proceedings in Spl.S.C.No.170 of 2023 on the file of the Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District.*
>
> *Accordingly, this Criminal Original Petition stands allowed and the proceedings in Spl.S.C.No.170 of 2023 on the file of the Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District, is hereby quashed. Consequently, connected criminal miscellaneous petition is closed."*
>
> (Emphasis supplied)

12. From the aforesaid it could be said that the High Court laid down three propositions of law which are as follows: -

i. Mere possession or storage of any pornographic material is not an offence under the POCSO. We are mindful of the fact that, whilst endorsing the aforesaid proposition of law, the High Court in its impugned Order either consciously did not deem it necessary to refer to Section 15 of the POCSO or inadvertently failed to refer to Section

15 of the POCSO. Nevertheless, in either case that may be, the aforesaid proposition of law found favour with the High Court.

ii. Section 67B of the IT Act only makes the act of transmission, publication or creation of material depicting children in sexually explicit manner an offence. Mere watching or downloading of child pornography in private domain is not punishable under the same.

iii. In the absence of any material to indicate any transmission or publication of pornographic content involving child, no offence could be said to have been committed under the POCSO or the IT Act, and the criminal proceedings would be liable to be quashed. In other words, to attract the provisions of the POCSO or the IT Act it is not sufficient to merely establish storage or possession of child pornography and that transmission or publication of the same is also required to be established. In the absence of the same the criminal proceedings are liable to be quashed.

13. In such circumstances referred to above, the appellants being aggrieved with the Impugned Order passed by the High Court have come up before this Court with the present appeal.

C. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellants.

14. Mr. H.S. Phoolka, the learned Senior Counsel appearing for the appellants submitted that the interpretation of the relevant provisions of POCSO by the High Court for the purpose of holding that mere storage or possession of any child pornographic material does not amount to an offence, poses a significant threat to the well-being of children and may result in proliferation of child pornography, posing a significant threat to the very social fabric of the society at large. In support of his submissions, Mr. Phoolka relied on the Convention on Cybercrime and the United Nations Convention on the Rights of the Child, 1989.

15. He further submitted that the chargesheet filed by the investigating agency specifically records that, as per the information received from the National Commission for Missing and Exploited Children, USA (NC-MEC), the accused had been watching child pornographic videos for the past two years.

16. He further contended that the High Court erroneously proceeded under Section 14(1) of the POCSO, which deals with the use of children for pornographic purposes, without giving due consideration to Section 15(1) of the Act.

17. He further submitted that Section 15(1) explicitly penalizes the downloading and failure to delete child pornography. In the present case, the respondent's stance that he had received two files containing child pornography via WhatsApp is falsified by the NC-MEC report. Furthermore, there is nothing on record to substantiate that the videos were received on WhatsApp.

18. It was further argued that the High Court committed a serious error in quashing the criminal proceedings without addressing itself on Section 15 of the POCSO. He submitted that the impugned judgment poses a significant threat to child welfare and is contrary to several national and international commitments.

19. He further submitted that the High Court also failed to distinguish between adult pornography and child pornography, as Sections 67 and 67A of the IT Act deal with adult pornography, while Section 67B was specifically introduced in 2009 to provide more stringent punishment for collecting, downloading, or watching child pornographic material.

20. He further submitted that in view of Section 30 of the POCSO the High Court was legally obliged to presume the existence of a culpable mental state on the part of the accused for having committed any offence under the Act that requires such a mental state.

21. In the last, Mr. Phoolka submitted that a conjoint reading of Section 67B of the IT Act, Section 15, and Section 30 of the POCSO leaves no manner of doubt as regards the culpability of persons in possession of child pornography.

ii. <u>Submissions on behalf of the National Commission for Protection of Child Rights (NCPCR)</u>.

22. Ms. Swarupama Chaturvedi, the learned Senior Counsel appearing for the National Commission for Protection of Child Rights (NCPCR), submitted that there was a serious lapse on the part of the State in failing to register the FIR for the offence punishable under Section 15 of the POCSO, 2012, as the possession of pornographic material involving a child in any form by itself is an offence under Section 15(1) of the Act. It was also argued that the State as a Prosecuting agency failed in its duty to bring it to the notice of the High Court that chargesheet was ultimately filed for the offence under Section 15(1) of the POCSO & not Section 14.

23. She further submitted that the accused had downloaded pornographic material involving a child onto his mobile phone, retained possession of it, and failed to take any steps to delete the same for two years, as mandated under Section 19 of the POCSO, 2012.

24. She contended that the High Court failed to appreciate the mandate of Section 30, which raises a presumption of a culpable mental state on the part of the accused for any offence under the Act that necessitates such a mental state. The provision, therefore, shifts the burden of proving the absence of a culpable mental state onto the accused.

25. She would further submit that Section 19 of the POCSO imposes mandatory reporting of an offence under the Act if there was an apprehension that such offence is likely to be committed or knowledge that such an offence has been committed. It was pointed out that the failure to discharge this obligation by itself is punishable under Section 21 of the POCSO. She pointed out that the social media platforms claim to report such instances to the National Center for Missing and Exploited Children (NCMEC), a US-based NGO, which then reports them to the National Crime Records Bureau (NCRB). However, Section 19 mandates reporting such cases to the Special Juvenile Police Unit (SJPU) or the Special Police. Therefore, reporting to an NGO cannot absolve the social media platforms of its liability under Section 21 of the POCSO.

26. In the last, it was submitted that the issue as regards the plight of minors involved or used in child pornography is a matter of serious concern for one and all. She prayed for issuance of appropriate directions. She submitted that in an age when children require internet access for educational purposes, it

has become imperative to provide them with a safe online environment in accordance with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC).

iii. <u>Submissions on behalf of the respondent no. 1 / the Sole Accused</u>.

27. Mr. Prashant S. Kenjale, the learned Counsel appearing for the respondent no. 1 / the accused, submitted that the FIR was lodged for the offence under Section 14(1) of the POCSO and Section 67B of the IT Act, and thus, no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

28. He further submitted that the date of the receipt of the videos recovered from the mobile phone of the respondent no. 1 phone is 14.06.2019, at which point the 2019 amendment to Section 15 was not yet in force.

29. He further contended that the two files found from the Respondent's phone were named (a.) VID-20190614-WA005.mp4 and (b.) VID-20190823-WA0020.mp4. The use of "WA" in the file names indicates that they were automatically downloaded by WhatsApp, which has an auto-download feature, as shown in a research study. He would submit that in such circumstances, the said videos had been automatically downloaded onto his

phone and that the respondent no. 1 was unaware of their existence. He argued that the forensic evidence clearly indicates both the creation and modification date as 14.06.2019, thereby indicating that the files were never accessed.

30. He further submitted that the mere possession of the aforesaid videos does not constitute an offence under Section 15(1) of the POCSO, as the respondent never had any intention to share or distribute them. He also argued that even if it is assumed that the respondent no. 1 had watched the said videos once and then failed to delete it, he cannot be charged under Section 15(1) of the POCSO, as he was unaware of its presence due to the government's failure to publicize the law.

31. He submitted that ignorance of law on the part of the respondent no. 1 was accompanied by a *bona fide* belief, and as such it would not constitute an offence under Section(s) 15 of the POCSO and 67B of the IT Act. In support of this argument, he placed reliance on the decisions of this Court in ***Chandi Kumar Das Karmarkar v. Abanidhar Roy***, reported in **AIR 1965 SC 585**, and ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.***, reported in **(1979) 2 SCC 409**.

iv. <u>Submissions on behalf of the respondent nos. 2 & 3 / the State</u>.

32. Mr. D. Kumanan, the learned Counsel appearing for the State, submitted that the High Court, whilst passing the Impugned Order proceeded on an erroneous footing that an offence under Section 14 of the POCSO had been alleged against the accused, even-though both the chargesheet as-well as the quashing petition clearly mentioned that the indictment against the accused was under Section 15(1) of the POCSO.

33. He further submitted that the High Court in its Impugned Order failed to look into Section 67B of the IT Act. The High Court whilst quashing the criminal proceedings neither discussed nor gave any due consideration to Section 67B, eventhough chargesheet had been filed for an offence under it.

34. It was submitted that both Section 15 of the POCSO and Section 67B of the IT Act had been enacted with the salutary object of curtailing child abuse by penalizing any form of use of child pornography, including watching of such pornographic content in order to tackle the larger problem of creation and dissemination of such material by the perpetrators.

35. He submitted that more than hundred pornographic videos were found stored in the mobile phone of the respondent no. 1 / accused herein. Furthermore, the accused had himself admitted before the High Court that he along with

his friends would regularly watch such pornographic material. In such circumstances it was argued that the accused had stored such material in his phone with the intention of sharing it with his friends.

36. It was further submitted that the marginal note of Section 15 of the POCSO i.e. "*Punishment for storage of pornographic material involving child"* is self-explanatory and that sub-section (1) of the said provision punishes the storage or possession of any such pornographic material when done with an intention to share or transmit it. Reliance was placed on Section 30 of the POCSO to argue that the said provision specifically provides for presumption of a culpable mental state on part of the accused for any offence under the Act which requires such mental state, and as such the onus was on the accused to prove that he had no intention to share the material that was found stored in his phone, which was also overlooked by the High Court.

37. In the last, it was submitted that once the chargesheet and the other materials on record *prima-facie* disclosed the commission of an offence, more particularly the pornographic videos that were found stored in the mobile phone of the accused, it was not proper for the High Court to exercise its inherent powers under Section 482 of the Cr.P.C to quash the criminal proceedings.

D. ISSUES FOR DETERMINATION

38. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for our consideration: -

I. What is the scope of Section 15 of the POCSO? In other words, what is the underlying distinction between sub-section(s) (1), (2) and (3) respectively of the POCSO?

II. Whether, mere viewing, possessing or storing of any child pornographic material is punishable under the POCSO?

III. What is the true scope of Section 67B of the IT Act?

IV. What is the scope of Section 30 of the POCSO? In, other words, what are the foundational facts necessary for invoking the statutory presumption of culpable mental state in respect of Section 15 of the POCSO?

V. Whether, the statutory presumption contained in Section 30 of the POCSO can be invoked only at the stage of trial by the Special Court alone established under the POCSO? In other words, whether it is permissible for the High Court in a quashing petition filed under Section 482 of the Cr.P.C. to resort to the statutory presumption of culpable mental state contained in Section 30 of the POCSO?

E. ANALYSIS

i. Relevant Statutory Scheme and Provisions.

a. Legislative History and Scheme of the POCSO.

39. Before adverting to the rival submissions canvassed on either side, it would be apposite to first look into the statutory scheme and refer to the relevant provisions of the POCSO.

40. As the long title, 'Protection of Children from Sexual Offences Act, 2012' suggests, the POCSO was enacted by the Parliament to address the urgent need for a comprehensive law to protect children from sexual abuse and exploitation.

41. Sexual exploitation of children is a pervasive and deeply rooted issue that has plagued the societies worldwide and has been a matter of serious concern in India. Prior to the enactment of the POCSO, India lacked a specific legal framework dedicated to dealing with sexual offenses against children. While the provisions related to sexual offenses existed in the IPC, they were not adequately tailored to address the unique vulnerabilities and the needs of children.

42. The inadequacy of the existing laws to effectively deal and combat with the sexual abuse of children was starkly evident. The IPC, though equipped to

handle sexual offences, did not explicitly recognize the various forms of sexual abuse that children might face. Under the IPC there was no distinction between an adult and a child victim for the purposes of the offences punishable under the Code nor did it account for the specific psychological and developmental needs of such child victims. Moreover, the procedural laws were not child-friendly, often resulting in secondary victimization during the legal process. The increasing incidence of child sexual abuse in India and the growing awareness of the long-term psychological impact on the victims underscored the need for a dedicated law. The POCSO was introduced to fill this gap and provide a robust legal mechanism to safeguard children from sexual crimes and protect them from offences of sexual assault, sexual harassment and pornography.

43. The Statement of Objects and Reasons for the enactment of the POCSO makes it abundantly clear that since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically provided for nor were they adequately penalized, the POCSO has been enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences and for matters connected therewith and incidental thereto.

44. It further states that the POCSO is a 'self-contained comprehensive legislation' for the purpose of enforcing the rights of all children to safety, security and protection from sexual abuse and exploitation countered through commensurate penalties as an effective deterrence for sexual offences and pornography and has been enacted keeping in mind Articles 15 and 39 of the Constitution respectively and the United Nations Convention on the Rights of the Children. The Statement of Objects and Reasons of the POCSO reads as under: -

> *"STATEMENT OF OBJECTS AND REASONS*
>
> *Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.*
>
> *The United Nations Convention on Rights of Children, ratified by India on 11th December,1992, requires the State Parties to undertake all appropriate National, By-lateral and Multi lateral 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.*
>
> *The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'study on child abuse: India 2007' conducted by the Ministry of Women and Child Department. Moreover, sexual offences against children are not adequately addressed by the extent laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be*

defined explicitly and countered through commensurate penalties as an effective deterrence.

It is, therefore, proposed to enact a self-contained comprehensive legislation inter-alia to provide for protection of children from the sexual offences and pornography with due regard for safeguarding the interest and well being of the child at every stage of the Judicial process, incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

(Emphasis supplied)

45. The primary legislative intent behind the enactment of the POCSO was to create a comprehensive legal framework that would not only punish offenders but also provide a child-friendly system for the recording of evidence, investigation, and trial of offenses. The POCSO was designed to cover all forms of sexual abuse against children, including sexual harassment, child pornography, and aggravated sexual assault, among others. It aimed to ensure the safety and dignity of child victims during the legal process, with specific provisions that mandate in-camera trials, the presence of a trusted adult during the proceedings, and the prohibition of aggressive questioning of child victims.

46. The POCSO is a manifestation of the unique scheme formed by Article(s) 15 and 39 respectively of the Constitution and the obligation cast by the United Nations Convention on Rights of Children that was ratified by India. Article 15 more particularly sub-article (3) read with Article 39(f) of the Constitution **i)** enables the State to make special provisions for children

AND ii) at the same time obligates the State to direct its policy towards ensuring that the tender and vulnerable age of children is not exploited or abused and to secure a dignified and healthy childhood and youth, free from any moral or material abandonment or exploitation. The UN Convention on Rights of Children prescribes a set of standards that have to be ensured by all State parties including India to secure the best interest of the child and to specifically undertake preventive measures against any form of exploitation of children such as prostitution, unlawful sexual activity or pornographic performances and depictions. The POCSO is a legislative manifestation towards realization of these constitutional provisions, by providing a specialized framework to combat and prevent any and all forms of sexual abuse and exploitation as stated in its long Preamble. The relevant portion of the long Preamble of the POCSO reads as under: -

> *"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.*
>
> *Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;*
>
> *And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;*
>
> *And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be*

protected and respected by every person by all means and through all stages of a judicial process involving the child;

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

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

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

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

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

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

47. Section 2(1) sub-clause (d) of the POCSO defines the term "child" to mean any person below the age of eighteen years. Thus, the definition of the term "child" used under the POCSO is denuded of any gender i.e., the term is both gender neutral and gender fluid and as such will include any person who is below the age of 18-years. The relevant provision reads as under: -

*"**2. Definitions.** –*
(1) In this Act, unless the context otherwise requires, –
(d) "child" means any person below the age of eighteen years;"

48. Section 2(1)(da) defines the term "child pornography" to mean and include any visual depiction of a child involved in any sexually explicit conduct such

as photograph, video, image generated digitally or by a computer which is indistinguishable from an actual child i.e., any self-generated image of an actual child or any other image that has been created, adapted or modified, that appears to depict a child. The relevant provision reads as under: -

> *"**2. Definitions.** –*
> *(1) In this Act, unless the context otherwise requires, –*
> *(da) "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child;"*

49. Section 15 of the POCSO delineates and provides when the storage or possession of pornographic material involving a child shall be a punishable offence under the POCSO and further prescribes the punishment for such storage or possession of pornographic material involving a child. The relevant provision reads as under: -

> *"**15. Punishment for storage of pornographic material involving child.** –*
> *(1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.*
>
> *(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either*

description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

50. It would be worthwhile to note that Section 15 of the POCSO had undergone a significant change by virtue of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (for short, the "**2019 Amendment Act**"), whereby several key changes were introduced. We shall discuss the said provision *viz-à-viz* the unamended provision of Section 15 along with the object and purpose behind the 2019 Amendment Act in more detail in the latter part of this judgment.

51. Section 30 of the POCSO provides for the presumption of culpable mental state and provides that where any offence under the POCSO requires a culpable mental state on the part of the accused, the existence of such mental state on the part of the accused shall be presumed by the Special Court, and that it shall be open for the accused to rebut this presumption. In other words, the accused can prove that he had no such mental state with respect to any offence under the Act. The relevant provision reads as under: -

*"**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."*

52. This Court in its decision in ***Independent Thought v. Union of India & Anr.*** reported in **2017 INSC 1030** held that the preamble to the POCSO recognizes and mandates that the Act and its provisions ought to operate and be interpreted in a manner that would be in the best interest and well-being of the child. It should **i)** ensure that the sexual exploitation and abuse of children are addressed effectively and **ii)** induce a healthy physical, emotional, intellectual and social development of the child. The relevant observations read as under: -

> *"42. [...] The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child". Finally, the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". [...]"*
>
> (Emphasis supplied)

53. In ***Attorney General for India v. Satish*** reported in **2021 INSC 762** this Court had the occasion to examine the entire legislative scheme of the POCSO. It held that each provision of the POCSO should be construed *viz-a-viz* the other provisions of the Act and with reference to the context or background with which the legislation was enacted, so as to make the Act and its provisions more meaningful and effective. This Court further emphasized that, while construing the provisions of the POCSO, the impact of sexual assault and exploitation on the children should not be ignored and further the courts should avoid a narrow or pedantic interpretation that would the defeat the statute; rather, where the intention of the legislature cannot be given effect to or cannot be realized, a meaningful construction of the statute should be adopted to bring about a more effective result. The relevant observations read as under: -

> *"33. [...] As per the rule of construction contained in the maxim "Ut Res Magis Valeat Quam Pereat", the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also needless to say that where the intention of the Legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. [...]*
>
> *xxx xxx xxx*
>
> *37. [...] However, it is equally settled legal position that the clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole Statute relating to the subject matter. The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an adverse effect on their mental state. The*

suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective."

(Emphasis supplied)

54. Justice S. Ravindra Bhat in his concurring opinion in ***Attorney General for India*** (supra) further observed that the POCSO and its nuanced provisions were designed keeping in mind the need to protect the autonomy and dignity of children. It was enacted to criminalize those acts and behaviour that have the propensity to harass, discomfit or demean minors, and as such it is the duty of the courts to ensure that the provisions of the POCSO are not interpreted in a manner that would undermine its purpose or the pressing needs of the times. The relevant observations read as under: -

"*11. The limitations in law in dealing with acts that undermined the dignity and autonomy of women and children, ranging from behaviour that is now termed "stalking" to pornography, or physical contact, and associated acts, which were not the subject matter of any penal law, were recognized and appropriate legislative measures adopted, in other countries. These have been alluded to in Trivedi, J's judgment, in detail. These laws contain nuanced provisions criminalizing behaviour that involve unwanted physical contact of different types and hues, have the propensity to harass and discomfit women and minors (including minors of either sex), or demean them.*

xxx xxx xxx

33. In the end, I cannot resist quoting Benjamin Cardozo that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." It is, therefore, no part of any judge's duty to strain the plain words of a statute, beyond recognition and to the point of its destruction, thereby denying the cry of the times that children desperately need the assurance of a law designed to protect their autonomy and dignity, as POCSO does."

(Emphasis supplied)

55. Similarly in ***Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.*** reported in **2017 INSC 658**, this Court observed that the POCSO had been brought with the purpose of protecting the children from sexual exploitation and harassment. It had been designed to secure the well-being and the best interests of the child with the protection of the child's dignity being the backbone of the legislation. The dignity, protection and interest form the bedrock of the POCSO. The relevant observations read as under: -

> *"18. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.*
>
> *xxx xxx xxx*

63. [...] The POCSO Act, as I have indicated earlier, comprehensively deals with various facets that are likely to offend the physical identity and mental condition of a child. The legislature has dealt with sexual assault, sexual harassment and abuse with due regard to safeguard the interest and well being of the children at every stage of judicial proceeding in an extremely detailed manner. The procedure is child friendly and the atmosphere as commanded by the provisions of the POSCO Act has to be congenial. The protection of the dignity of the child is the spine of the legislation. [...]"

(Emphasis supplied)

56. In ***Nawabuddin v. State of Uttarakhand*** reported in **2022 INSC 162** this Court held that any act of sexual assault, exploitation or harassment of the children should be dealt with in a stringent manner and that no leniency should be shown when dealing with an offence under the POCSO in view of the object that is sought to be achieved by the Act. The relevant observations read as under: -

"10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure."

(Emphasis supplied)

b. Relevant Provisions of the IT Act.

57. For better and effective adjudication of the issues involved in the case at hand, it would be apposite to refer to the IT Act which also contains several provisions, more particularly Section(s) 67, 67A and 67B respectively, that penalize the use, transmission and publication of obscene materials including child pornography. These provisions together encompass and collectively form the umbrella scheme of comprehensive penal provisions contained in the IT Act in this regard.

58. Section 67 of the IT Act is the principal provision that criminalizes the publication or transmission of "obscene material" in any electronic form and constitutes an offence. Section 67A of the IT Act, is a more aggravated offence, prescribing enhanced punishment than the preceding provision. It does so by further amplifying the scope of 'obscene material' by stipulating that any obscene material that contains or depicts any sexually explicit act or conduct, when published or transmitted shall be punishable under the said provision.

59. Section 67B of the IT Act specifically deals with child pornographic materials. It provides for an even more severe form of offence by bringing within its ambit those obscene materials in any electronic form that depict a child in any sexually explicit act or conduct and by further expanding the

scope of 'actus reus' which is punishable under the provision to include not just publication or transmission but also the browsing, creation, collection, online facilitation or enticement of children into any sexual act or conduct etc. The said provision reads as under: -

> *"**67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form**. — Whoever —*
> *(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or*
>
> *(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or*
>
> *(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or*
>
> *(d) facilitates abusing children online; or*
>
> *(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,*
> *shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:*
>
> *Provided that provisions of Section 67, Section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form—*
>
> *(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the*

interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation. — For the purpose of this section, "children" means a person who has not completed the age of 18 years."

ii. <u>Scope of Section 15 of the POCSO and Section 67B of the IT Act</u>.

60. In the case at hand, we are concerned with the interpretation of Section 15 of the POCSO and Section 67B of the IT Act, more particularly the scope of these two provisions and what would constitute an offence under each of them. In other words, what exactly has been made punishable under Section(s) 15 of the POCSO and 67B of the IT Act respectively and what are the necessary ingredients or elements to establish or make out an offence under it.

a. Contradictory Views of different High Courts on the subject.

61. Before proceeding with the analysis of the aforesaid two provisions, it would be appropriate to refer to the decisions of various High Courts and the cleavage of opinion that have been expressed as regards the scope of Section 15 of the POCSO and Section 67B of the IT Act.

62. In ***Nupur Ghatge v. State of Madhya Pradesh*** (**MCRC No. 52596 of 2020**), the accused therein was alleged to have uploaded child pornographic videos

and photographs on his social media account, and thus, a case was registered against him under Section 67B of the IT Act. The Gwalior Bench of the Madhya Pradesh High Court held that Section 67B penalizes various forms of acts including the act of watching or transmitting any child pornographic material in electronic form. It further held that any defence of the accused as to the absence of any involvement in transmission or sharing of such material or the mental state of the accused cannot be looked into at the stage of quashing under Section 482 of the Cr.P.C. The relevant observations read as under: -

> *"From the whats-app chats filed by the applicant, it appears that the applicant himself was involved in porn activities, therefore, the provision of Section 67B of the Act, 2000 would be applicable as Section 67-B of the Act, 2000 also includes records in any electronic form own abuse or that of others pertaining to sexually explicit act with children.*
>
> *xxx xxx xxx*
>
> *The burden is on the applicant to prove his defence which cannot be decided by this Court in exercise of powers under Section 482 of CrPC."*

63. In ***P.G. Sam Infant Jones v. State represented by Inspector of Police*** reported in **2021 SCC OnLine Mad 2241** the accused therein was alleged to have browsed, downloaded and transmitted child pornographic material through his e-mail and social media account. Accordingly, a case was registered against him for the offences under Section 15(1) of POCSO and Section 67B of the IT Act, whereupon the accused therein preferred an

anticipatory bail application before the Madurai Bench of the Madras High Court. The Madras High Court observed that while viewing of pornography in private domain may not be an offence in view of an individual's right to expression and privacy, child pornography falls outside the ambit of such individual rights and stands on a different footing. It held that Section 67B penalizes various kinds of acts pertaining to child pornography including the act of viewing such material. The relevant observations read as under: -

> *3.The case of the prosecution is that on 27.06.2020 at 17.38:51 hours, the petitioner browsed, downloaded and transmitted child pornographic material by using Airtel Sim bearing No.9787973370 through his e-mail and Facebook Account.*
>
> *xxx xxx xxx*
>
> *5. Viewing pornography privately will not constitute an offence. Offence is an act that is forbidden by law and made punishable. That is the definition found in Section 40 of IPC. As on date, there is no provision prohibiting such private acts. There are some who even elevate it as falling within one's right to free expression and privacy. But child pornography falls outside this circle of freedom. Section 67-B of the Information Technology Act, 2000 penalises every kind of act pertaining to child pornography. [...] Therefore, even viewing child pornography constitutes an offence.*
>
> (Emphasis supplied)

64. In ***Ajin Surendran v. State of Kerala & Anr.*** reported in **2022 KER 7207** child pornographic videos were found stored in the mobile phone of the accused therein. The High Court of Kerala at Ernakulam observed that Section 15 of POCSO gets attracted when any person stores or possesses

pornographic material in any form involving a child, with an intention to share or transmit it, whereas Section 67B of the IT Act gets attracted when a person browses or downloads any such material in any electronic form. Accordingly, it held that in view of the videos that were found stored in the accused's mobile phone, *prima-facie* both of the aforesaid provisions are said to be squarely attracted, and thus the power under Section 482 cannot be invoked for quashing the criminal proceedings. The relevant observations read as under: -

> "*3. I have gone through the first information statement as well as the final report. It would show that the mobile phone belongs to the petitioner and the sim card was examined and it was found that in the memory card, pornographic video of children were stored. Section 15 of POCSO Act gets attracted when any person stores or possesses pornographic material in any form involving a child, with an intention to share or transmit child pornography. Section 67B(b) of the IT Act gets attracted when a person among other things, browses or downloads material in any electronic form depicting children in obscene or indecent or sexually explicit manner. Thus, both the sections are squarely attracted. When prima facie case is made out, power under Section 482 cannot be invoked*."
>
> (Emphasis supplied)

65. In ***Manuel Benny v. State of Kerala*** reported in **2022 KER 9730** it was found that the accused person therein had downloaded and stored pornographic videos depicting children in a sexually explicit manner in his mobile phone from a messaging app; 'Telegram' for private viewing. Accordingly, a case was registered against the accused therein under Section 15 of the POCSO and Section 67B of the IT Act. When the final report came

to be filed, the offence under Section 15 of the POCSO was dropped, and chargesheet was filed only for the offence under Section 67B of the IT Act. The accused preferred a quashing petition before the High Court of Kerala at Ernakulam on the ground that even if the materials in the chargesheet were taken at their face value, no ingredients were made out to constitute the offence under Section 67B of the IT Act. A learned Single Judge of the High Court whilst quashing the criminal proceedings held that in order to attract the offence under Section 67B of the IT Act, the pornographic material in question must be voluntarily downloaded. It held that there should be an intention on the part of the accused to download any pornographic content in order to view it so as to constitute an offence under Section 67B of the IT Act. The learned Single Judge further observed that as per the FSL report, the child pornographic videos had been accessed through the messaging app 'Telegram' wherein there is a possibility of automatic download of videos. Since there was no material to show that the accused therein had voluntarily downloaded or browsed the pornographic material in question, no *prima facie* offence had been made out under Section 67B of the IT Act, and thus the High Court quashed the criminal proceedings. The relevant observations read as under: -

> *"5. A perusal of the final report would show that the only allegation against the petitioner is that he downloaded and enjoyed material depicting children in obscene, indecent and sexually explicit manner from the application called 'Telegram'. In order to attract the offence under Section 67B of the IT Act,*

the videos or material has to be voluntarily downloaded into any device. In other words, there should be intention on the part of the petitioner to download the material in order to view it. The definite case of the petitioner is that he did not download any offensive material. Even in Annexure A3 FSL report it is seen that the path of those images is from Android backup and the child pornographic videos were accessed through 'Telegram'. The learned Additional DGP submitted that the contents transmitted in the 'Telegram' can be automatically downloaded in the mobile phone by default. Hence, it cannot be said that the petitioner has intentionally downloaded the material, considering the features of the 'Telegram' App.

Since there is no material to show that the petitioner has browsed or downloaded child pornographic material, the offence under Section 67B of the IT Act is not attracted. Hence, no purpose will be served in proceedings with the matter further. Accordingly, the Crl.M.C is allowed. All further proceedings pursuant to Annexure A2 final report in Crime No.531/2020 of Melukavu Police Station now pending as C.C.No.257/2021 on the files of the Judicial Magistrate of the First Class, Erattupetta stands hereby quashed."

(Emphasis supplied)

66. In ***Lakshya v. State of Maharashtra & Anr.*** (**Criminal Writ Petition No. 479 of 2022**), the accused therein had viewed and stored a child pornographic video in his mobile, which he subsequently showed to his other friends and co-accused therein. On the basis of the aforesaid, a case was registered against the accused persons under Section(s) 15(1) and (3) of the POCSO along with Section 67B of the IT Act. The accused preferred a discharge application which came to be rejected by the Trial Court whereafter the accused therein went in appeal before the High Court of Judicature at Bombay, Nagpur Bench. The learned Single Judge of the High Court dismissed the appeal and upheld the rejection of the discharge

application by the Trial Court. The High Court held that merely because the accused therein was not the creator of the pornographic material in question it cannot be said that no offence had been made out. It held that the act of the accused to store and forward the pornographic material and the failure on his part to delete or report the same would squarely fall within the ambit of Section(s) 15(1) and (2) of the POCSO and Section 67B of the IT Act. However, the High Court chose not to advert to the offence under Section 15(3) of the POCSO that was contained in the chargesheet as a *prima facie* case had already been established against the accused therein for the other offences with which they were charged. The relevant observation reads as under: -

> *"8. With the assistance of the learned Advocate for the accused and the learned APP for the State, I have gone through the provisions of Section 67-B of the I. T. Act and Section 15 of the POCSO Act. The main allegation against the accused is that they stored, forwarded and shared with each other porn video. Even if it is assumed for the sake of argument that they are not creators of the porn video, in my view, the benefit of discharge cannot be granted to them. [...]*
>
> *9. In my view, perusal of Section 15 of the POCSO Act in entirety would show that the act of the accused persons to store, forward and possess pornographic material involving a child is squarely covered under Section 15(1) and (2) of the POCSO Act. They failed to delete or destroy or report the same to the designated authority. As per the case of the prosecution, they stored, possessed and circulated the said porn video. Therefore, in my view, at this stage, it is very difficult for the accused to come out of the tentacles of Section 15(1) and (2) of the POCSO Act.*
>
> *10. Section 67-B of the I.T. Act provides a punishment for publishing or transmitting the material depicting children in*

Sexually explicit act, etc., in an electronic form. If the basic ingredient of Section 67-B, prima facie, are applied to the facts of the case on hand, it would show beyond doubt that the act of the accused is squarely covered within the ambit of Section 67-B of the I. T. Act. In my view, in the teeth of the allegations against the accused and the material collected during the course of investigation and compiled in the charge-sheet, it would be very difficult to accept the contention of the accused persons. It is true that the applicants are young. They are students. They are from reputed family. However, while deciding the discharge application this could not be the consideration. If this submission is accepted on this ground then this would be nothing short of showing misplaced sympathy to the persons who are prima facie accused of the commission of offence."

(Emphasis supplied)

67. In ***Shantheeshlal T. v. State of Kerala*** reported in **2024 KER 35968**, during investigation certain pornographic videos involving a child had been recovered from the device of the accused thereunder. Accordingly, chargesheet was submitted against the accused therein for the offences punishable under Section(s) 15(1) of the POCSO and 67B of the IT Act. The accused thereunder preferred a quashing petition before the High Court of Kerala at Ernakulam, wherein the learned Single Judge quashed the aforesaid chargesheet and the criminal proceedings taking the view as under: -

(i) ***First,*** the learned Single Judge held that in order to attract the provision of Section 15(1) of the POCSO there must be a storage or possession of child pornographic material and further such material should be shown to have been shared or transmitted by the person

accused. Mere possession or storage of pornographic material by itself is not an offence under Section 15(1) of the POCSO unless it is shown that the accused person had indeed shared or transmitted such material. In other words, to constitute an offence under Section 15(1) there must be an actual act of transmission or sharing of the pornographic material depicting a child in a sexually explicit act or conduct that was found to be stored or in possession of the accused. The relevant observation reads as under: -

> *"9. Reading the provision, it is emphatically clear that storing or possessing pornographic materials in any form involving a child and failure to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be an offence. So mere storing or possessing pornographic material is not an offence under Section 15(1) of POCSO Act, if the said storing or possession is without any intention to share or transmit the same. Therefore, mere storing or possessing pornographic materials by itself is not an offence. Thus, in order to attract an offence under Section 15(1) of the POCSO Act, the stored or possessed pornographic materials should be shared or transmitted. In the instant case, there is no material available to hold that the accused either shared or transmitted pornographic materials, though storing of the same was detected. Therefore, the offence under Section 15(1) of the POCSO Act is not made out in the instant case."*
>
> (Emphasis supplied)

(ii) ***Secondly,*** it observed that, even for the purposes of Section 67B of the IT Act there must be some material to show that the accused

person had either browsed, downloaded, published, transmitted or created any material in electronic form depicting a child in a sexually explicit act or conduct. To constitute an offence under Section 67B of the IT Act the accused person must have intentionally either downloaded, browsed, recorded or transmitted a pornographic material involving a child. In the absence of any material to show or establish specific intention on the part of the accused to share or transmit the pornographic material found, no offence could be said to have been made out under Section 67B of the IT Act. Any accidental or automatic download of such material will not fall within the purview of the said provision. The relevant observations read as under: -

> *"11. Publishing, transmitting or causing any material in electronic form which depicts children engaged in sexually explicit act or conduct or creation of text or digital images etc. are the ingredients under Section 67B of the IT Act also.*
>
> *xxx xxx xxx*
>
> *13. Therefore, going by the decision, automatic or accidental downloading of children engaged in sexually explicit act or conduct is not an offence under Section 67B, once the specific intention to do so is not established, by the materials which form part of the prosecution records.*
>
> *14. In the present case, the materials collected during investigation would show that some pornographic messages, which would depict children engaged in sexually explicit act or conduct were found in the devise*

> *of the accused. <u>But there are no materials to show that the petitioner intentionally downloaded or browsed or recorded the same. More particularly there are no materials to show that the petitioner had either shared, transmitted or published the same in any manner.</u>*
>
> *15. <u>Thus, the materials available do not suggest the ingredients to find prima facie, commission of offence under Section 67B of the IT Act</u>."*
>
> (Emphasis supplied)

As besides the recovery of the pornographic material from the device of the accused there was nothing to show that he had either shared or transmitted or intentionally downloaded the same in the first place. In such circumstances, the learned Single Judge held that no *prima facie* offence had been made out either under Section(s) 15(1) of the POCSO or 67B of the IT Act and thus, proceeded to quash the criminal proceedings.

68. Similarly, in ***Akash Vijay v. State of Kerala*** reported in **2024 KER 42626**, the Kerala High Court placing reliance on the decision of ***Shantheeshlal T*** (supra) held that mere storage or possession of any pornographic material involving a child will not constitute an offence under Section(s) 15 of the POCSO or 67B of the IT Act in the absence of any material to show that the accused person either intentionally downloaded or browsed the said material or that he shared or transmitted the same. The relevant observations read as under: -

"6. On perusal of the prosecution records, no materials collected during investigation to show that the petitioner intentionally downloaded or browsed or recorded the same and there are no materials available to show that the petitioner had either shared, transmitted or published the video, in any manner. The allegation is confined to that of presence of porn video in the mobile phone of the accused alone.

xxx xxx xxx

8. Reading the facts of this case, the same is similar to the facts dealt in Shantheeshlal T.'s case (supra). Therefore, applying the same ratio, this Crl.M.C. is liable to be allowed."

(Emphasis supplied)

69. In ***Akhil Johny v. State of Kerala*** reported in **2024 KER 53767**, the learned Single Judge of the Kerala High Court held that where the allegations are limited only to the presence of pornographic material involving a child in the mobile phone or hard disk of the accused, no offence could be said to have been made out under Section(s) 15 of the POCSO or 67B of the IT Act and as such the criminal proceedings would be liable to be quashed. The relevant observations read as under: -

"6. On perusal of the prosecution records, no materials collected during investigation to show that the petitioner intentionally downloaded or browsed or recorded the same and there are no materials available to show that the petitioner had either shared, transmitted or published the video, in any manner. The allegation is confined to that of presence of porn video in the mobile phone of the accused alone.

xxx xxx xxx

8. Reading the facts of this case, the same is similar to the facts dealt in Shantheeshlal T.'s case (supra). Therefore, applying the same ratio, this Crl.M.C. is liable to be allowed."

(Emphasis supplied)

70. In ***Inayathulla N (1) v. State*** reported in **2024 KHC 26513**, the accused therein was charged for browsing a website and viewing pornographic materials involving a child. Accordingly, a case was registered against him under Section(s) 67B of the IT Act. A learned Single Judge of the High Court of Karnataka held that the soul and essence of Section 67B lies in the act of publication or transmission of any material depicting a child in any sexually explicit conduct, and that mere browsing or watching of such material would not attract the aforesaid provision. It further held that in such cases even investigation should not be permitted to be continued and thus, proceeded to quash the criminal proceedings. The relevant observations read as under: -

"7. [...] Section 67B of the IT Act punishes those persons who would publish, transmit the material depicting children in sexually explicit acts in electronic form. The soul of the provision is publishing or transmitting of material depicting children in sexually explicit act.

8. The allegation against the petitioner is that he has watched a pornographic website. This, in the considered view of the Court, would not become publishing or transmitting of material, as is necessary under Section 67B of the IT Act. At best, as contended, the petitioner could be a porn addict, who has watched pornographic material. Nothing beyond this, is alleged against the petitioner. If the facts are pitted against the ingredients necessary to drive home Section 67B of the IT Act, what would unmistakably emerge is, further proceedings cannot be

permitted to be continued, as it would become an abuse of process of law. [...]

9. The Apex Court in the afore laid postulates holds that even if the facts that forms the complaint is accepted as true, it would not make out any offence. In such cases, even investigation should not be permitted to be continued. Therefore, the impugned proceedings cannot be permitted to be continued, as it does not make out an offence under Section 67B of the IT Act."

(Emphasis supplied)

71. We are conscious of the fact that the aforesaid decision of ***Inayathulla N (1)*** (supra) was subsequently taken in review by the learned Single Judge of the Karnataka High Court under the nomenclature "recall" upon realising that Section 67B of the IT Act had been misinterpreted more particularly the failure to advert to sub-section (b) of the said provision which criminalizes the browsing of child pornographic sites. Consequently, in ***Inayathulla N (2) v. State*** reported in **2024 KHC 28204** the learned Single Judge set aside its earlier order in ***Inayathulla N (1)*** (supra) by observing that although Section 67B sub-section (a) of the IT Act may not apply in the absence of any transmission or publication of any child pornography, yet sub-section (b) of the said provision would indeed be applicable where the allegations involve browsing or viewing of any child pornographic material. It is relevant to note that although the court was apprised of the fact that even Section 15 of the POCSO was being contemplated to be added in the chargesheet, yet the High Court in view of the limited question before it did

not deem it necessary to go into the applicability of the said provision at that stage. The relevant observations read as under: -

> *"5. This Court accepting the facts had allowed the petition in terms of its order dated 10-07-2024. [...] After release of the order, the State appears to have noticed the short assistance rendered by it, as also the fact that the cyber tipline/2nd respondent was not heard in the matter. The further fact is that the State has filed an application before the Court to bring in Section 15 of the Protection of Children from Sexual Offices Act, 2012 ('POCSO Act' for short). [...] By a separate order passed on 19-07-2024, the I.A. filed by the State stood answered and the order dated 10-07-2024, by accepting the reasons indicated in the affidavit was recalled and the matter was restored to file.*
>
> *xxx xxx xxx*
>
> *8. [...] The reliance placed by the petitioner is on Section 67B(a) of the Act which was relied on and proceedings quashed. What becomes applicable to the case at hand is Section 67B(b). Section 67B(b) open up prosecution against a person who creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner. It is not in dispute that the petitioner, in the case at hand, has browsed child pornographic material for about 50 minutes. Browsing child pornographic material makes it an offence under Section 67B(b) of the Act."*
>
> (Emphasis supplied)

72. Thus, it appears from the aforesaid that there are divergent views expressed by different High Courts of the country as regards the ingredients necessary to constitute an offence under Section 15 of the POCSO and Section 67B of the IT Act. The Kerala High Court has taken the view that mere possession or viewing of pornographic material involving a child will not fall within the

ambit of Section 15 of the POCSO, rather what the provision criminalizes is the actual act of transmission or sharing of the said material. It has held that where the allegations are confined only to the possession of pornographic material and there is nothing to indicate the actual transmission of the same, the criminal proceedings shall be liable to be quashed. Whereas, the Bombay High Court appears to have taken the view that under Section 15(1) of the POCSO, what is penalized is the storage of child pornography and resultant failure to delete or report the same while under Section 15(2), it is the storage and consequent transmission of child pornography. Similarly, with respect to Section 67B, both the Karnataka High Court and the Kerala High Court have held that what is criminalized is the intentional browsing or transmission of child pornography, and not the mere possession of such material.

b. Three distinct offences punishable under Section 15 of the POCSO.

73. Prior to the 2019 Amendment Act, Section 15 of the POCSO as originally enacted, stipulated that any person who stores any pornographic material involving a child for commercial purposes shall be punishable under the said provision. Thus, under the erstwhile Section 15 of the POCSO only one act was criminalized; in other words, only the storage of child pornography for a commercial purpose was made a punishable offence. Storage of such

material for any other purpose was outside the scope and purview of the said provision. The said provision as it then stood, reads as under: -

> ***"15. Punishment for storage of pornographic material involving child. –***
> *Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extent to three years or with fine or with both."*

74. Over a period of time, the legislature realized that despite the enactment of POCSO, there had been an increase rather than a decline in the number of cases pertaining to child sexual abuse. The legislature noted that some of the provisions of the POCSO were not proving to be effective in addressing the various forms of sexual degradation, abuse and exploitation of children in the country. The Protection of Children from Sexual Offences (Amendment) Act, 2019 earmarked a significant step by the legislature in response to the aforesaid problem, by introducing several new offences and further making the existing offences more stringent with enhanced punishments, as a form of deterrence to sexual predators and to combat the sexual exploitation of children in order to safeguard a secure and dignified environment for them. The Statement of Objects and Reasons of the 2019 Amendment Act read as under: -

> *"STATEMENT OF OBJECTS AND REASONS*
>
> *"1. The Protection of Children from Sexual Offences Act, 2012 (the said Act) has been 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.

2. The said Act is gender neutral and regards the best interests and welfare of the child as a matter of paramount importance at every stage so as to ensure the healthy physical, emotional, intellectual and social development of the child.

3. However, in the recent past incidences of child sexual abuse cases demonstrating the inhumane mind-set of the abusers, who have been barbaric in their approach towards young victims, is rising in the country. Children are becoming easy prey because of their tender age, physical vulnerabilities and inexperience of life and society. The unequal balance of power leading to the gruesome act may also detriment the mind of the child to believe that might is right and reported studies establish that children who have been victims of sexual violence in their childhood become more abusive later in their life. The report of the National Crime Records Bureau for the year 2016 indicate increase in the number of cases registered under the said Act from 44.7 per cent. in 2013 over 2012 and 178.6 per cent. in 2014 over 2013 and no decline in the number of cases thereafter.

4. The Supreme Court, in the matter of Machhi Singh vs. State of Punjab [1983 (3) SCC 470], held that when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The same analogy has been reiterated by the Supreme Court in the matter of Devender Pal Singh vs. State (NCT of Delhi)[AIR 2002 SC 1661] wherein it was held that when the collective conscience of the community is so shocked, the court must award death sentence.

5. <u>In the above backdrop, as there is a strong need to take stringent measures to deter the rising trend of child sex abuse in the country, the proposed amendments to the said Act make</u>

provisions for enhancement of punishments for various offences so as to deter the perpetrators and ensure safety, security and dignified childhood for a child. It also empowers the Central Government to make rules for the manner of deleting or destroying or reporting about pornographic material in any form involving a child to the designated authority.

6. The Protection of Children from Sexual Offences (Amendment) Bill, 2019, for the aforementioned purpose, which was introduced and pending consideration and passing in the Lok Sabha, lapsed on the dissolution of the Sixteenth Lok Sabha. Hence, the present Bill.

7. The Bill seeks to achieve the above objectives. NEW DELHI; The 12th July, 2019."

(Emphasis supplied)

75. Pursuant to the aforesaid 2019 Amendment Act, a slew of amendments were brought within the POCSO, which *inter alia* included **i)** the insertion of Section 2(da) by which "child pornography" came to be defined under the Act **AND ii)** the amendment of Section 15 of the Act whereby now three distinct offences are made punishable under the said provision. Again, at the cost of repetition, the amended Section 15 of the POCSO is reproduced hereunder: -

*"**15. Punishment for storage of pornographic material involving child.** –*
(1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

(Emphasis supplied)

76. A bare perusal of the aforesaid provision makes it abundantly clear that Section 15 of the POCSO is in three parts. The legislature by virtue of the 2019 Amendment Act has now made three different forms of storage or possession of child pornography a punishable offence under the said provision, unlike the erstwhile provision, which had criminalized only one form of storage of child pornography.

77. Section 15 sub-section (1) of the POCSO now provides that any person who either stores or possesses any pornographic material involving a child and fails to either delete, destroy or report the same with the intention to share or transmit such material, shall be liable to fine of not less than rupees five

thousand for the first offence, and a fine of not less than rupees ten thousand for any subsequent offence.

78. On the other hand, Section 15 sub-section (2) of the POCSO provides that any person who either stores or possesses any pornographic material involving a child for transmitting, displaying, propagating, or distributing the same in any manner except for either reporting it or for using it as evidence shall be punishable with either imprisonment extending upto three-years or with fine or both.

79. Whereas, Section 15 sub-section (3) of the POCSO stipulates that any person who either stores or possesses any pornographic material involving a child for commercial purpose shall be punishable with imprisonment of not less than three-years, which may extend upto five-years, or with fine, or both for the first offence, and for any subsequent offence, he shall be punishable with imprisonment not less than five-years, that may extend upto seven-years and along with fine.

I. Concept of an Inchoate Crime – The 'Actus Reus' and 'Mens Rea' required under Section 15.

80. Before proceeding further to discuss the scope of Section 15 of the POCSO and the ingredients necessary to constitute an offence thereunder, it would be apposite to first understand the true purpose and the nature of the said penal provision.

81. A plain reading of Section 15 of the POCSO and the marginal note appended thereto would reveal that the common theme permeating across sub-section(s) (1), (2) and (3) respectively is that there is no requirement whatsoever for an actual transmission of any child pornographic material in order to fall within the ambit of the said provision. What is sought to be penalized under Section 15 of the POCSO is the storage or possession of any child pornographic material when done with a particular intention or purpose as stipulated in sub-section(s) (1), (2) or (3), as the case may be. Thus, the bare textual reading of the said provision makes it clear that it is the intention which is being punished and not the commission of any criminal act in the traditional sense. This in the criminal jurisprudence is known as an 'Inchoate Crime' or 'Inchoate Offence'.

82. Inchoate crimes are defined as criminal acts that are committed in preparation for a further offence. The term "inchoate" itself means "undeveloped" or "incomplete."

83. The Doctrine of Inchoate Crimes is a cornerstone of criminal jurisprudence. It is aimed at addressing the legal culpability of those who engage in a conduct that is preparatory to the commission of any substantive offence. Inchoate crimes, are often referred to and described as an incomplete or preliminary offence, that capture the essence of criminal intent and the preparatory actions that precede the commission of a criminal act. It

underscores the principle that the law does not merely respond to offences already committed but also intervenes when a crime is in the process of being committed, thus thereby protecting public order and safety. Inchoate crimes represent a critical aspect of criminal law, embodying the legal system's proactive and deterrent approach to crime itself.

84. The primary rationale for the existence of inchoate crimes within the legal framework is the prevention of harm by intervening at an early stage i.e before the potential damage is caused. It recognizes that though certain actions do not result in an offence, nonetheless those actions pose a sufficient threat to society to warrant legal intervention. The jurisprudence surrounding inchoate crimes has evolved as a balance struck between **i)** the need for early intervention on the one hand with **ii)** the cardinal principle of criminal law that no one should be punished merely for their thoughts or intentions on the other, by criminalizing only those actions of an individual that demonstrate a clear movement towards the commission of a criminal offense. It is deeply rooted in the preventive or deterrent nature or approach of a particular law by criminalizing those conduct, actions or intentions that pose a significant risk of harm. An inchoate offence requires towing a delicate balance between the need for prevention of potential threat to the society and the risk of undoing the sacrosanct fundamental principle of '*actus non facit reum nisi mens sit rea*' in order to ensure that the law remains a powerful tool in the

maintenance of public order. This inherent tension between respecting the autonomy of an individual's thought and state of mind with the societal interest and safety is often balanced and resolved by carefully shaping and defining the point at which any particular action or preparatory step becomes sufficiently proximate to the commission of an offence. In other words, the law would only intervene at the point where an individual has acquired the means to commit a further offence, and will not punish the mere thought of committing an offence in the absence of any overt steps towards the same. Thus, the critical or central component of any inchoate crime is the preliminary or preparatory *actus reus* that sufficiently reflects the essence or existence of a criminal intent.

85. Offence pertaining to the possession of any contraband is a prime example and one of the facets of an inchoate crime, as they involve the possession of items that are prohibited by law due to their inherent dangerousness or their use in the commission of further criminal offences. The criminalization of possession as an inchoate crime is predicated on the idea that possession is not an innocuous act but a preparatory step towards more significant criminal conduct. This is because, ***first,*** it allows intervention at an early stage, before the contraband can be used to cause harm. ***Secondly***, it acts as a deterrent by penalizing individuals who engage in activities that are likely to lead to more serious offenses. ***Thirdly***, it reflects the societal interest in preventing the

accumulation and availability of dangerous items that have no legitimate purpose except for the further perpetuation of a more severe offence and harm to society at large.

86. The POCSO as outlined in its Statement of Object and Reasons was specifically designed to provide commensurate penalties to serve as a deterrent against the sexual abuse and exploitation of children. Additionally, the Statement of Objects and Reasons accompanying the 2019 Amendment Act which *inter-alia* amended Section 15 of the Act to provide for three distinct offences punishable under it, explicitly emphasizes that the said amendments had been introduced in order to implement stringent measures aimed at addressing and deterring the alarming increase in child sexual abuse. The plain reading of sub-section(s) (1), (2) and (3) respectively of Section 15 of the POCSO along with the marginal note appended to it which reads "*Punishment for storage of pornographic material involving child*" indicates, that the said provision punishes only the storage of pornographic material involving a child when done with a specific intent prescribed thereunder and that there is no requirement for any actual transmission. It is trite to say that, in the absence of any inherent conflict or contradiction between the marginal note and the substantive parts of a particular provision, the marginal note may be used to aid in the interpretation of the provision. Thus, the aforesaid leaves no manner of doubt in the mind of this Court, that

the provision of Section 15 of the POCSO is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when stored with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

87. Under Section 15 sub-section (1), where a person either stores or possesses any child pornography and does not delete or report the same, in order to share or transmit the same, he will be liable under the said provision. The use of the words "*with an intention to share or transmit child pornography*" in the said provision makes it clear that no actual sharing or transmission is required to occur, rather what is required is only the intention to share or transmit because of which the said material was neither deleted, destroyed, or reported. In other words, the *actus reus* that is penalized under Section 15 sub-section (1) is the failure to delete, destroy or report any child pornography that was stored or in possession of any person with an intention to share or transmit the same. Had the intent of the legislature been otherwise, it would have clearly used the words "*transmits*" or "*shares*" instead.

88. Similarly, Section 15 sub-section (2) penalizes the storage or possession of any child pornographic material when done for the purpose of either

transmitting, propagating, displaying or distributing the same in any manner. The use of the words "*for transmitting or propagating or displaying or distributing in any manner at any time"* clearly suggests that again no actual act of transmission, propagation, display or distribution is required to take place. Had the intent of the legislature been otherwise, it would have explicitly stated "*any person, who stores or possesses pornographic material in any form involving a child and transmits or propagates or displays or distributes in any manner at any time"*. The use of the words "*for transmitting or propagating or displaying or distributing **in any manner***" in Section 15 sub-section (2) makes it crystal clear that the said provision deals with two kinds of *actus reus* being **(I)** ***first,*** the storage or possession of a pornographic material involving a child when done with an intention to either transmit it or to propagate it or to display or distribute it though no actual transmission, propagation, display or distribution might have occurred **OR (II)** ***secondly,*** the storage or possession of a pornographic material involving a child which was actually transmitted, propagated, displayed or distributed in any form or manner. In other words, the *actus reus* that is required under Section 15 sub-section (2) is that a pornographic material involving a child must be found to have been stored or in possession with an intention to either transmit it or to propagate it or to display or distribute it or the same must have been transmitted, propagated, displayed or distributed in any form or manner.

89. The underlying difference in the *actus reus* under Section 15 sub-section(s) (1) and (2) is that in the former the storage or possession of any such material is due to the omission to delete, destroy or report the same whereas in the latter, the storage or possession of any such material is in order to facilitate the transmission, propagation, display or distribution of the same. To further put the distinction into perspective, the *actus reus* under sub-section (1) must be such that indicates that the child pornographic material found in storage or possession was only due to an omission to delete or destroy. Whereas under sub-section (2) it must be shown that such material had been stored or in possession for a reason more than just mere omission i.e., for the reason of transmitting, propagating, displaying or distributing the same. The use of the words "*any manner*" in sub-section (2) makes it clear that apart from the storage or possession of such pornographic material, there must be something more to show either **(I)** the actual transmission, propagation, display or distribution of such material **OR (II)** the facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. Thus, Section 15 sub-section (2) of the POCSO would cover both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts.

90. On the other hand, the *mens rea* which is required to constitute an offence under Section 15(1) is the intent to share or transmit a pornographic material involving a child, and the said intention is to be gathered or gauged from the *actus reus* itself i.e., by culling out the manner in which there was an omission to delete, destroy or report such a material or the reason behind the same. This is evinced from the construction of the expression "*but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography*" which makes it clear that the scope of discerning the intent to share or transmit has been both limited **AND** tied to only the omission to delete, destroy or report i.e., the *actus reus*. The expression "*with an intention to share or transmit*" cannot be singled out and construed devoid of its context. Thus, it is the manner in which along with the attending circumstances attributable to the failure to delete, destroy or report that must sufficiently be indicative of the intent to share or transmit any material.

91. In Section 15 sub-section (1) of the POCSO the legislature by qualifying and linking the expression "*intent to share or transmit*" to the omission to delete, destroy or report, has in its wisdom made the intention or *mens rea* under the said provision a matter of inference, to be ascertained from the *actus reus* itself. The degree of probability for inferring such intention would largely depend upon the manner in which the *actus reus* i.e., how the omission took

place. It is for the courts to ascertain whether the manner in which the material was found in storage or possession, the attending circumstances to the omission and the conduct of the person accused sufficiently refutes or displaces the inference of an intention to share or transmit or not.

92. The underlying reason behind tying the inference of intention to the omission alone is because the legislature was alive to the practical difficulty that exists in establishing an intention to share or transmit any child pornographic material from just the mere possession of such material. In offences pertaining to or involving the possession of any contraband, it is too uphill a task for the courts to peer through and look into the mind of the person accused and then cull out the intention of that person behind possessing or storing such material. Thus, in such cases instead of directly establishing the intention from the mental state of the person accused, it is established indirectly by inferring it from the manner in which the contraband was found to have been stored or in possession. Here again due to the infeasibility or difficulty in cogently establishing an inference of intention often due to the lack of any material and the very private and clandestine nature of the offence, the courts instead try to look for some material or circumstances that might displace the inference of such an intention, and wherever there is nothing to show the same, the courts may without hesitation proceed to infer the existence of such an intention.

93. Whereas, under Section 15 sub-section (2) the *mens rea* is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage that would be indicative of any facilitation or actual transmission, propagation, display or distribution of such material. Thus, wherever in addition to the storage or possession of any child pornographic material, there exists any material or attending circumstances that would either show or indicate the facilitation or actual commission of any of the acts enumerated in Section 15 sub-section (2) of the POCSO, the said provision would get attracted in place of Section 15 sub-section (1). We say so because, the presence of such additional material may demonstrate that the intention of the person accused has gone beyond the contours of Section 15 sub-section (1). It evinces a more significant manifestation of the intention of the person accused, which moved from what is required in sub-section (1) to a much higher degree of intention that is required under sub-section (2). In other words, the existence of such additional material strengthens the inference of that intention which is required and made punishable under Section 15 sub-section (2).

94. Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose. The term 'commercial purpose' refers to and encompasses any activity or transaction

that is carried out or undertaken as a means of any commercial enterprise i.e., with the object or intention of any gain, irrespective of whether it was in monetary terms or not. Thus, to constitute an offence under this provision, the requirement is that the storage or possession of any child pornography must be in lieu of any monetary gain or for receiving any other valuable consideration. Again, the words "*any commercial purpose*" indicate that the storage or possession must be with an intention to generate or acquire any monetary gain or any other form of valuable consideration, irrespective and regardless of whether such monetary gain or valuable consideration is actually generated or acquired. Thus, it is immaterial whether any monetary gain or any other benefit was actually realized or not. To establish an offence under Section 15 sub-section (3), besides the storage or possession of the pornographic material involving a child, there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent of any form of gain or benefit. As soon as there is any material to indicate that the storage or possession of any child pornographic material <u>was done in lieu or in expectation of some form of gain or benefit</u>, it would constitute an offence under Section 15 sub-section (3) of the POCSO notwithstanding whether such gain was actually realized.

95. Thus, while Section 15 sub-section (1) requires the existence of the requisite *mens rea* or intention due to which the child pornographic material was not deleted, destroyed or reported, Section 15 sub-section (2) requires the existence of the requisite *mens rea* or intention which propelled or led the person accused to not only store or possess the said material but also to take some additional steps towards either the actual transmission, propagation, display or distribution or the facilitation of the same. In contrast, Section 15 sub-section (3) requires the existence of the requisite *mens rea* or intention due to which the person accused not only stored or possessed the child pornographic material but also compelled him to take some additional steps either for any gain or benefit or in lieu or expectation of some form of gain or benefit.

96. For the sake of clarity, it would be apposite to give few illustrations as a guiding example to further demonstrate the fine but pertinent distinction that exists between sub-section (1), (2) and (3) of Section 15 of the POCSO.

97. For illustration; say certain child pornographic material was found stored in the personal mobile phone of 'A' and the same was neither deleted, destroyed nor reported. Here though there is possession or storage of child pornographic material but since there is nothing to show any facilitation of transmission, propagation, display or distribution of the said material, this would attract the provision of Section 15(1). At the same time, since the

material in question was found in the personal mobile of ‘A’ the same is indicative that the omission to either delete, destroy or report in all likelihood was due to the intent to share or transmit. Here the manner in which the omission has occurred is sufficiently indicative of the intent to share or transmit, as there is nothing apart to show that the omission was attributable to any other reason but the intent to share or transmit, and thus it would constitute an offence under Section 15(1) of the POCSO.

98. Conversely, say for example certain child pornographic material was found stored in a broken mobile phone of ‘A’ and the said material had never been deleted, destroyed or reported. Now again, there is nothing to show that there was either any actual transmission, propagation, display or distribution nor anything to show that something apart from and in addition to the storage or possession had been done by ‘A’ for facilitation of the transmission, propagation, display or distribution of such material. This would again attract the provision of Section 15(1) instead of 15(2) of the POCSO. However, since the material was found in a broken phone, it is likely that the failure to delete, destroy or report the same was attributable to the inability of ‘A’ to operate the broken mobile rather than the intent to share or transmit, thus, no offence would be made out under Section 15(1) of the POCSO. This is because, the manner in which the omission has occurred is not sufficiently

indicative of the intent to share or transmit. Thus, no offence could be said to have been constituted under Section 15 sub-section (1) of the POCSO.

99. Take for instance, certain child pornographic material was found stored in the mobile phone of ‘A’ but this time, the said material had found its way in the device due to an automatic download of media of which ‘A’ had no knowledge whatsoever. Here although there is possession or storage of such material, yet the omission to delete, destroy or report is clearly shown and established by ‘A’ that it was due to lack of knowledge about the existence of such material on his parts. Here the manner in which the omission has occurred is not sufficiently indicative of the intent to share or transmit, thus no offence could be said to have been made out under Section 15(1) of the POCSO.

100. Take a case where certain child pornographic material was found stored in the mobile phone of ‘A’ but this time in addition to the aforesaid material few chats were also recovered wherein ‘A’ told his friend ‘B’ that he had some child pornographic material which he could share with him. Here, since there is additional material to show that ‘A’ had taken some overt steps in order to propagate the said material, he would be liable under Section 15(2) of the POCSO.

101. For another illustration, say for example, again certain child pornographic material was found stored in the mobile phone of 'A' but this time 'A' creates a chat group consisting of several of his friends, and sends a message therein stating that he has some child pornographic material which he would forward on the group. Here, since there is additional material to show that 'A' had taken some overt steps in order to distribute the said material, he would be liable under Section 15(2) of the POCSO.

102. Conversely, say 'A' who has certain child pornographic material in his phone, again creates a group consisting of several of his friends, but this time he sends a message stating that he has some child pornographic material which he would send in exchange of some amount of money. Here, since there is additional material to show that 'A' had taken some overt steps in respect of the said material for some monetary gain, he would now be liable under Section 15(3) of the POCSO instead.

103. We may at the cost of repetition clarify that there may be situations where the possession or storage of the pornographic material is found to be in a such a manner that the same by itself would be indicative of an intention to either transmit, display, propagate or distribute such material or that it was done in lieu or expectation of any gain. In such cases the storage or possession of child pornographic material itself would sufficiently be indicative of the requisite intention either under Section 15 sub-section(s)

(2) or (3) as the case may be, and there would be no requirement to adduce any additional material as long as the manner of storage or possession of such material or the attending circumstances itself is sufficiently indicative of such intention.

104. For illustration; say certain child pornographic material was found stored in five to six television devices in a hotel run by 'A'. Here, because the pornographic material has been found to be stored in multiple devices that too at a place which has easy access for the public, the same would be indicative that the 'A' was using the hotel and the television devices therein as a means for facilitating display of such pornographic material, and thus, would be punishable under Section 15 sub-section (2) of the POCSO.

105. For another illustration say again certain child pornographic material were found stored in five to six television devices in a hotel run by 'A', but this time some price was mentioned onto the pornographic material itself. Here, because some amount of money was found to be mentioned on the material itself and the said material was stored in a place with easy public access, the same would be indicative that the 'A' was using the hotel and the television devices therein as a means for facilitating display of such pornographic material in lieu of monetary gain, thus, would be punishable under Section 15 sub-section (3) of the POCSO.

106. The aforesaid illustrations have been provided only as a guiding example to highlight the distinction between sub-section(s) (1), (2) and (3) of Section 15 of the POCSO. These illustrations should not be mechanically applied or construed by any court in any proceeding while dealing with any matter involving Section 15 of the POCSO devoid of the context in which these illustrations have been given and without applying its mind as to whether the necessary ingredients have been established or not in the individual facts and circumstances of the matter. Any matter involving Section 15 sub-section (1), (2) or (3) of the POCSO, must be dealt with independent of the illustrations narrated above and *stricto-sensu* in accordance with only the ratio of this decision.

107. Lastly, we must also caution the police and the courts to be mindful of the fact that wherever in a given case a particular sub-section of Section 15 is found to be applicable, the other two remaining sub-sections of the said provision will cease to be applicable. Section 15 sub-section(s) (1), (2) and (3) respectively of the POCSO are independent and distinct offences. The three offences cannot coexist simultaneously in the same set of facts. They are distinct from each other and are not intertwined that they cannot survive without each other. This is because, the underlying distinction between Section 15 sub-section(s) (1), (2) and (3) respectively lies in the different degree of culpable *mens rea* that is required under each of the three

provisions. The inception of the requisite culpable *mens rea* begins and takes shape from the intention specified under sub-section (1), then gradually continues to transform into the intention stipulated under sub-section (2) and finally culminates into the intention prescribed under sub-section (3). Under Section 15 sub-section (1) of the POCSO, the requisite intention therein is still *in fieri* i.e., in process of developing and culminating into either the intention under sub-section(s) (2) or (3). Whenever, the said intention ultimately crystalizes into the intention either under sub-section(s) (2) or (3), the other provisions would automatically become inapplicable.

108. Yet one another important aspect, that the police and the courts should be mindful of is that while examining any matter involving the storage or possession of any child pornography, it finds that particular sub-section of Section 15 is not attracted, it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO. The police at the time of investigation and the courts at the time of taking cognizance, should keep this aforesaid aspect in mind. In other words, both should try to ascertain that if offence is not made out in one particular sub-section, whether the same is made out in the other two sub-sections or not.

II. Concept of 'Possession', 'Constructive Possession' and 'Immediate Control' under Section 15 of the POCSO.

109. During the course of hearing, our attention was also drawn to a recent news article that reported how on social media, links to view child pornography

were being circulated and sold for anywhere between Rs. 40 to Rs. 5,000. The news report indicates, how social media platforms are rife with child sexual abuse, and gave certain insight about the *modus operandi* of the distribution of such material on these platforms. It explained how the sellers and distributors of child pornographic material rather than sharing any downloads to such material, would ingeniously only share links to such material instead in lieu of money, so as to circumvent the penal provisions of the POCSO and IT Act, which criminalized only the storage of such material. By indefinitely forwarding links, they completely bypass the requirement of first storing such material onto any device, and similarly those who view such material also only use the links, without ever downloading such material onto their device.

110. As earlier mentioned, prior to the 2019 Amendment Act, Section 15 of the POCSO only criminalized the storage of any child pornographic material for any commercial purpose. Thereafter, the legislature in view of the increasing number of child sexual abuse cases, amended Section 15 of the POCSO, to recognize and criminalize three distinct forms or manner of storage of child pornographic material, as has been discussed in the preceding parts of this judgment.

111. One another subtle but significant change that was made to all three sub-sections of Section 15 was the inclusion of the word "possession" in addition to storage, which was earlier not there in the erstwhile provision of Section 15 of the POCSO.

112. Thus, while the word "*possession*" was originally absent in the unamended Section 15 of the POCSO, the legislature in its wisdom, specifically added the said word in the amended Section 15, whereby now both the storage or the possession of any child pornographic material would be liable to be punished when done with any of the specified intention thereunder.

113. We believe that the change referred to above was not made inadvertently or lightly, but rather was done specifically with the intention of making the provisions of Section 15 of the POCSO more stringent to effectively deter the dissemination and use of child pornography.

114. An important aspect of the jurisprudence on possession as an inchoate crime is the doctrine of constructive possession. Constructive possession extends the concept of possession beyond physical control to situations where an individual has the power and intention to control the contraband, even if it is not in their immediate physical possession. This doctrine is particularly relevant in cases where contraband is found in a location that is not directly

under the physical control of the accused, but where the accused has access to and control over the area where the contraband is found.

115. In ***U.S. v. Tucker*** reported in **150 F. Supp. 2d 1263 (D. Utah. 2001)**, the U.S. District Court, Utah, explained and elaborated on the doctrine of constructive possession. In the said case, the defendant therein used to routinely view child pornography, but he never used to keep it stored in his computer, and would often delete any such material and its traces from its computer after he was finished viewing them. When charged with the offence of possession of child pornographic material, he challenged the same, contending that since no material had been stored in his disk, he cannot be said to be in possession of any child pornography. The court held that wherever a person exercises some form or manner of immediate control over any particular material, both tangible or intangible, such material would be said to be in his constructive possession. It observed that the control of a person over such material can be ascertained by seeing whether he could manipulate, alter, modify or destroy such material or not, if the answer to any of the above is in an affirmative, such material would be deemed to be in his conscious or constructive possession.

116. Similarly in ***U.S. v. Romm*** reported in **455 F. 3d. 990 (9th Cir., 2006)**, the defendant therein admitted to viewing images of child pornography on the Internet. He would save them to disk, view them for about 5 minutes, then

delete them. The Court held that a person can be said to possess child pornography even without downloading or storing it, if he or she seeks it out and exercises dominion or control over it. It observed that this dominion or control may be evident by factors such as when viewing the images on the screen, did the person have the ability to print them, save them, forward them or delete them. If he did, then he can be said to have knowingly exercised custody or control over those images and thus, consequently in possession of the same.

117. Thus, for establishing constructive possession both the power to control the material in question and the knowledge of exercise of such control are required. The doctrine of constructive possession, is a crucial development in the criminal jurisprudence, especially pertaining to inchoate crimes where possession is sought to be punished, as it ensures that no person can evade liability by simply distancing themselves from the physical possession of contraband while retaining the ability to control it.

118. We are of the considered view, that wherever a person indulges in any activity such as viewing, distributing or displaying etc. pertaining to any child pornographic material without actually possessing or storing it in any device or in any form or manner, such act would still tantamount to 'possession' in terms of Section 15 of the POCSO, if he exercised an

invariable degree of control over such material, applying the aforesaid doctrine of constructive possession.

119. Say for instance, 'A' routinely watches child pornography over the internet, but never downloads or stores the same in his mobile. Here 'A' would still be said to be in possession of such material, as while watching he exercises a considerable degree of control over such material including but not limited to sharing, deleting, enlarging such material, changing the volume etc. Furthermore, since he himself on his own volition is viewing such material, he is said to have knowledge of having control over such material.

120. Conversely, say 'A' is sent an unknown link by 'B', which upon clicking opened a child pornographic video on the phone of 'A'. Here although 'A' at the time of opening the link had control over the said link, yet he cannot be said to have a knowledge of that control over such material as he at that relevant point of time was unaware as to what would open from the said link; thus 'A' cannot be said to be in possession. We say so, because, 'A' had no information as to what the link pertained to, in order to have knowledge of control over such material, a person requires reasonable information such as what is involved in the material in question, what is the purpose of such material, etc. Without such information no person can decide whether he wants to view it, or delete it or further forward it i.e., he cannot effectively exercise the control that he has, without a certain degree of knowledge.

121. However, in the aforementioned illustration, if 'A' rather than closing the link in a reasonable time, continues to view such material he would be deemed to be in possession of such material. This is because, after a reasonable window of time, he would be said to have sufficient information about such material to have knowledge for the effective exercise of his control over such material.

122. Thus, we are of the considered view that any form of intangible or constructive possession of any child pornographic material will also amount to "possession" under Section 15 of the POCSO in terms of the Doctrine of Constructive Possession. There is no requirement of a physical or tangible "storage" or "possession" of such material in Section 15 of the POCSO. We may clarify with a view to obviate any confusion that, where any child pornographic material is in the constructive possession of an accused, there the failure or omission to report the same would constitute the requisite *actus-reus* for the purposes of Section 15 sub-section (1) of POCSO.

123. For instance, say, 'A' is sent an unknown link by 'B', which upon clicking opened a child pornographic video on the phone of 'A'. Now if 'A' immediately closes the link, although once the link is closed 'A' is no longer in constructive possession of the child pornography, this by itself does not mean that 'A' has destroyed or deleted the said material by merely closing

the link. ‘A’ will only be absolved of any liability if he after closing the link further reports the same to the specified authorities. Thus, when it comes to constructive possession of an accused, it is the failure or omission to report that constitutes the requisite *actus-reus* for the purposes of Section 15 sub-section (1) of POCSO.

124. At this juncture we may also address ourselves on another pertinent aspect for constituting an offence under Section 15 of the POCSO. The term ‘storage’ and ‘possession’ that has been used in the said provision does not require that such ‘storage’ or ‘possession’ must continue to be there at the time of registration of an FIR or any criminal proceeding. The provision of Section 15 is not fixated any particularly time-frame. What is *simpliciter* required to constitute an offence under Section 15 of the POCSO is the establishment of ‘storage’ or ‘possession’ of any child pornographic material with the specified intention under sub-section(s) (1), (2) or (3), at any relevant point of time. Even, if the said ‘storage’ or ‘possession’ no longer exists at the time of registration of the FIR, nonetheless an offence can be made out under Section 15 if it is established that the person accused had ‘stored’ or ‘possessed’ of any child pornographic material with the specified intention at any particular point of time even if it is anterior in time. We say so because, any other view aside from the above, in our opinion would lead to a chilling effect with drastic consequences, whereby the provisions of the

POCSO may be defeated by a devious person. If for instance, a person immediately after storing and watching child pornography in his mobile phone deletes the same before an FIR could be registered, could it be said that the said person is not liable under Section 15, because at the time of registration of the FIR, such material no longer existed on the device of the person accused? The answer to the aforesaid, must be an emphatic "no". Thus, we clarify that there is no requirement under Section 15 of the POCSO that 'storage' or 'possession' must continue to exist at the time of initiation of the criminal proceeding, and no such requirement can be read into the said provision. An offence can be made out under Section 15 if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it was before such initiation or registration of criminal proceedings.

c. Pornographic Material must *prima facie* appear to involve a Child.

125. At this stage, we may explain one another crucial aspect concerning Section 15 of the POCSO, more particularly the criteria for determining whether the material in question involves or depicts a 'child', or in other words whether such material can be considered a 'child pornography' or not. The determination of whether the individual involved is a 'child' or not, in terms of the POCSO is a crucial foundational element for constituting various offences under the Act.

126. Section 2(1)(d) of the POCSO stipulates that the term 'child' means and refers to any person who is below the age of eighteen years. Thus, under the POCSO more particularly Section 2(1)(d) an objective criterion has been prescribed by the legislature for determining whether a person is a 'child' or not for the purposes of any offence under the Act. The said criteria is based on the age of the individual in question, and involves ascertaining and establishing whether he or she is under eighteen years of age, if so, such person would be considered a 'child' for the purposes of any offence in respect of such child that is punishable under the POCSO.

127. Earlier under the POCSO, there was no specific definition of 'child pornography'. Thus, under the erstwhile Section 15 of the POCSO, there was only one criteria for ascertaining whether the material in question can be regarded as 'child pornography' or not, which was by establishing that the material depicts or involves a person who is under the age of eighteen years.

128. It was only with the enactment of the aforesaid 2019 Amendment Act, whereby the term "child pornography" was specifically defined under the POCSO by way of insertion of Section 2(1)(da) in the Act. At the cost of repetition, Section 2(1)(da) of the POCSO is reproduced below: -

> *"**2. Definitions.** –*
> *(1) In this Act, unless the context otherwise requires, –*

> *(da) "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child;"*

129. A plain reading of the above would indicate that the term "child pornography" means any visual depiction of a child involved in any sexually explicit conduct. It further explains that the expression 'visual depiction' means and includes the following: -

i. A photograph or video, which may be either in actual or any electronic form.

ii. An image generated digitally or by a computer which is indistinguishable from an actual child i.e., any self-generated image which appears to depict a lifelike child indistinguishable from an actual child, and will not include any artistic or cartoon based depiction.

iii. Any other image (including any video-based imagery) that has been created, adapted or modified.

The above list of material mentioned is inclusive in nature i.e., the different types, form and manner of visual depiction that has been enumerated therein is not exhaustive in any manner. In the last, the said provision, more particularly the words "*but appear to depict a child*" lays down the test or criteria for ascertaining, whether any of the above mentioned visual depiction is a 'child pornography' or not, by prescribing a *prima facie* subjective satisfaction that the material appears to depict a child.

130. The use of the comma before the words "*but appear to depict a child*" is significant. The legislature has used the aforesaid comma both as a disjunctive and a conjunctive to the words preceding it. It has been used as a disjunctive to stress, that the subjective criteria that the material in question appears to depict a child is not inextricably linked or limited to just one category of visual depictions i.e., the last category being "*image created, adapted, or modified*". At the same time, it has been used as a conjunctive in relation to all types of visual depictions that have been illustrated in the said provision, to clearly indicate, that this subjective criterion applies to the entire provision i.e., to all types of visual depictions mentioned therein or in other words to 'child pornography'.

131. Thus, any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to *prima facie* depict a child or appear to involve a child, would be deemed as 'child pornography' for the purposes of the POCSO. Therefore, for any offence under the POCSO that relates to child pornographic material, such as Section 15, the courts would only be required to form a *prima facie* subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person. Such satisfaction may be arrived at from any authoritative and definitive opinion such as through a forensic science laboratory (FSL) report of such material or from any expert opinion on the material in

question, or by the assessment of such material by the courts themselves, depending on the peculiar facts and circumstances of each case.

132. This aforesaid test or criteria of 'subjective satisfaction' is not a superfluous or imaginary creation of the legislature, but a well-founded test, that exists in various other countries. In this regard, reference may be made to the decision of the Court of Appeal of England & Wales in ***Regina v. Michael Land*** reported in **[1997] EWCA Crim J1010-15** wherein the court was dealing with an offence of possession of indecent photographs of children for the purpose of distribution under Section 1(1)(c) of the Protection of Children Act 1978. There the question arose whether the individual in the aforesaid photographs was under sixteen years of age or not. The court observed that often there lies an inherent difficulty in making any positive identification of the person in question, so as to establish their age conclusively. It held that, thus in such situations, the question whether such person is a child or not would have to be ascertained as a matter of inference from the facts and the material in question, without any need for a formal proof of the same. The court further rejected the contention that in the absence of any paediatric or other expert evidence, no such inference can be drawn. It observed that such fact-based questions of age can be assessed by the judge or the jury as the case may be by use of their critical faculties and

senses such as their eyes, supplemented with their own judgement and experience.

133. In ***John Leadbetter v. Her Majesty's Advocate*** reported in **[2020] HCJAC 51**, the High Court of Justiciary, Scottland held that no expert witness is required for proof of age of any person depicted in an obscene material in question. It further held that, such proof of age may be established by any witness or a person who demonstrates a certain extent of skill or knowledge in determination of the age on the basis of a wide range of evidence that may be available.

134. In ***United States v. Katz*** reported in **178 F.3rd 368 (5th Cir. 1999)**, it was held by the U.S. Court of Appeals, Fifth Circuit, Louisiana, that the threshold question whether the age of any person in a child pornography may be determined by a 'lay' jury without the assistance of expert testimony where there is no conflict of opinion as to the age. However, it observed that where the individual in question appears to have reached puberty, there expert testimony or opinion as to proof of age would be necessary.

135. In ***Commonwealth v. Robert*** reported in **(829 A.2d. 127)**, the Superior Court of Pennsylvania observed that proof of age, like proof of any material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. It held that the proof necessary to satisfy the element of

age in a dissemination or possession of child pornography case is not limited to expert opinion testimony.

136. What is discernible from the aforesaid is that, although, in the few decisions referred to by us, there is a difference of opinion as to whether an expert's testimony or determination is necessary or not for the proof of age of an individual depicted in any pornographic material, yet in all of the aforementioned decisions it has been consistently held that the criteria for such determination is only the subjective satisfaction.

137. The test or criteria of 'subjective satisfaction' is in view of the practical difficulty that exists in conclusively establishing the age of an individual in any pornographic material through any objective means or criteria. This is owed to the fact that often, it is next to impossible to establish the identity of the victim, then to trace the whereabouts of such person, and then objectively determine their age. If such a criterion is adopted, then most of the cases pertaining to the possession of any child pornographic material would fail at the threshold, due to want of any means or information for conclusively proving the age of the victim.

138. The aforesaid aspect may be looked at from one another angle. Any mandate of an objective determination of the age by conclusive means, could possibly result in absurd consequences. For instance, say a pornographic material

involves an under-teen child who by virtue of his built on the face of it appears to be a child, yet such material will not be considered child pornographic material in the eyes of law, unless an objective determination of the exact age of such child is carried out in a conclusive manner. In the absence of any such determination, the prosecution of possession of such material would have to fail, merely due to technicalities and the inflexible character of the criteria or test for determining the age.

139. The aforesaid provision of Section 2(1)(da) of the POCSO holds significant importance, as the legislature whilst giving teeth to the existing provision of Section 15 of the Act, and making three distinct offences punishable under it through the 2019 Amendment Act, also consciously defined the term 'child pornography' under the POCSO through the very same amendment. It indicates the legislature's intention of construing both these provisions together as a whole; neither Section 15 of the POCSO nor Section 2(1)(da) can be interpreted or invoked in isolation from the other.

140. The legislature through Section 2(1)(da) of the POCSO, made a conscious departure from the already existing objective criterion of determination of age in terms of Section 2(1)(d) which is generally applicable to the POCSO, as it was alive to aforementioned inherent difficulty that is posed by such criteria. The legislature was well aware, that if the proof of age in offences

pertaining to child pornography such as under Section 15 of the POCSO would also have to be assessed by the existing objective test, it would lead to a very chilling effect, whereby the entire Section 15 of the POCSO could be rendered unworkable merely on account of a hyper-technical approach as to determination of age, thereby defeating the very object of the POCSO.

141. The aforesaid aspect may also be looked at from one more angle. Section 2(1)(da) of the POCSO was inserted by the legislature with two-fold purpose in mind. While one of the purpose of Section 2(1)(da) of the POCSO, was to explicitly define and delineate what type of visual depictions would be considered 'child pornography' to remove any ambiguity that existed earlier, the real purpose behind insertion of the said provision was to mitigate the tendency of the courts to refer and apply the objective criteria of age determination prescribed under Section 2(1)(d) of the POCSO, even when dealing with matters involving child pornography. Which is why the legislature in addition to explaining the contour of visual depiction in Section 2(1)(da) of the POCSO, also specifically added the words "*but appear to depict a child*" in the end.

142. If the courts while dealing with any matter involving child pornography, continue to refer and rely on Section 2(1)(d) of the POCSO, then the same will frustrate the intention behind Section 2(1)(da) more particularly the

words "*but appear to depict a child*" in the statute book, thereby render that portion of the aforesaid provision *otiose* and nugatory.

143. The true purport of Section 2(1)(da) of the POCSO, is to ensure that for offences pertaining to child pornography, it is Section 2(1)(da) that is given due regard and not Section 2(1)(d). Thus, in any offence pertaining to child pornography the definition of 'child' in Section 2(1)(d) would pale in comparison to the definition of 'child pornography' under Section 2(1)(da) of the POCSO. As such, the court while dealing with an offence under Section 15 of the POCSO, must be mindful of the fact, that it is Section 2(1)(da) of the POCSO, which has to be referred to and relied upon and not Section 2(1)(d). In other words, it is the definition of 'child pornography' which is of relevance while considering whether Section 15 of the POCSO can be invoked or not.

d. Scope of Section 67B of the IT Act.

144. The IT Act was originally enacted with the object of providing a legal framework for *inter-alia* recognizing electronic records & digital signatures, facilitating electronic commerce, and providing a legal sanctity to e-contracts. While the IT Act did include certain provisions to penalize cybercrimes, they were rudimentary and did not comprehensively address issues like creation and facilitation of sexual abuse of children, the online

publication, transmission and distribution of child pornography or the sexual inducement, enticement and exploitation of children over the internet.

145. The aforesaid was due to the fact that, the IT Act prior to the Information Technology (Amendment) Act, 2008 (for short, the '**2008 Amendment Act**'), criminalized only one act being the publication or transmission of obscene material, under Section 67. The IT Act made no distinction between the publication or transmission of an 'obscene material' from the publication or transmission of an obscene material involving any sexually explicit act or conduct i.e., pornographic material or for that matter child pornographic material. More glaringly, there was no difference in either publication or transmission of such material from the distribution, facilitation and consumption of such material over the internet. The IT Act also did not recognize other forms of sexual abuse and exploitation of children over the internet as a punishable offence such as enticement of children into any sexual act.

146. Over a period of time, as the age of internet evolved, the inadequacies of the IT Act became apparent, primarily due to more and more children using the internet and a corresponding increase in number of cyber-crimes being committed against them. Thus, there was a need for a more robust legal framework particularly for the protection of vulnerable population like children over the internet.

147. The 50th Report of the Standing Committee on Information Technology on the 'Information Technology (Amendment) Bill, 2007' noted that although a new provision in the form of Section 67A had been proposed for specifically criminalizing publication or transmission of pornographic material with enhanced punishment, yet there was no specific provision pertaining to child pornography. The Standing Committee, rejected the response of the Department of Information Technology that the provision of Section 67A in general would also include child pornography, and instead recommended that a specific provision for child pornography be incorporated, in order to not just criminalize the publication and transmission of child pornography with an enhanced punishment but also to tackle and criminalize other related forms of child sexual abuse such as, online enticement of children into sexual acts, distribution of child pornography and the facilitation or creation of such material. The relevant recommendations read as under: -

> *"6. The Information Technology Act, 2000 was enacted keeping in view technology directions and scenario as it existed at that point of time. As the technology has a habit of reinventing itself into cheaper and more cost-effective options, it becomes imperative to give a fresh look to any technology driven law from time to time. Moreover, due to overall increase in e-commerce, growth in outsourcing business, new forms of transactions, new means of identification, consumers concern, promotion of e-governance and other information technology applications, technology neutrality from its present 'technology specific' form in consonance with development all over the world, security practices and procedures for protection of Critical Information infrastructure, emergence of new forms of computer misuse like child pornography, video voyeurism, identity theft and e-commerce frauds like phishing and online theft, rationalization of*

punishment in respect of offences with reference to the Indian Penal code, a need was felt to review the Indian Information Technology Act, 2000"

xxx xxx xxx

(iii) Child Pornography

118. Clause 31 proposes to insert Section 67 A whereby punishment has been provided for publishing or transmitting of material containing sexually explicit act in electronic form.

119. In the above context, a non-official witness as well as the CBI have been of the view that the proposed Section should be recast to include 'child pornography' also and specific provisions should be incorporated in this Section to criminalize child pornography in tune with the laws prevailing in advanced democracies of the world as well as Article 9 of the Council of Europe Convention on Cyber Crimes which states as under: -

> *"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: (a) producing child pornography for the purpose of its distribution through a computer system; (b) offering or making available child pornography through a computer system; (c) distributing or transmitting child pornography through a computer system; (d) procuring child pornography through a computer system for oneself or for another person; (e) possessing child pornography in a computer system or on a computer-data storage medium.*
>
> *2. For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:*
> *(a) a minor engaged in sexually explicit conduct;*
> *(b) a person appearing to be a minor engaged in sexually explicit conduct;*
> *(c) realistic images representing a minor engaged in sexually explicit conduct.*
>
> *3. For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.*
>
> *4. Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c*

120. When the Committee desired to hear the views of the Department of Information Technology in incorporating an express provision on defining child pornography as suggested by the Expert Committee, it was replied that a new Section 67A related to punishment for publishing or transmitting of material containing sexually explicit acts has been proposed as per which stringent provision has been made relating to pornography in general and would also automatically cover child pornography.

121. On the issue of criminalising child pornography and making penal provision towards that, the Department stated that, the advice/ assistance in the Commission of Crime (Pornography) through offering advice on information regarding the websites for facilitating any possession or downloading illegal content might be considered an offence.

122. The Department of Information Technology also agreed to a suggestion that the pre-offence grooming i.e. the initial actions taken by the offender to prepare the child for sexual relationships through online enticement and distributing or showing pornography to a child should also be made a criminal offence.

RECOMMENDATIONS / OBSERVATIONS

xxx xxx xxx

Child Pornography

24. The Committee note that Clause 31 of the Bill intends to insert a new Section 67A which provides for stringent punishment for publishing or transmitting of material containing sexually explicit acts in electronic form. But the Committee are concerned to find that the term 'child pornography' has nowhere been mentioned in the proposed Section. The Department's argument that the Section while covering 'pornography' will automatically cover child pornography does not convince the Committee as there should be no scope for assumption or presumption when fresh amendments are being proposed. The Committee, therefore, impress upon the Department to include the term 'child pornography' in the proposed Section 67A in view of its growing menace. They also desire that specific provisions should be incorporated in this Section to criminalise child pornography in tune with the laws prevailing in the advanced Countries and Article 9 of the Council of Europe Convention on Cyber Crimes. In view of the several manifestations of sexual abuse of the children and its loathsome ramifications, the Committee desire that the act of grooming the child for sexual relationship through online enticement or distributing/showing pornography or through any other online means should also be made a criminal offence and

a suitable provision be made in this regard in the proposed Section 67A."

(Emphasis supplied)

148. From the aforesaid, it can be seen that the Standing Committee whilst making its recommendation, underscored that no useful purpose would be served if the publication or transmission of any child pornography is punished all the same as any other pornographic material. It highlighted, that while the IT Act had originally been enacted keeping in mind the requirements that existed then, yet now with the march of the age of internet, it has become imperative to undertake a fresh approach to the provisions of the IT Act particularly those relating to cyber-crime in light of the new emerging forms of misuse of the internet. It opined that, merely criminalizing the publication or transmission of child pornography will not be sufficient, and that other various forms of online sexual abuse and exploitation also need to be recognized and adequately punished, on par with the laws prevailing in various other countries.

149. It was in the aforesaid backdrop that the legislature by virtue of the Information Technology (Amendment) Act, 2008 *inter-alia* amended Section 67 of the IT Act and introduced Section 67A along with Section 67B. This was for the first time, that a specific provision had been made, to recognize and protect the vulnerable and tender age of children by criminalizing various forms of online sexual degradation, abuse and

exploitation with enhanced punishment. At the cost of repetition, Section 67B of the IT Act is being reproduced below: -

> *"**67-B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form**. — Whoever —*
> *(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or*
>
> *(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or*
>
> *(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or*
>
> *(d) facilitates abusing children online; or*
>
> *(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,*
> *shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:*
>
> *Provided that provisions of Section 67, Section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form—*
>
> *(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or*

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation. — For the purpose of this section, "children" means a person who has not completed the age of 18 years."

150. A conjoint reading of Section(s) 67 and 67A *viz-a-viz* 67B would reveal that unlike the former which penalizes only the publication or transmission of any obscene material or pornographic material, the scope and ambit of Section 67B is much wider inasmuch as it recognizes and penalizes five different forms / categories of *actus reus*, being: -

(i) <u>Section 67B sub-section (a)</u>: -

a. Section 67B sub-section (a) of the IT Act pertains to the dissemination of child pornography and penalizes the publication or transmission of any material involving a child in any sexually explicit act or conduct, and the direct or indirect involvement in aiding or facilitating the dissemination of such material.

b. In order, to constitute an offence under this provision, there must be an actual publication or transmission of any child pornographic material, though the said publication or transmission may be done either by the accused himself or be caused through someone else at the instance or behest of the accused. In other, words Section 67B sub-section (a) punishes any person who is involved in a process, in any

manner that leads to the publication or transmission of any child pornographic material.

c. Thus, twin-conditions as prescribed under Section 67B(a) of the IT Act, need to be satisfied in order to constitute an offence: - **(I)** the actual publication or transmission of any child pornographic material **AND (II)** the involvement of the accused in such publication or transmission process in any manner.

(ii) Section 67B sub-section (b): -

a. It penalizes the creation of any text or image-based content in any electronic form, that depict children in any obscene or indecent or sexually explicit manner. It further penalizes the collection, solicitation, browsing i.e., online viewing, or downloading of such material. Thus, even the mere viewing of any child pornographic material that is stored in a mobile phone would tantamount to 'browsing' of such material in electronic form. Lastly, it also penalizes the advertising, promotion, exchange or distribution of any such material. Here again, what is punishable is only the actual commission of any of the above-mentioned acts.

b. The scope of Section 67B sub-section (b), is more expansive than the preceding sub-section because, **(i)** ***first,*** the term 'material' here includes any electronic content depicting children in sexually explicit

acts as well as in obscene or indecent contexts, and **(ii) *secondly,*** the *actus reus* encompasses not just the act of disseminating but also the acts of creating, propagating, or engaging with or using such material.

c. In other words, Section 67B sub-section (b) penalizes the actual commission of any of the following: -

   i. the act of producing or creating any text or digital image based electronic material (incl. videos) that depict children in any obscene, indecent or sexually explicit manner;

   ii. the act of engaging or using such material by way of collecting, browsing, accessing, downloading, saving, seeking, actively searching such material from any computer resource, and;

   iii. the act of facilitating or propagating the circulation or dissemination of such material by advertising, promoting, exchanging or sharing, distributing or offering for sale such material from any computer resource on the internet.

(iii) <u>Section 67B sub-section (c)</u>: -

a. Section 67B sub-section (c) of the IT Act penalizes the act of any person to induce or entice a child to participate or indulge in any sexually explicit act or any other act that would offend any adult of reasonable mind, using any computer resource.

b. In order to constitute an offence under the said provision, what is required is only the actual commission of an act of inducement or enticement in any manner by the accused alone, <u>and there is no</u>

requirement that such enticement or inducement must have resulted in the child indulging in any sexually explicit or any other offensive act.

c. Thus, even where the accused merely attempts to entice a child to indulge in any such act, through a computer resource, he would be liable under this provision, irrespective of whether the child also indulges in such act or not. Furthermore, such enticement or inducement may be for having the child either indulge in any sexually or offensive act with the accused himself or with any other person at the instance or persuasion of the accused.

d. In other words, what is penalized under Section 67B sub-section (c) is the act of enticing or inducing a child to indulge in any sexually explicit offensive act or behaviour.

(iv) Section 67B sub-section (d): -

a. Section 67B sub-section (d) penalizes any form or manner of facilitation of abuse of children, online i.e., it penalizes any form of degradation, exploitation, or abuse of children on any online platform. The *actus reus* punishable under the said provision is the doing, aiding or abetting of any act, either directly or indirectly that would facilitate or enable the abuse of children online in any indecent, lascivious or prurient manner.

b. It is pertinent to note, that under Section 67B sub-section (d) there is no requirement that the act in question must have been done only with an

intention to facilitate the abuse of children online. What is rather required to constitute an offence under the said provision is that the act must be such which likely would facilitate the abuse of children online.

c. In other words, what is penalized is any act that has the propensity or likelihood to aid, enable or support the online abuse of children in any obscene, indecent, or lewd fashion.

(v) <u>Section 67B sub-section (e)</u>: -

a. Section 67B sub-section (e) of the IT Act penalizes the act of recording through video or any other electronic means, the participation of any sexually explicit act with or in the presence of any child. The *actus reus* required is the use of any video or any other electronic means to record any sexually explicit act being done either by the accused himself or by anyone else in the presence of a child.

b. It must be borne in mind, that the sexually explicit act itself need not be done in the actual presence of the child, rather what is required is that the child was made privy to such sexually explicit act, and the same was recorded by the accused in any electronic form. Say for instance, that in the presence of a child, a pornographic video is played, and the same is then recorded by the accused. Here since, the recording includes a child being subjected to a sexually explicit act in the form a pornographic

video, an offence would be constituted under the said provision, even though no such act was done in the actual presence of the child.

c. In other words, what is penalized under Section 67B sub-section (e) is the act of exposing or subjecting a child to any sexually explicit act by anyone, and recording the same in any electronic form.

151. From the aforesaid, it is clear that Section 67B of the IT Act is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online. It not only punishes the electronic dissemination of child pornographic material, but also the creation, possession, propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual denigration and exploitation of the vulnerable age of children.

152. This Court in ***Sharat Babu Digumarti v. Govt. of NCT of Delhi*** reported in **(2017) 2 SCC 18** held that Chapter XI of the IT Act, more particularly Section(s) 67 through 67B are a complete code in itself when it comes to offences relating to electronic forms of obscene and pornographic material. The relevant observations read as under: -

> *"31. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Sections 67-A and 67-B is a complete code relating to the offences that are covered under the IT Act. [...]"*
>
> (Emphasis supplied)

153. Thus, Section(s) 67, 67A and 67B of the IT Act being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene / pornographic material through electronic means is not defeated by a narrow construction of these provisions.

iii. <u>The Presumption of Culpable Mental State under Section 30 of the POCSO</u>.

154. As discussed earlier, the POCSO is a special legislation that was specifically enacted to punish aggravated forms of offences related to sexual abuse and exploitation of children as well as including the well-being of the children. Its nuanced provisions have been deliberately designed to provide stringent measures in order to secure the dignity protection and interest of children. It was in this backdrop, that the legislature in its wisdom specifically provided for certain statutory presumptions as regards commission of certain specified offences as-well as presumption of the existence of a culpable mental state on the part of the person accused so as to ensure that the legislation is effective in addressing the increasing number of child sexual abuse cases.

155. The provisions pertaining to statutory presumptions under the POCSO are contained in Section(s) 29 and 30 which provide for presumption as to

certain offences and presumption of culpable mental state respectively. In the case at hand we are concerned with Section 30 of the POCSO which at the cost of repetition is being reproduced hereunder: -

> *"**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."*

156. Section 30, sub-section (1) provides that where any offence under the POCSO requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state. It further provides that the accused may as a defence prove that he had no such mental state with respect to any act being sought to be punished under the Act. Thus, Section 30(1), makes it clear that the presumption of culpable mental state applies to any offence under the said Act that requires such mental state, and the use of the word "*shall"* makes it mandatory for the Special Court to presume the existence of such mental state. However, the said provision also clarifies that, although the said presumption is mandatory yet it is rebuttable

inasmuch as the person accused is permitted to prove any fact to establish the contrary i.e., to show that no such mental state existed on his part. Section 30 sub-section (2) further explains the manner and the circumstances under which the said presumption can be rebutted, insofar as it stipulates that in order to prove any fact to show that no such mental state existed, the person accused has to prove the same beyond a reasonable doubt and not on a mere preponderance of probability. Thus, the standard prescribed for rebutting the said statutory presumption of culpable mental state is beyond a reasonable doubt. Lastly, the Explanation appended to the said provision provides that 'culpable mental state' shall include intention, motive, knowledge of a fact and the belief in, or the reason to believe a fact.

a. Concept of Statutory Presumption and Principle of Foundational Facts.

157. In ***Attorney General*** (supra) this Court while considering the aforesaid Section(s) 29 and 30 of the POCSO observed that the same had been specifically incorporated by the legislature in view of the serious nature of the offences punishable under the POCSO and the object behind the enactment of the said legislation. Furthermore, this Court in view of the importance of the aforesaid provisions, held that any offence under the Act pertaining to sexual, assault, harassment etc., ought to be construed *viz-a-viz*

the other provision (sic Section(s) 29 and 30) of the POCSO. The relevant observations read as under: -

> *"36. It may also be pertinent to note that having regard to the seriousness of the offences under the POCSO Act, the Legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. It may further be noted that though as per sub section (2) of Section 30, for the purposes of the said 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, the Explanation to Section 30 clarifies that "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Section 7, 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11, "sexual intent" would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of "culpable mental state" on the part of the accused.*
>
> *37. This takes the Court to the next argument of Mr. Luthra that there being an ambiguity, due to lack of definition of the expressions - "sexual intent", "any other act", "touching" and "physical contact", used in Section 7, coupled with the presumptions under Sections 29 and 30 of the Act, the reverse burden of proof on the accused would make it difficult for him to prove his innocence and, therefore, the POCSO Act must be strictly interpreted. In the opinion of the Court, there cannot be any disagreement with the said submission of Mr. Luthra. In fact it has been laid down by this Court in catena of decisions that*

the Penal Statute enacting an offence or imposing a penalty has to be strictly construed. A beneficial reference of the decisions in the case of Sakshi v. Union of India reported in (2004) 5 SCC 518, in the case of R. Kalyani v. Janak C. Mehta reported in (2009) 1 SCC 516 and in the case of State of Punjab v. Gurmeet Singh, (2014) 9 SCC 632 be made in this regard. However, it is equally settled legal position that the clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole Statute relating to the subject matter. The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an adverse effect on their mental state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective."

(Emphasis supplied)

158. The statutory presumption of culpable mental state is neither a concept which is alien to the law nor is it something which is exclusive to the POCSO alone. In fact, there are several legislations which also contain similar provisions relating to the statutory presumption of culpable mental state, such as Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the "**NDPS Act**"), Section 138A of the Customs Act, 1962 (for short, the "**Customs Act**"), Section 278E of the Income Tax Act, 1961 (for short, the "**Act, 1961**") to name a few. Since all of the aforesaid provisions are *pari materia* with Section 30 of the POCSO, it would be apposite to refer to the various decisions of this Court interpreting these analogous provisions.

159. In ***Bhanabhai Khalpabhai v. Collector of Customs*** reported in **1994 Supp. (2) SCC 143**, this Court whilst examining the scope of Section 138A of the Customs Act which relates to presumption of culpable mental state observed that the said statutory presumption had been incorporated by the legislature in view of the difficulty that the prosecution often faces in proving every link in respect of commission of certain offences by way of direct evidence. It further observed that such statutory presumption is an exception to the general criminal jurisprudence that the onus never shifts on the accused and he has only to raise a doubt in the mind of the court, in respect of the correctness of the prosecution version. The relevant observation reads as under: -

> *"9. In the facts and circumstances of the case, it can also be held that the appellant was concerned with the specified goods in connection with 'fraudulent evasion or attempt at evasion' of duty chargeable on the specified goods. It is well known, that it is very difficult for the prosecution, to prove every link, in respect of the commission of the offence under the Act by direct evidence. The whole process of smuggling, for evading payment of custom duty consists of different links. The links aid and abate each other, sometimes through a remote control. That is why, Parliament has introduced Section 138-A in the Act. [...] The provision relates only to burden and nature of proof at the trial, as such it was applicable in the present case. In view of the aforesaid section, a presumption has to be drawn, in respect of existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. It can be said that the provision aforesaid is an exception to the general criminal jurisprudence that onus never shifts on the accused and he has only to raise a doubt in the mind of the court, in respect of the correctness of the*

prosecution version. It is different from Sections 106 and 114 of the Evidence Act. In view of Section 138-A, once a presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to prove as a defence that no such mental state with respect to the act charged, did exist. [...]"

(Emphasis supplied)

160. In another decision of this Court in ***Devchand Kalyan Tandel v. State of Gujarat*** reported in **(1996) 6 SCC 255,** it was reiterated that the statutory presumption engrafted in Section 138A of the Customs Act was out of necessity in view of the growing number of cases pertaining to evasion of duty or prohibitions or other alike economic offences and the inherent difficulty of the prosecution in establishing ingredients of such offences. It held that, once the recovery of prohibited goods from the accused person has been duly established by the prosecution, the statutory presumption would arise. It further held, that the question in such cases would be whether in the proved facts and circumstances, could the recourse of the statutory presumption be taken. The relevant observations read as under: -

"10. [...] It is no doubt true that in a charge for violation of the provisions of Section 135(1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted to evade any duty chargeable on the goods or have violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under Section 138-A and without such presumption an accused can be convicted under Section 135(1)(a). But the legislature having found it difficult to establish the necessary ingredients of such evasion of duty or prohibitions and the economic offences

having grown in proportion beyond the control, came forward with the presumption available under Section 138-A of the Act. The main object of Section 138 A is to raise a presumption as to the culpable mental state on the part of the accused when he is prosecuted in a court of law. In other words, if a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was knowingly concerned in the fraudulent evasion or attempted evasion of any duty chargeable on the goods in question. In the case of Bhanabhai Khalpabhai v. Collector of Customs [1994 Supp (2) SCC 143 : 1994 SCC (Cri) 882] this Court has held that in view of Section 138-A a presumption has to be drawn in respect of the existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. The question, therefore, arises as to whether in the proved facts and circumstances the courts below were justified in taking recourse to the statutory presumption under Section 138-A of the Act. [...]

(Emphasis supplied)

161. In ***State of Punjab v. Baldev Singh*** reported in **(1999) 6 SCC 172** a Constitution Bench of this Court held that a presumption is an inference of fact drawn from the facts which are known as proved and as such the statutory presumption under Section 54 of NPDS Act that an accused has committed an offence under the Act will only get attracted once the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the procedure laid down in the Act. The relevant observations read as under: -

"54. Thus, even if it be assumed for the sake of argument that all the material seized during an illegal search may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by

itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50."

(Emphasis supplied)

162. In ***Seema Silk Sarees v. Directorate of Enforcement*** reported in **(2008) 5 SCC 580**, although the provision involved therein is not *pari materia* with Section 30 of the POCSO, yet the observations made by this Court are relevant to the issue involved in the case at hand. Therein this Court whilst upholding the constitutional validity of Section 18 of the Foreign Exchange Regulation Act, 1973 which *inter-alia* provided for a statutory presumption of contravening the provisions of the said Act, held that such a statutory presumption would stand attracted once certain foundational facts are established by the prosecution. The relevant observation read as under: -

"19. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [...]

20. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. [...]

(Emphasis supplied)

163. Similarly in ***Noor Aga v. State of Punjab & Anr.*** reported in **(2008) 16 SCC 417,** the constitutional validity of Section 35 of the NDPS Act was challenged which as aforestated provided for the presumption of culpable mental state. This Court speaking through Justice S.B. Sinha (as he then was) whilst upholding the validity of the aforesaid provision observed that although the presumption of innocence being a human right cannot be thrown aside, yet the same would still be subject to exceptions. The court held that where a statute raises a presumption with regard to the culpable mental state on the part of the accused and also places the burden of proof on the accused to prove the contrary, the said presumption would be constitutionally valid and can be raised provided that the foundational facts pertaining to the establishing the *actus reus* of the requisite offence has been proved. It further held that despite such statutory presumption, the initial burden would always lie upon the prosecution to prove certain foundational facts clearly establishing the *actus reus* in respect of the offence that is sought to be punished. It is only after the prosecution has proved the foundational facts, that the statutory presumption gets attracted, whereafter the burden would shift onto the accused to prove otherwise. In the last it also held that the extent of burden to prove the foundational facts pertaining to the *actus reus* by the prosecution would depend upon the seriousness of the offence. The relevant observations read as under: -

"35. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.

xxx xxx xxx

51. The Act specifically provides for the exceptions. It is a trite law that presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

xxx xxx xxx

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. [...]

xxx *xxx* *xxx*

> *58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.*
>
> (Emphasis supplied)

164. In ***Bhola Singh v. State of Punjab*** reported in **(2011) 11 SCC 653** this Court while placing reliance on the decision in ***Noor Aga*** (supra) reiterated that the statutory presumption envisaged in Section 35 of the NDPS Act will only come into play after the prosecution had discharged its initial burden to prove certain foundational facts. It observed that the applicability of such statutory presumption is dependent upon the facts as spelt out by the prosecution, after which the burden would shift onto the accused to establish otherwise. It held that in the absence of any foundational facts pertaining to the alleged offence, no presumption can be drawn. The relevant observations read as under: -

"10. While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in Noor Aga v. State of Punjab while upholding the constitutional validity of Section 35 observed that as this section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come into play.

11. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. [...]"

(Emphasis supplied)

165. In ***Baldev Singh v. State of Haryana*** reported in **(2015) 7 SCC 554** this Court held that the presumption of culpable mental state contained in Section 35 of the NDPS Act would come into play once the possession of the contraband in question by the accused has been established by the prosecution, whereafter, the onus would be on the accused to rebut the said presumption. It further held, that such presumption may be rebutted by the accused by either raising doubts in the prosecution's case and the material relied upon it for establishing the possession or that it may adduce any other

evidence to rebut the same. In the last, it also held that where the prosecution is unable to establish the possession or where the court has doubts over the prosecution's case, the said presumption would automatically be discharged. The relevant observations read as under: -

> *"12. [...] Once the physical possession of the contraband by the accused has been proved, Section 35 of the NDPS Act comes into play and the burden shifts on the appellant-accused to prove that he was not in conscious possession of the contraband. [...]The Explanation to sub-section (1) of Section 35 expanding the meaning of "culpable mental state" provides that "culpable mental state" includes intention, knowledge of a fact and believing or reason to believe a fact. Sub-section (2) of Section 35 provides that for the purpose of Section 35, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of the probability. Once the possession of the contraband by the accused has been established, it is for the accused to discharge the onus of proof that he was not in conscious possession. Burden of proof cast on the accused under Section 35 of the NDPS Act can be discharged through different modes. One of such modes is that the accused can rely on the materials available in the prosecution case raising doubts about the prosecution case. The accused may also adduce other evidence when he is called upon to enter on his defence. If the circumstances appearing in the prosecution case give reasonable assurance to the court that the accused could not have had the knowledge of the required intention, the burden cast on him under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence."*
>
> (Emphasis supplied)

166. What can be discerned from the above is that the idea behind providing for a statutory presumption of culpable mental state is in view of the exigency

posed by the difficulty that often exists in establishing certain types of offences such as inchoate offences due to its clandestine nature. Such presumptions are in essence an exception to the cardinal principle of criminal jurisprudence that the act does not make a person guilty unless the mind is also guilty.

167. Traditionally, it is the prosecution who bears the burden of proving every element in a particular offence, including the accused's mental state, beyond a reasonable doubt. In order to establish the commission of any offence, the prosecution must stand on its own legs i.e., the onus lies on the prosecution to prove beyond reasonable doubt not just the wrongful act but also the wrongful intention of the person in doing such an act. However, in certain offences particularly economic offences or inchoate offences like possession of child pornography where apart from the *actus reus* there exists no other material to depict or demonstrate the *mens rea*, it is too difficult for the prosecution to look into the mind of the accused to cull out with certainty what his intention was or could have been for doing a particular act let alone cogently establish the same beyond a reasonable doubt. Due to the elusive and concealed nature of such offences there is often little to no direct evidence available to establish what was in fact in the mind of the accused at the time when the particular act in question occurred or that the said act was done only with a particular intention.

168. It is in such scenarios, the legislature consciously provides for a statutory presumption of a culpable mental state to overcome the aforesaid hurdles and assist the prosecution to prove its case. This presumption of a culpable mental state is neither a conclusive proof of guilt for any particular offence nor does it completely replace or absolve the prosecution of its burden of proof and should not be understood as such, but rather it is a potent tool to assist the prosecution in discharging its initial burden and establishing its case. It seeks to bridge the evidentiary gap that exists between the *actus reus* and the *mens rea* in complex clandestine offences which otherwise cannot be proved through conventional means.

169. One good reason for providing such statutory presumptions in different legislations is owed to the fact that at times having regard to the peculiar case the prosecution may find it extremely difficult to know the mind of the accused so as to establish his intention and mental state. In contrast, the accused may not have to face the same degree of difficulty because he is fully aware of his mental state and can explain his intentions on the basis of his conduct or actions.

170. However, since the courts were in *seisin* of the harshness of such presumptions and the inherent danger they pose – particularly in blurring the line between the presumption of a culpable mental state and the

presumption of the guilt itself and thereby undoing or compromising the fairness of such criminal proceeding, this Court for the first time in ***Baldev Singh*** (supra) sowed the seeds for a test to ascertain as to when such presumption can be safely attracted which was later more fully evolved in ***Noor Aga*** (supra) wherein a brightline test was laid down in the form of the 'Rule or Principle of Foundational Facts'.

171. This 'Rule or Principle of Foundational Facts' *simpliciter* lays down that before the statutory presumption of culpable mental state could be validly invoked, the prosecution must first establish certain foundational facts. These foundational facts typically involve or correspond to proving those facts or elements that cogently establish the *actus reus* required for the offence alleged by the prosecution. It is only after such foundational facts have been proved beyond a reasonable doubt that the prosecution may take recourse of the statutory presumption provided by the legislature. The rationale behind the same is two-fold. ***First***, in the absence of any *actus reus* there is no possible way to ascertain the corresponding *mens rea* that is required to be established. This is because it is the *actus reus* which demarcates or delineates the *mens rea* which is to be looked for and established. Without an *actus reus* of any form there arises no question of establishing and consequently presuming the *mens rea*, in view of the fundamental principle of criminal jurisprudence, that no one should be

punished for their thoughts or intention alone unless accompanied by some form of act. ***Secondly,*** and more importantly it ensures that the statutory presumption does not overreach or take the place of proof of guilt under the guise of 'presumption of culpable mental state'.

172. It would be too much to shift the entire onus onto the accused and to then ask him to prove a negative fact. Thus, any statutory presumption would operate only after the prosecution first lays the foundational facts necessary for the offences that have been alleged beyond a reasonable doubt. This is because a negative cannot be proved in the initial threshold, in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. Thus, in law it is trite that the initial burden always lies on the prosecution. This why, the establishment of foundational facts by the prosecution is a prerequisite for triggering the statutory presumption for shifting the onus on the accused to prove the contrary. It is a delicate balance struck between the practical need for such presumption in law and the cardinal principles of criminal jurisprudence to ensure that the presumption does not cross or transgress the fine line that demarcates presumption of 'culpable mental state' from the 'presumption of guilt' itself.

173. Since a negative cannot be proved, an accused cannot be asked to disprove his guilt even before the foundational allegations with supporting material

thereof are placed and duly established by the prosecution before the court. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under any specific provision of the POCSO as the case may be, the statutory presumption of culpable mental state under Section 30 of the POCSO will not come into the picture.

174. Even if the prosecution establishes such foundational facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution's case as improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption, however the said presumption under Section 30 of the POCSO will be said to have been rebutted only where the accused by way of his defence establishes a fact contrary to the presumption and proves the same beyond a reasonable doubt.

b. Foundational Facts required under Section 15 of the POCSO.

175. Now coming to Section 15 of the POCSO, as discussed earlier, the foundational facts ordinarily pertain to the *actus reus* required under a particular offence. However, given the fact that Section 15 penalizes three distinct and varying degrees of intention and having regard to the mutually exclusive nature of each of the three offences provided thereunder, the mere

storage or possession of a child pornographic material cannot become the foundational facts or basis for attracting all three of the said offences all the same.

176. As discussed by us in the foregoing parts of this judgment, while on a plain reading Section 15 sub-section(s) (1), (2) and (3) it might appear that all require the same *actus reus* i.e., the storage or possession of the child pornographic material, however, such an interpretation is flawed as a closer examination of each of the sub-section would reveal that there exists a very fine but pertinent distinction in the *actus reus* which is required to constitute an offence under Section 15 sub-section(s) (1), (2) or (3) of the POCSO.

177. Thus, for the purpose of Section 15 sub-section (1), the necessary foundational facts which the prosecution would first have to establish before it can be allowed to validly raise the statutory presumption of culpable mental state would *simpliciter* be the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same. Once, the aforesaid is clearly established by the prosecution, a presumption would be raised in terms of Section 30 of the POCSO that the person accused had the knowledge of the child pornographic material that was found to be stored or possessed by him and that he had the intent to share or transmit the same due to which he failed to delete, destroy or report it.

178. Whereas when it comes to Section 15 sub-section (2), since the *actus reus* required to constitute an offence thereunder requires the storage or possession of any pornographic material involving a child along with any additional mater to show either the actual transmission, propagation, display or distribution of any such material or the facilitation of any of the abovementioned acts. Thus, in order to invoke the statutory presumption of culpable mental state as contained in Section 30 of the POCSO, the prosecution would be required to first establish not just the storage or possession of any child pornographic material, but also any other material to indicate any actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter, the statutory presumption would stand attracted, and it shall be presumed by the courts that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the said act(s) had not been done for the purpose of either reporting or for use as evidence. We clarify that, though wherever any actual transmission, propagation, display or distribution of such material takes place, the offence under Section 15 sub-section (2) would be constituted, thereby seemingly not requiring any further to be proved. However, due to the two exceptions carved out in sub-section (2) namely that transmission,

propagation, display or distribution of child pornographic material when done for either reporting the same or for use as evidence, the statutory presumption in such scenario will still continue to serve a useful purpose by aiding the prosecution in reinforcing that any of the abovementioned acts had not been done with the intention of either reporting the same or for using it as evidence, unless the contrary is proven.

179. Lastly, for the purpose of Section 15 sub-section (3) of the POCSO, the *actus reus* required therein is the storage or possession of any child pornographic material and any other material to indicate that such storage or possession was done in lieu or in expectation of some form of gain or benefit. Thus, where the prosecution established the storage or possession of such material and further shows anything else that might indicate that the same had been done for some form of gain or benefit or the expectation of some gain or benefit, the foundational facts would be said to have been proved, and the statutory presumption envisaged under Section 30 of the POCSO can be validly raised. Then the onus would lie on the accused to prove that the storage or possession of such material had not been done with intention of any commercial purpose.

c. Whether the Presumption under Section 30 of the POCSO can be resorted to in a Quashing Proceeding?

180. The last aspect which remains to be examined is whether the said statutory presumption of culpable mental state provided in Section 30 of the POCSO can be resorted to in a quashing proceeding by the High Courts in exercise of their inherent powers under Section 482 of the Cr.P.C. (corresponding Section 530 of the Bhartiya Nagrik Suraksha Sanhita, 2023, for short, the "**BNSS**"). In other words, at what stage can the aforesaid said statutory presumption be invoked at. Before proceeding with the analysis of the said aspect, it would be appropriate to refer to a few decisions of this Court on this issue.

181. In ***State of M.P. v. Harsh Gupta*** reported in **(1998) 8 SCC 630**, this Court held that the statutory presumption contained in Section 69 of the Indian Forest Act, 1927 could not have been ignored by the High Court in deciding the quashing petition under Section 482 of the Cr.P.C. The relevant observations read as under: -

> *"3. It is rather surprising that at a stage when the only question to be considered was whether the complaint and its accompaniments disclosed any or all of the offences alleged against the respondent, the learned Judge not only went into a detailed discussion about his defence but recorded a conclusive finding that he was not guilty of the offences alleged against him. More surprising is that the learned Judge ignored the provisions of Section 69 of the Act which expressly raises a statutory*

presumption against a person arraigned that the forest produce recovered from him was a property of the Government, until the contrary is proved; and needless to say, the question of proof of the contrary can be answered after evidence is led.

4. For the foregoing discussion, we allow this appeal, set aside the impugned judgment and direct the Magistrate to proceed with the case in accordance with law, without in any way being influenced by any of the observations made by the High Court in the impugned order."

(Emphasis supplied)

182. This Court in ***Prakash Nath Khanna v. CIT*** reported in **(2004) 9 SCC 686** examined the scope of Section 278E of the Act, 1961. It held that where there is a statutory presumption as regards the existence of a culpable mental state on the part of the accused in respect of any offence alleged, any defence in respect of the absence of such mental state can only be pleaded in the trial. It further held that in such scenario, it will not be open for the High Court to delve into the aspect of the absence of such mental state in a quashing proceeding. The relevant observations read as under: -

"23. There is a statutory presumption prescribed in Section 278-E. The court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial."

(Emphasis supplied)

183. In another decision of this Court in ***R. Kalyani v. Janak C. Mehta & Ors.*** reported in **(2009) 1 SCC 516** although the issue therein did not pertain to the applicability of any statutory presumption, yet the observations made therein are significant. This Court held that the High Court in a quashing petition in exercise of its inherent jurisdiction cannot go into the aspect of either the existence or absence of any *mens rea* or *actus reus* for a particular offence to pass an order in favour of the accused. The relevant observations read as under: -

> *"15. Propositions of law which emerge from the said decisions are:*
> *(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.*
> *(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.*
> *(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.*
> *(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."*
>
> (Emphasis supplied)

184. In a recent decision of this Court in ***Rathis Babu Unnikrishnan v. The State (Govt. of NCT of Delhi) & Anr.*** reported in **2022 INSC 480** it was held that when there is a statutory presumption, it would not be judicious of the

quashing court to carry out a detailed enquiry on the facts alleged before first permitting the trial court to evaluate the evidence. It further observed that where a accused moves the court for quashing even before the commencement of trial, the High Courts in such cases should be slow and circumspect in prematurely extinguishing by discarding the legal presumption all together. The relevant observation reads as under: -

> *"11. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves Court for quashing even before trial has commenced, the Court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint.*
>
> *xxx xxx xxx*
>
> *13. Bearing in mind the principles for exercise of jurisdiction in a proceeding for quashing, let us now turn to the materials in this case. On careful reading of the complaint and the order passed by the Magistrate, what is discernible is that a possible view is taken that the cheques drawn were, in discharge of a debt for purchase of shares. In any case, when there is legal presumption, it would not be judicious for the quashing Court to carry out a detailed enquiry on the facts alleged, without first permitting the trial Court to evaluate the evidence of the parties. The quashing Court should not take upon itself, the burden of separating the wheat from the chaff where facts are contested. To say it differently, the quashing proceedings must not become an expedition into the merits of factual dispute, so as to conclusively vindicate either the complainant or the defence.*
>
> *xxx xxx xxx*
>
> *16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the*

factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption."

(Emphasis supplied)

185. From the above exposition of law, it is clear that there is no bar for the High Court to invoke the statutory presumption at the stage of deciding the quashing petition in respect to any offence to which such a presumption is applicable. Rather, any failure to give due weightage to the same, may result in dire consequences such as premature quashing of the criminal proceeding or allowing the accused to completely bypass the statutory presumption which otherwise would have been applicable in the trial. In light of our earlier discussion and without again referring to a plethora of decisions in this regard, it is clear how the statutory presumption plays a vital role when it comes to offences such as those under the POCSO.

186. This Court in ***Attorney General*** (supra) specifically held that considering the objects of POCSO, its provisions, more particularly, pertaining to sexual assault etc should be construed *viz-a-viz* the other provisions of the Act more meaningful and effective. Any selective reference to a particular provision in complete ignorance of the other provision would result in a mutilation of the entire scheme and purport of the legislation and thereby defeat the purpose with which it was enacted. The High Courts as a matter of choice should not shy away from referring to the statutory presumption that has been incorporated in the Act, whilst deciding a quashing petition. The High Courts must not deal with a particular offence under any enactment devoid or in disregard of the rest of the statutory framework, it must recognize and refer to the legislation *in toto*.

187. Otherwise, it would give an undue advantage to an accused by allowing him to mischievously prefer a quashing petition before the trial commences and completely bypass the statutory presumption provided by the legislature and walk right away from the criminal proceedings, thereby setting the entire legislation at naught. It is imperative for the courts to discourage any such attempts on part of the accused to short circuit the statutory provisions and procedure laid in a particular Act and evade trial entirely. In such situations, the statutory presumption becomes all the more important to effectively ensure that criminal process is not manipulated by any devious accused.

188. As has been held in ***Prakash Nath Khanna*** (supra) and ***Rathis Babu Unnikrishnan*** (supra), any defence of the accused for the purpose of rebutting the said statutory presumption should ordinarily be left to the trial court to be looked into at-least when it comes to quashing petitions. Though, in certain exceptional circumstances, the High Court may entertain such defence to quash the criminal proceedings where it appears from the facts itself that the allegations themselves are completely false and bogus and by no stretch of imagination said to be established. But in doing so, the High Court must be slow and circumspect & must exercise some restraint. The statutory presumption may be ignored only where no foundational facts have been established from the material on record.

189. Once the foundational facts are *prima facie* established from the materials on record, it would be improper for the High Court in a quashing petition to conduct an intricate evidentiary inquiry into the facts and ascertain whether the requisite mental elements are present or not. All these aspects should be left to be decided by the trial court which is the appropriate forum for the evaluation of the same, especially where the statutory presumption has been attracted *prima facie* from the material on record.

190. When the High Court quashes any criminal proceedings without considering the legal effect of the statutory presumption, it effectively scuttles the process of trial and thereby denies the parties the opportunity to adduce

appropriate evidence and the right to a fair trial. This would not only defeat the very case of the prosecution but would also thwart the very object of a particular legislation and thereby undermine the public confidence in the criminal justice system.

191. We are conscious of the fact that in ***Noor Aga*** (supra) this Court had held that the statutory presumption under Section 35 of the NDPS Act would only operate in the trial of the accused. However, a close reading of the said decision would reveal that this Court in ***Noor Aga*** (supra) only went so far as to say that before a statutory presumption could be invoked, the foundational facts must have been established by the prosecution. We may at the cost of repetition again reproduce the relevant observations of ***Noor Aga*** (supra) in this regard: -

> *"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.*
>
> (Emphasis supplied)

192. What has been conveyed by this Court in so many words in the aforesaid paragraph of ***Noor Aga*** (supra) is that despite the statutory presumption of culpable mental state, the initial burden to establish the foundational facts will still lie on the prosecution. This Court by no stretch of imagination could be said to have held that the statutory presumption of culpable mental state would only be applicable in trial. Even otherwise, since the decision of ***Noor Aga*** (supra) arose from a criminal appeal against conviction, this Court by no extent had the occasion to examine the applicability of the statutory presumption to proceedings other than the trial and appeal thereof.

193. We are also in *seisin* of the fact that Section 30 sub-section (1) specifically provides that "*the Special Court shall presume the existence of such mental state*". Similarly, Section 30 sub-section (2) also uses the words "Special Court". However, this in no manner can be construed to hold that it is the Special Court alone which has been vested with the power to raise the presumption under Section 30 of the POCSO. We say so, because: -

(i) ***First,*** the use of the words "*the Special Court shall presume the existence of such mental state*" in sub-section (1) and other mention of Special Courts in the provision is only explanatory in nature inasmuch as the legislature has used the said word to only explain how such presumption would ordinarily operate in a trial. It by no stretch can be understood as a bar on the applicability of such presumption to

other proceedings, as the said provision does not in any manner delineate or lay down the scope of such presumption and rather only elucidates the nature of the presumption (i.e., presumption of culpable mental state), the manner in which it would operate (i.e., applicable to any offence under the POCSO which requires any culpable mental state) and the standard of proof required to prove anything contrary (i.e., beyond a reasonable doubt). By no means it could be said that the legislature by the use of the words "*Special Court*" in Section 30 of the POCSO intended to curtail the application of the said statutory provision only in trial. Any such interpretation would completely render the other penal provisions meaningless, wherever the accused at the earlier stages moves for a quashing petition.

(ii) ***Secondly,*** the statutory presumption under Section 30 of the POCSO operates or gets attracted not by virtue of the court before which the matter happens to be at, but by the offence itself, for which the legislature specifically provides such presumption in the first place. Since, the presumption in essence is in respect of *mens rea* required for any offence under the POCSO, this presumption is inextricably linked to the offence alone and not the power conferred upon a particular court. This is evinced by Section 30 sub-section (1), more particularly the expression "*In any prosecution for any offence under this Act which requires a culpable mental state on the part of the*

accused". Furthermore, the aforesaid expression is of wide import and the words "*prosecution for any offence under this Act*" occurring therein would subsume and include any proceeding in respect of an offence under the POCSO would.

(iii) ***Thirdly,*** even otherwise, the mere usage of words "*Special Court*" in the said provision can by no extent defeat or override the inherent powers that have been vested in the High Court by virtue of Section(s) 482 and 530 of the Cr.P.C. and BNSS, respectively.

As such, the statutory presumption envisaged under Section 30 of the POCSO is applicable and can be invoked in any proceeding which involves an offence under the said Act that requires a culpable mental state, irrespective of the court where such proceeding is taking place.

194. It is a settled position of law that a statute is an edict of the legislature, the elementary principle of interpreting or construing a statute is to gather the *mens* or *sententia legis* i.e., the true intention of the legislature. It is trite saying that while interpreting a statute, the courts should strive to ascertain the intention of the Legislature enacting it, and it is the duty of the Courts to accept an interpretation or construction which promotes the object of the legislation and prevents its possible abuse. Thus, we are of the considered view that any other interpretation of the provisions of the POCSO and of the

various issues that have been discussed by us in the foregoing paragraphs, would frustrate the very avowed and salutary object of the POCSO and its provisions.

iv. <u>Whether the case at hand was one fit for the High Court to quash?</u>

195. The undisputed facts are that, during investigation two videos depicting children involved in a sexual activity were recovered from the mobile phone of the respondent no. 1. As per the FSL Report, the aforesaid two videos were last modified in the memory of the accused person's phone on 05.09.2016 and 14.06.2019 respectively. The respondent no. 1 himself admitted before the High Court as recorded in the impugned order that he was addicted to watching pornography. In what circumstances such statement come to be recorded by the High court is a mystery. Although, the FIR dated 29.01.2020 alleged offences under Section(s) 14(1) of the POCSO and 67B of the IT Act, yet in the chargesheet, the aforesaid offence under Section 14(1) of the POCSO was substituted and instead offence under Section 15(1) of the POCSO was alleged to have been committed.

196. The High Court in its Impugned Order whilst quashing the criminal proceedings arising out of the aforesaid chargesheet dated 19.09.2023 completely failed to advert to the actual charge that was alleged therein more particularly Section 15 sub-section (1) of the POCSO. Instead, the High

Court appears to have just relied upon the FIR and premised its findings on Section 14 of the POCSO, even though the said offence had been dropped in the chargesheet. Thus, there appears to be a serious lapse on part of the High Court in failing to advert to Section 15 of the POCSO especially when the chargesheet had already been filed at the time of passing of the Impugned Order. It is no longer *res-integra* that once the investigation is over and chargesheet is filed, the FIR pales into insignificance. The court, thereafter, owes a duty to look into all the materials collected by the investigating agency in the form of chargesheet.

197. It is no longer *res-integra,* that the High Court in exercise of its inherent powers under Section(s) 482 of the Cr.P.C. or 530 of the BNSS as the case must not conduct a mini trial or go into the truthfulness of the allegations while dealing with a quashing petition. The High Court may be justified in quashing the chargesheet if it appears to it that continuance of criminal proceedings would be nothing but gross abuse of the process of law.

198. In ***R.P. Kapur v. State of Punjab*** reported in **AIR 1960 SC 866**, this Court summarised some categories of cases where inherent power can, and should be exercised to quash the proceedings: -

> *(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;*

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

199. This Court in ***State of Haryana v. Bhajan Lal*** reported in **1992 AIR SC 604** held that the power of quashing must be used very sparingly and with circumspection. It must only be used in the rarest of the rare cases. While laying down the principles relating to quashing of criminal proceedings, this Court held that while examining a complaint or FIR, the quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or in the complaint. The relevant observations read as under: -

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

200. In ***S.M. Datta v. State of Gujarat*** reported in **(2001) 7 SCC 659** this Court again cautioned that criminal proceedings ought not to be scuttled at the initial stage. Quashing of a complaint or FIR should rather be an exception

and a rarity than an ordinary rule. This Court also held that if a perusal of the first information report leads to disclosure of an offence even broadly, law courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere.

201. In view of the aforesaid consistent line of decisions of this Court, the High Court in our considered view could be said to have committed an egregious error by quashing the criminal proceedings without even properly perusing the chargesheet and the other material on record.

202. The High Court should neither be picky nor remain oblivious in deciding which provision to advert to while considering a quashing petition. When dealing with a quashing petition, there lies a duty on the High Court to properly apply its mind to all the material on record. The least which is expected of High Court in such situation is to carefully go through the allegations contained in the FIR and the charge-sheet, and to ascertain (i) whether, the offences alleged therein could be said to have been *prima facie* established from the material on record? or (ii) whether, apart from the offences alleged in the FIR or the charge-sheet, there is possibility of any other offence *prima facie* being made out? The High Court in exercise of its inherent powers, may be justified in quashing the criminal proceedings only

where, neither any offence as alleged in the FIR or charge-sheet is disclosed nor any other offence is *prima facie* made out, and the continuance of the proceedings may be found to amount to abuse of process of law.

203. In the case at hand, there is no dispute by either side that, the two videos infact depicted children in a sexual activity. It is also not the case of the respondent no. 1 that the said videos were not recovered from his mobile phone. In such circumstances, the child pornographic material that was recovered from the personal mobile phone of the accused which was regularly in use by him, *prima facie* establishes the storage or possession of child pornographic material at his hand. Further, since the aforesaid child pornographic material was found to have been stored in the said personal mobile phone since 2016 and 2019, *prima facie* it could be said there was a failure on the part of the respondent no.1 to delete, destroy or report such material.

204. It was also sought to be contended on behalf of the respondent no. 1 that the 2019 Amendment Act whereby and whereunder, the three distinct offences pertaining to the storage or possession of child pornography were made punishable under Section 15 of the POCSO came into force with effect from 16.09.2019. Whereas the both the videos in question had been allegedly stored in the device before the 2019 Amendment Act came into force. Since,

the present Section 15(1) of the POCSO was not in operation at the relevant time when the videos were allegedly stored, the respondent no. 1 cannot be punished under the said provision which did not exist at the time of storage of such video.

205. However, we are not impressed with the aforesaid submission. What is sought to be punished under Section 15 is not the time when such material was stored or came to be possessed but rather the storage or possession itself, which may be continuous, wherein the relevant point of time of such storage or possession for constituting any offence under the POCSO more particularly Section 15 would be reckoned from the date of registration of the FIR. In the present case, it is not in dispute that when 2019 Amendment came into force and later when the FIR was registered, the aforesaid two videos were still stored in the mobile phone of the respondent no. 1. In such circumstances, Section 15 sub-section (1) could be said to be *prima facie* attracted.

a. Plea of Ignorance of Law: Ignorance of Law viz-a-viz Incognizance of Law.

206. At this juncture, we may address yet another submission that was canvassed on behalf of the accused as regards the plea of *bona-fide* ignorance of law. It was contended that the accused was not aware of the fact that storing of child-pornography was a punishable offence under Section 15 of POCSO

and that the child pornographic material which was found stored in his mobile phone was due to his unawareness of the law accompanied by a *bona-fide* belief that such storage was not an offence, and as such he ought not to be held liable. In this regard, reliance has been placed on two decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) and ***Motilal Padampat Sugar Mills*** (supra).

207. In ***Chandi Kumar Das Karmarkar*** (supra), the facts of the case are as follows; there was a civil dispute *inter-alia* between the accused persons therein and the complainant as regards the ownership of a water tank where fishes had been reared. The complainant therein had acquired possession of the said tank on the strength of an *ex-parte* decree against the accused persons. Eventually, that *ex-parte* decree was set-aside, however the final decision on the title was still pending. Although no application for restitution was preferred yet the accused, due to a *bona-fide* ignorance of law, was under the impression that he had regained possession of the said tank and again started catching fishes in the tank. The complainant lodged an FIR against the accused persons *inter-alia* alleging theft of fish from his tank. The accused therein in his defence pleaded ignorance of law stating that he was unaware that, the said tank and the fishes in that expanse of water under the law continued to be deemed to be the property of the complainant in the absence of any restitution or that the possession of the water reservoir had

not reverted back to him. He further pleaded that; he was under a *bona-fide* belief that he had a right of possession of the said tank by virtue of the *ex-parte* decree being set-aside. This Court held that any claim of right due to a *bona-fide* ignorance of law, if reasonable will not constitute an act of theft. It further explained that a claim to such right means one which is not a false pretence but a fair pretence, and not a complete absence of claim but a *bona-fide* claim, however weak. The relevant observations read as under: -

> *"6. The offence of theft consists in the dishonest taking of any moveable property out of the possession of another with his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete. Fish in their free state are regarded as ferae naturae but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as a fishery but only within that spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any bona fide claim of right.*
>
> *7. Now the ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. This court in Criminal Appeal No. 31 of 1961 (Suvvari Sanyasi Apparao v. Boddepalli Lakhminarayana decided on October 5, 1961 observed as follows:*
>
> > *"It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only*

no legal right but no appearance or colour of a legal right."

8. By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim put a bona-fide claim, however weak. This Court observed in the same case that the law was stated in 2 East P.C. 659 to be:

"If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal."

and reffered to 1 Hale P.C. 509 that "the best evidence is that the goods were taken quite openly". The law stated by East and Hale has always been the law on the subject of theft in India and numerous cases decided by Indian Courts are to be found in which these principles have been applied.

Niyogi, J. in his judgment also referred to some of the decisions of the Calcutta High Court and we find ourselves in particular agreement with the following statement of the law in Hamid Ali Bepari v. Emperor :

"It is not theft if a person, acting under a mistaken notion of law and; believing that certain property is his and that he has the right to take the same ... removes such property from the possession of another."

(Emphasis supplied)

208. In ***Motilal Padampat Sugar Mills*** (supra) the State Government therein had framed a policy for grant of sales tax exemption to new industrial units in the State. On the basis of the said policy, the appellant therein set-up an industrial unit and approached the State Government for claiming the exemption. The State Government informed him that he would be granted only partial concession in sales tax, to which the appellant was agreeable.

However, subsequently, the State having second thoughts, rescinded the concession which was being granted to the appellant. Aggrieved by which the appellant preferred a writ petition claiming exemption from sale tax as per the policy. However, the State Government in response submitted that the appellant therein by accepting a partial concession on sales tax had waived its right to claim full exemption. This Court rejecting the said plea of waiver and estoppel held that, the appellant therein was unaware about the policy and the extent of the exemption in sales tax under the law. Thus, the appellant due to the ignorance of law had a *bona-fide* belief that the policy only provided for a partial concession rather than a complete exemption. This Court observed that it cannot be presumed that the appellant was fully informed about the policy and that he had waived or abandoned his right with full knowledge of the said policy. It further observed that often the maxim "*ignorantia juris non excusat*" i.e., "ignorance of the law is no excuse" is often misconstrued to mean that everyone is presumed to know the law. Accordingly, this Court rejecting the plea of promissory estoppel held that due to the ignorance of law on the part of the appellant, it cannot be said that he had full knowledge of its right to exemption so as to waive or abandon the same. The relevant observations read as under: -

> *"6. [...] The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had*

knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated June 25, 1970. In fact, in the petition as originally filed, the right to claim total exemption from Sales Tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement : there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J., pointed out in Martindale v. Falkner:

> *"There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so."*

Scrutton, L.J., also once said:

> *"It is impossible to know all the statutory law, and not very possible to know all the common law."*

But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam

> *"... the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."*

It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the. appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated June 25, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

(Emphasis supplied)

209. Thus, from the aforesaid, we are of the considered view that the reliance on the part of the accused on the two decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) and ***Motilal Padampat Sugar Mills*** (supra) is

completely misplaced. In ***Chandi Kumar Das Karmarkar*** (supra) the question before this Court was whether the accused therein due to the ignorance of law could be said to have a *bona-fide* belief of a right or claim to possession of the fish tank or in other words whether a plea of ignorance is a valid defence to any acts done pursuant to a *bona-fide* belief of existence of a right under the mistaken notion of law. Whereas in ***Motilal Padampat Sugar Mills*** (supra) the issue for consideration before this Court was whether the appellant therein due to the ignorance of law could be said to have wilfully waived his right, or in other words whether a plea of ignorance is a valid defence to any promissory estoppel to a right.

210. Thus, both the aforesaid decisions in ***Chandi Kumar Das Karmarkar*** (supra) ***Motilal Padampat Sugar Mills*** (supra) are not applicable. We say so, because this Court in the aforesaid decisions has only gone so far as to say that a plea of ignorance of law can be used as a valid defence for either showing that the purported act was done or not done (as the case may be) due to a consequent *bona-fide* belief as to the existence of such a right or claim. In other words, a plea of ignorance of law can be a valid defence if it consequently gives rise to a legitimate and *bona-fide* mistake of fact as to the existence (or non-existence) of a particular right or claim.

211. This may be better understood through a four-prong test wherein for a valid defence, there must exist **(1)** an ignorance or unawareness of any law and **(2)** such ignorance or unawareness must give rise to a corresponding reasonable and legitimate right or claim **(3)** the existence of such right or claim must be believed *bonafide* and **(4)** the purported act sought to be punished must take place on the strength of such right or claim. It is only when all the four of the above conditions are fulfilled, that the person would be entitled to take a plea of ignorance of law as a defence from incurring any liability.

212. As held in ***Chandi Kumar Das Karmarkar*** (supra) a plea of ignorance of law is a valid defence only to the acts said to have been done on the basis of a right or a claim, the existence of which was *bona-fidely* believed or entertained on the basis of ignorance of law or mistaken notion of law. Thus, for a plea of ignorance of law, the ignorance or mistake of law must be such which legitimately gives rise to a *bona-fide* belief of the existence of a right or a claim, and the said person commits any act on the strength of such right or claim. This is fortified from the following observation "*A claim of right in good faith, if reasonable saves the act [...] where such a plea is raised*" in paragraph 7 of ***Chandi Kumar Das Karmarkar*** (supra). Thus, a plea of ignorance of law is only valid for the defence of a *bona-fide* claim of right and any acts done thereunder. As such, where a person commits any act on the assertion of a right, the existence of which was *bona-fidely* believed due

to a mistaken notion of law, such person will not be liable due to the honest but mistaken factum of such right or claim stemming from or accompanied by ignorance of law.

213. Similarly, in ***Motilal Padampat Sugar Mills*** (supra) this Court only held that a plea of ignorance of law may be a valid defence for *bona-fidely* believing the existence of a wrong or incorrect right i.e., the right to only a partial concession of sale tax exemption. Accordingly, this Court held that where a person due to ignorance of law was not fully informed about a particular right, there can be no waiver of such right unless it is shown that such person was indeed aware of the said right.

214. Thus, the aforesaid decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) ***Motilal Padampat Sugar Mills*** (supra) are distinguishable for the simple reason that storage or possession of child pornographic material cannot be equated or traced to any right or assertion even if it was a mistaken one. Even if a person is unaware that the possession or storage of such material is punishable, it by no stretch can be considered to give rise to any right or assertion as there exists no such right to either store or possess such material, and thus it is not a valid defence. We say so because, no person of an ordinary prudent mind with the same degree of oblivion or unawareness as to the law, more particularly Section 15 of

POCSO could as a natural corollary be led to a belief of existence of a right to store or possess any child pornographic material. The ignorance or unawareness must have a reasonable nexus with the right or assertion claimed i.e., the ignorance or unawareness must be such which could legitimately and reasonably give rise to a corresponding right or claim the and the existence of which must be *bona-fidely* believed. Otherwise, anyone could make a bald or blanket claim of having a *bonafide* belief of any right to wriggle out of any liability arising out of its actions on the touchstone of unawareness of any particular law. Thus, even if the accused was unaware about Section 15 of POCSO, this by itself does not give rise to a corresponding legitimate or reasonable ground to believe that there was any right to store or possess child pornographic material. As such the four-prong test is not fulfilled and the defence of ignorance of law by the accused must fail.

215. Even otherwise, one must be mindful to the fact that such a plea is not a statutory defence with any legal backing, but rather a by-product of the doctrine of equity. Whether such a defence is to be accepted or not, largely depends upon the extant of equity in the peculiar facts and circumstances of each individual cases. It is an equally settled cannon of law that equity cannot supplant the law, equity has to follow the law if the law is clear and unambiguous.

216. This Court in ***National Spot Exchange Ltd. v. Anil Kohli, Resolution Professional for Dunar Foods Ltd***. reported in **(2022) 11 SCC 761** after referring to a catena of its other judgments, had held that where the law is clear the consequence thereof must follow. The High Court has no option but to implement the law. The relevant observations made in it are being reproduced below: -

> *"15.1. In Mishri Lal [BSNL v. Mishri Lal, (2011) 14 SCC 739 : (2014) 1 SCC (L&S) 387], it is observed that the law prevails over equity if there is a conflict. It is observed further that equity can only supplement the law and not supplant it.*
>
> *15.2. In Raghunath Rai Bareja [Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230] , in paras 30 to 37, this Court observed and held as under : (SCC pp. 242-43)*
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> > *"30. Thus, in Madamanchi Ramappa v. Muthaluru Bojjappa [AIR 1963 SC 1633] (vide para 12) this Court observed: (AIR p. 1637)*
> >
> > > *'12. ... [W]hat is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.'*
> >
> > *31. In Council for Indian School Certificate Examination v. Isha Mittal [(2000) 7 SCC 521] (vide para 4) this Court observed: (SCC p. 522)*
> >
> > > *'4. ... Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.'*
> >
> > *32. Similarly, in P.M. Latha v. State of Kerala [(2003) 3 SCC 541 : 2003 SCC (L&S) 339] (vide para 13) this Court observed: (SCC p. 546)*

'13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law.'

33. In Laxminarayan R. Bhattad v. State of Maharashtra [(2003) 5 SCC 413] (vide para 73) this Court observed: (SCC p. 436)

'73. It is now well settled that when there is a conflict between law and equity the former shall prevail.'

34. Similarly, in Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577] (vide para 35) this Court observed: (SCC p. 588)

'35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.'

35. Similarly, in E. Palanisamy v. Palanisamy [(2003) 1 SCC 123] (vide para 5) this Court observed: (SCC p. 127)

'5. Equitable considerations have no place where the statute contained express provisions.'

36. In India House v. Kishan N. Lalwani [(2003) 9 SCC 393] (vide para 7) this Court held that: (SCC p. 398)

'7. ... The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations.'..."

(Emphasis supplied)

217. Unawareness or incognizance of law should not be conflated with ignorance of law. This Court in ***Motilal Padampat Sugar Mills*** (supra) duly acknowledged that a plea of unawareness of law is fundamentally different in scope and application from the rule that ignorance of the law does not excuse anyone. The former as explained above, is a byproduct of the doctrine of equity whereas the latter is a cardinal rule of criminal jurisprudence and no person can claim to be absolved of any criminal offence or liability on a plea of ignorance of law. Thus, where something is specifically made punishable under the law, then in such cases the law would prevail over equity, and no plea of ignorance of law can be taken as a defence to absolve or dilute any liability arising out of such punishable offences. Thus, even if all four preconditions are satisfied, the courts are not bound to accept such a plea, if it is in negation or derogation of any law or the idea of justice.

218. Equity modifies the applicable law or ensures its suitability to address the particular circumstances before a court to produce justice. The modification of general rules to the circumstances of the case is guided by equity, not in derogation or negation of positive law, but in addition to it. It supplements positive law but does not supplant it. In a second sense however, where positive law is silent as to the applicable legal principles, equity assumes a primary role as the source of law itself. Equity steps in to fill the gaps that exist in positive law. Thus, where no positive law is discernible, courts turn

to equity as a source of the applicable law. However, where positive law exists, equity will always yield to it. [See ***M. Siddiq v. Mahant Suresh Das***, reported in **2020 1 SCC 1**]

219. It was further contended by the respondent no. 1 that although the said child pornographic material was found stored in his mobile phone, yet he had no knowledge of the same. He would submit that, the aforesaid videos that were found stored in his mobile as revealed by the FSL Report had been automatically downloaded into his mobile phone without his knowledge or volition.

220. Even, assuming that the respondent no. 1 did not actually store the aforesaid two videos in his mobile phone, and that he had no knowledge of the existence of those videos, nonetheless, the aforesaid aspect cannot be looked into by us at the stage of quashing, more particularly while deciding whether a *prima-facie* case is said to be made out. Even otherwise, since the material on record adduced by the prosecution clearly establishes the possession or storage of child pornographic material and the failure on the part of the respondent no. 1 in deleting, destroying or reporting the same, the foundational facts necessary to invoke the statutory presumption of culpable mental state could be said to have been *prima facie* established.

221. In view of the statutory presumption of culpable mental state being attracted, any defence of the respondent no. 1 such as the absence of knowledge or intention would be a matter of trial. Absence of culpable mental state has to be established before the trial court by leading cogent evidence in that regard. Such defences should not be looked into by us at this stage. All that should be ascertained is whether a *prima facie* case is said to have been made out.

v. <u>Summary of our conclusion</u>

222. We summarize our final conclusion as under: -

(I) Section 15 of the POCSO provides for three distinct offences that penalize either the storage or the possession of any child pornographic material when done with any particular intention specified under sub-section(s) (1), (2) or (3) respectively. It is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when done with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

(II) Sub-section (1) of Section 15 penalizes the failure to delete, destroy or report any child pornographic material that has been found to be stored or in possession of any person with an intention to share or transmit the same. The *mens-rea* or the intention required under this provision is to

be gathered from the *actus reus* itself i.e., it must be determined from the manner in which such material is stored or possessed and the circumstances in which the same was not deleted, destroyed or reported. To constitute an offence under this provision the circumstances must sufficiently indicate the intention on the part of the accused to share or transmit such material.

(III) Section 15 sub-section (2) penalizes both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts. To constitute an offence under Section 15 sub-section (2) apart from the storage or possession of such pornographic material, there must be something more to show i.e., either **(I)** the actual transmission, propagation, display or distribution of such material **OR (II)** the facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. The *mens rea* is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage that is indicative of any facilitation or actual transmission, propagation, display or distribution of such material.

(IV) Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose. To

establish an offence under Section 15 sub-section (3), besides the storage or possession of the pornographic material involving a child, there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent to derive any gain or benefit. To constitute an offence under sub-section (3) there is no requirement to establish that such gain or benefit had been actually realized.

(V) Sub-section(s) (1), (2) and (3) respectively of Section 15 constitute independent and distinct offences. The three offences cannot coexist simultaneously in the same set of facts. They are distinct from each other and are not intertwined. This is because, the underlying distinction between the three sub-sections of Section 15 lies in the varying degree of culpable *mens rea* that is required under each of the three provisions.

(VI) The police as well as the courts while examining any matter involving the storage or possession of any child pornography, finds that a particular sub-section of Section 15 is not attracted, then it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO. If the offence does not fall within one particular sub-section of Section 15, then it must try to ascertain whether the same falls within the other sub-sections or not.

(VII) Any act of viewing, distributing or displaying etc., of any child pornographic material by a person over the internet without any actual

or physical possession or storage of such material in any device or in any form or manner would also amount to 'possession' in terms of Section 15 of the POCSO, provided the said person exercised an invariable degree of control over such material, by virtue of the doctrine of constructive possession.

(VIII) Any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to *prima facie* depict a child or appear to involve a child, would be deemed as 'child pornography' and the courts are only required to form a *prima facie* opinion to arrive at the subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person for any offence under the POCSO that relates to child pornographic material, such as Section 15. Such satisfaction may be arrived at from any authoritative opinion like a forensic science laboratory (FSL) report of such material or opinion of any expert on the material in question, or by the assessment of such material by the courts themselves.

(IX) Section 67B of the IT Act is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online. It not only punishes the electronic dissemination of child pornographic material, but also the creation, possession, propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual

denigration and exploitation of the vulnerable age of children. Section(s) 67, 67A and 67B respectively of the IT Act being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene / pornographic material through electronic means is not defeated by a narrow construction of these provisions.

(X) The statutory presumption of culpable mental state on the part of the accused as envisaged under Section 30 of the POCSO can be made applicable provided the prosecution is able to establish the foundational facts necessary to constitute a particular offence under the POCSO that may have been alleged against the accused. Such presumption can be rebutted by the accused either by discrediting the prosecution's case or by leading evidence to prove the contrary, beyond a reasonable doubt.

(XI) The foundational facts necessary for the purpose of invoking the statutory presumption of culpable mental state for an offence under Section 15 of POCSO are as follows: -

(a) For the purpose of sub-section (1), the necessary foundational facts that the prosecution may have to first establish is the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same.

(b) In order to invoke the statutory presumption of culpable mental state for an offence under sub-section (2) the prosecution would be required to first establish the storage or possession of any child pornographic material, and also any other fact to indicate either the actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter it shall be presumed by the court that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the said act(s) had not been done for the purpose of either reporting or for use as evidence.

(c) For the purpose of sub-section (3) the prosecution must establish the storage or possession of such material and further prove any fact that might indicate that the same had been done to derive some form of gain or benefit or the expectation of some gain or benefit.

(XII) The statutory presumption of culpable mental under Section 30 of POCSO can be made applicable in a quashing proceeding pertaining to any offence under the POCSO.

F. FEW MEANINGFUL SUGGESTIONS.

223. Before, we close this matter, we must address ourselves on a very important aspect, as regards the need to effectively address the growing number of dissemination and use of child pornography.

i. The Lingering Impact of Child Pornography on the Victimization & Abuse of Children.

224. A child's victimization begins with the sexual act, continues through its recording, and perpetuates as photographs and videos that float through cyberspace, freely accessible to anyone who has the ability to surf the internet.[1] Child sexual exploitation is one of the most heinous crimes imaginable, and the offence of Child Pornography is equally as heinous, if not more, as in the latter the victimization and exploitation of the child does not end with the initial act of abuse.[2] The creation or dissemination of such pornographic material further extends and compounds the harm infinitely and at a far larger scale.[3] It in essence turns the singular incident of an abuse into a ripple of trauma inducing acts where the rights and dignity of the child is continuously violated each time such material is viewed or shared. This is

[1] Eva J. Klain, Heather J Davies, Molly A. Hicks Et. Al., Child Pornography: The Criminal Justice-System Response, 8 (Penn State University Press, 2001).
[2] Philip Jenkins, Beyond Tolerance: Child Pornography on the Internet (New York University Press, 2003)
[3] Burgess, Ann W. & C.R. Hartman, *Child Abuse Aspects of Child Pornography*, 7 PSYCHIATRIC ANNALS, 248 (1987).

why it is imperative that we collectively as a society address this issue with the utmost seriousness.

225. The impact of such continuous victimization is profound. Any act of sexual abuse inherently inflicts lasting physical and emotional trauma on the child. However, the dissemination of this act of abuse through pornographic material further accentuates and deepens the trauma into a psychological scar. The knowledge that their abuse is being watched by countless strangers, sometimes years after the actual event, exacerbates the psychological wounds on top of the trauma that was already induced by the act in the first place.[4] This perpetuating violation deprives the victim of any remaining hope or chance to heal, recover from the abuse and find closure. [5]

226. One must also be mindful of the fact that the term "child pornography" is a misnomer that fails to capture the full extent of the crime. It is important to recognize that each case of what is traditionally termed "child pornography" involves the actual abuse of a child. The use of the term "child pornography" can lead to a trivialization of the crime, as pornography is often seen as a consensual act between adults. It undermines the victimization because the

[4] Audrey Rogers, *The Dignity Harm of Child Pornography – From Producers to Possessors,* in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016).
[5] Tali Gal, Child Victims and Restorative Justice – A Needs Rights Model, 17 (Oxford University Press, 2011)

term suggests a correlation to pornography — conduct that may be legal, whose subject is voluntarily participating in, and whose subject is capable of consenting to the conduct.[6]

227. The term "child sexual exploitation and abuse material" or “CSEAM” more accurately reflects the reality that these images and videos are not merely pornographic but are records of incidents, where a child has either been sexually exploited and abused or where any abuse of children has been portrayed through any self-generated visual depiction.[7]

228. The term "child sexual exploitation and abuse material" (CSEAM) rightly places the emphasis on the exploitation and abuse of the child, highlighting the criminal nature of the act and the need for a serious and robust response. We are conscious that in the preceding parts of this judgment, we have used the term “child pornography”, however the same has been done only for the purposes of giving a better understanding of the nuances involved in the

[6] Jonah R. Rimmer, Child Sexual Exploitation, (Oxford Research Encyclopaedia Criminology, 2024).

[7] Mary Graw Leary, *The Language of Child Sexual Abuse and Exploitation,* in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016); *see also,* Danijela Frangež, Anton Toni Klančnik, Mojca Žagar Karer Et. Al., The Importance of Terminology Related to Child Sexual Exploitation, 66(4) REV. ZA. KRIM. KRIMINOL. 291 (2015); *see also,* Kathryn C. Seigfried Spellar & Virginia Soldino, *Child Sexual Exploitation: Introduction to a Global Problem,* in Thomas J. Holt & Adam M. Bossler (Eds.), The Palgrave Handbook of International Cybercrime and Cyberdeviance, (Palgrave Macmillian, Cham, 2020)

present matter. We further forbid the courts from using the term "child pornography" and instead the term "child sexual exploitation and abuse material" (CSEAM) should be used in judicial orders and judgements of all courts across the country.

229. Although, there exists a tangible difference between the act of viewing CSEAM and the act of engaging in sexual abuse of children, yet the latter desire is always inherent in the former.[8] Both the use of CSEAM and the act of child sexual abuse share a common, malevolent intent: the exploitation and degradation of a child for the sexual gratification of the abuser. The production of child sexual exploitative material is inherently linked to the act of sexual abuse. In both cases, the intent is clear: to sexually exploit and harm a child. The creation of such material is not a passive act but a deliberate one, where the abuser intentionally engages in the exploitation of a child, knowing full well the harm it causes.[9]

230. This intent is what makes these crimes particularly heinous. The abuser is not only violating the child's body but is also reducing them to an object for

[8] Vaughn I. Rickert & Owen Ryan, *Is the Internet the Source?,* 40 J. ADOLESC. HEALTH 104 (2007); s*ee also,* Dr. Ethel Quayle, *Assessment issues with young people who engage in problematic sexual behaviour through the Internet,* in M.C. Calder (Ed.), New Developments with young people who sexually abuse (Russel House Publishing, Lyme Regis, UK, 2007).
[9] Matthew L Long, Laurence A. Alison & Michelle A McManus, *Child pornography and likelihood of contact abuse: a comparison between contact child sexual offenders and noncontact offenders,* 25(4) SEX ABUSE, 370 (2013).

their own gratification, with little regard for the child's dignity or well-being. This dehumanization is evident in the production and distribution of CSEAM, where the child is treated not as a person but as a commodity to be consumed. Those who consume such material may develop an increased desire to engage in further acts of child exploitation. The viewing of CSEAM can desensitize individuals to the horrors of child abuse, leading them to seek out more extreme forms of exploitation or even to commit acts of abuse themselves.[10]

231. Moreover, the demand for such material will always incubate a corresponding production and distribution of CSEAM.[11] Abusers may be motivated to create and distribute these materials to satisfy the demand, leading to the abuse of more children.[12] This cycle of abuse and exploitation underscores the need for stringent measures to not only punish those who create and distribute CSEAM but also to deter potential consumers and reduce the demand for such material.

232. Child sexual exploitative material is deeply degrading to the dignity of children. It reduces them to objects of sexual gratification, stripping them of

[10] Dr. Ethel Quayle Et. Al., *The role of sexual images in online and offline sexual bheaviour with minors,* 17(6) CURR. PSYCHIATRY REP. 1 (2019).
[11] Melissa Hamilton, *The Child Pornography Crusade and Its Net- Widening Effect,* 33 CARDOZO L. REV. 1694 (2012).
[12] Esposito & Lesli C., *Regulating the Internet: The Battle Against Child Pornography,* 30 CASEW. RES. J. INT'L. L. 5 (1998).

their humanity and violating their fundamental rights. Children are entitled to grow up in an environment that respects their dignity and protects them from harm. However, CSEAM violates this right in the most egregious manner possible.

233. The existence and circulation of CSEAM are affronts to the dignity of all children, not just the victims depicted in the material. It perpetuates a culture in which children are seen as objects to be exploited, rather than as individuals with their own rights and agency. This dehumanization is particularly dangerous because it can lead to a broader societal acceptance of child exploitation, further endangering the safety and well-being of children.[13]

234. Given the severity and far-reaching consequences of child sexual exploitation, there is a clear legal and moral imperative to take strong action against those who produce, distribute, and consume CSEAM. This includes not only criminal penalties for those involved in CSEAM but also preventative measures, such as education and awareness campaigns. Laws must be robust and strictly enforced to ensure that perpetrators are brought

[13] Jason S. Carrol Et Al., *Generation XXX, Pornography Acceptance and Use Among Emerging Adults,* 23 J. ADOLESCENT RES. 6 (2008).

to justice and that children are protected from further harm. The courts ought to be loathe in showing any form of leniency in such matters.[14]

235. The impact of CSEAM on its victims is devastating and far-reaching, affecting their mental, emotional, and social well-being. Victims of such heinous exploitation often endure profound psychological trauma that can manifest as depression, anxiety, and post-traumatic stress disorder (PTSD).[15] The relentless reminder that images and videos of their abuse are circulating online can lead to a persistent sense of victimization and helplessness, further exacerbating feelings of shame, guilt, and worthlessness. This awareness can make it highly challenging for victims to move forward, as the fear of being recognized and judged by others remains ever-present.[16]

236. In our society, where social stigma and notions of honour and shame are deeply entrenched, the social repercussions for victims are particularly severe. Many victims face intense social stigmatization and isolation, finding it difficult to form and maintain healthy relationships due to trust issues and trauma-related challenges. The stigma attached to being a victim of CSEAM

[14] Clare McGlynn & Dr. Hannah Bows, *Possessing Extreme Pornography: policing, prosecutions and the need for reform,* 83(6) J. CRIM. LAW., 473 (2019).
[15] Dr. Ethel Quayle, Lars Loof and Tink Palmer, Child Pornography and Sexual Exploitation of Children Online, 64 (ECPAT International, 2008).
[16] *See,* Michael C. Seto, Kailey Roche, Nicole C Rodrigues Et. Al., *Evaluating Child Sexual Abuse Perpetration Prevention Efforts: A Systematic Review,* 33 J. CHILD SEX. ABUS. 22 (2024).

can create significant barriers in social interactions, causing victims to withdraw and feel alienated from their communities. The continuous re-victimization through the sharing and viewing of these materials perpetuates the victims' suffering. Each instance of someone viewing or distributing the material represents a new violation, making it harder for victims to heal. This ongoing trauma can severely impact their self-esteem and self-worth, leading to long-term emotional and psychological damage. Furthermore, the impact extends to their education and employment opportunities. Many victims struggle to concentrate on their studies or work due to the overwhelming emotional burden they carry. This can lead to academic underachievement, difficulty in securing employment, and economic hardships, compounding their sense of insecurity and instability.[17]

237. Providing compassionate and comprehensive support is crucial to help victims heal and reclaim their lives. Therapeutic interventions, including trauma-informed counselling and support groups, can offer a safe space for victims to process their experiences and begin to heal. Legal and social support services are also essential to help victims navigate the complexities of their situation and rebuild their lives.

[17] Paul G. Cassel, James Marsh & Jeremy M. Christiansen, *The Case for Full Restitution for Child Pornography Victims,* 82 GEO. WASH. L. REV. 61 (2013).

238. In India, the misconceptions about sex education are widespread and contribute to its limited implementation and effectiveness. Many people, including parents and educators, hold conservative views that discussing sex is inappropriate, immoral, or embarrassing. This societal stigma creates a reluctance to talk openly about sexual health, leading to a significant knowledge gap among adolescents.

239. One prevalent misconception is that sex education encourages promiscuity and irresponsible behaviour among youth. Critics often argue that providing information about sexual health and contraception will lead to increased sexual activity among teenagers. However, research has shown that comprehensive sex education actually delays the onset of sexual activity and promotes safer practices among those who are sexually active.[18]

240. Another common belief is that sex education is a Western concept that does not align with traditional Indian values. This view has led to resistance from various state governments, resulting in bans on sex education in schools in some states. This type of opposition hinders the implementation of comprehensive and effective sexual health programs, leaving many adolescents without accurate information. This is what causes teenagers and

[18] Padminin Iyer & Peter Aggleton, *Seventy years of sex education – A Critical Review,* 74(1) HEALTH EDUC. J. 3 (2015).

young adults to turn to the internet, where they have access to unmonitored and unfiltered information, which is often misleading and can plant the seed for unhealthy sexual behaviours.

241. Additionally, there is a misconception that sex education only covers biological aspects of reproduction. Effective sex education encompasses a wide range of topics, including consent, healthy relationships, gender equality, and respect for diversity. Addressing these topics is crucial for reducing sexual violence and promoting gender equity.

242. Despite some of these challenges, there are successful sex education programs in India, such as the Udaan program in Jharkhand. This program's success highlights the importance of community involvement, transparency, and government support in overcoming resistance and creating a supportive environment for sex education.[19]

243. Positive age-appropriate sex education plays a critical role in preventing youth from engaging in harmful sexual behaviours, including the distribution, and viewing of CSEAM.[20] Positive sex education focuses on

[19] *See,* the Udaan Adolescent Education Program by the Centre for Catalyzing Change in Jharkhand in India.
[20] Cortney Lollar, Child Pornography and the Restitution Revolution, 103 J. CRIM. L. & CRIMINOLOGY 343 (2013).

providing accurate, age-appropriate information about sexuality, consent, and respectful relationships. Research indicates that comprehensive sex education can significantly reduce risky sexual behaviours, increase knowledge, enable healthy decision-making, reduce misinformation, delay sexual debut, decrease the number of sexual partners, and increase contraceptive use. The research done in India has shown the need for comprehensive sex education programs. A study of over 900 adolescents in Maharashtra found that students not exposed to scientific literature on reproductive and sexual health were more likely to initiate sex early.[21]

244. Furthermore, positive sex education promotes healthy attitudes towards sexuality and relationships, which can counteract the distorted perceptions often associated with the consumption of child pornography. It can also help foster greater empathy and respect for others, reducing the likelihood of engaging in exploitative behaviours. Comprehensive sex education programs also teach youth about the importance of consent and the legal implications of sexual activities, helping them understand the severe consequences of viewing and distributing child pornography.

[21] Jagdish Khubchandani, Jeffrey Clark & Raman Kumar, *Beyond Controversies: Sexuality Education for Adolescents in India*, 3(3) J. FAMILY MED. PRIM. CARE. 175 (2014).

245. It is of paramount importance that we begin to address misconceptions around sexual health, and promoting a comprehensive understanding of sex education's benefits is essential for improving sexual health outcomes and reducing the incidence of sexual crimes in India. This is especially crucial given India's growing population.

246. Section 43 of the POCSO obligates the Central Government and the State Government to undertake measures and ensure that the provisions of the said Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the legislation. It further requires the appropriate government to also impart proper training at tegular intervals to all government offices such as police on the implementation of the provisions of this Act. The relevant provision reads as under: -

> *"**43. Public awareness about Act.—***
> *The Central Government and every State Government, shall take all measures to ensure that—*
>
> *(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;*
> *(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act."*

247. Section 44 of the POCSO on the other hand obligates the National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights constituted under the Act to regularly monitor and assist in the implementation of the provisions of this Act. The relevant provision reads as under: -

> ***"44. Monitoring of implementation of Act.—***
> *(1) The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.*
>
> *(2) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006).*
>
> *(3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006)."*

248. We are of the considered view that the obligation of the appropriate government and the commission under Section(s) 43 and 44 of the POCSO respectively, does not end at just spreading awareness about the provisions of the POCSO. Since, one of the salutary and avowed object of the POCSO was the deterrence of offences of child sexual abuse and exploitation, thus, as a natural corollary, the obligation of the appropriate government and the

commission under the aforesaid provisions will also entail imparting of sex education and awareness amongst the general public, children as well as their parents and guardians, particularly in schools and places of education. The steps and efforts of the appropriate government and the commission towards the compliance of Section(s) 43 and 44 must go beyond just the textual wording of the said provisions and ought to earnestly take into account the pragmatic necessities for curtailing the issue of child abuse, exploitation and addiction to pornography.

249. Ultimately, it is our collective responsibility to ensure that victims of child pornography receive the care, support, and justice they deserve. By fostering a compassionate and understanding society, we can help them find their path to recovery and regain a sense of safety, dignity, and hope. This includes changing societal attitudes towards victims, improving legal frameworks to protect them, and ensuring that perpetrators are held accountable.

a. Obligation to report under Section(s) 19 & 20 respectively of the POCSO and Role of the Society and all Stakeholders.

250. Section 19 read with 20 & 21 of the POCSO is one such step towards recognizing this collective responsibility of the society in curtailing the issue of abuse and exploitation of children. Section 19 places an obligation on any

person who has an apprehension that an offence under POCSO is likely to be committed or has knowledge that such an offence has been committed, to report and provide information about the same to the Special Juvenile Police Unit or the local police. Section 19 further delineates the process and procedure in which such information or report has to be recorded by the authorities, and the course of action to be adopted. Section 20 extends such obligation to any and all personnel of media, hotels, hospitals, clubs or studios etc., to mandatorily report and provide information about any material or object which is sexually exploitative of a child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium to the authorities mentioned above. Any failure to do so, either in terms of Section 19 or 21 of POCSO shall be liable to be punished with imprisonment upto 6-months or fine or both. Further, any failure on the part of any employer or supervisor in reporting the commission of any offence or its apprehension in respect of a subordinate under his control, will also be liable to be punished with imprisonment which may extend to 1-year and also fine. The relevant provisions read as under: -

> *"**19. Reporting of offences.—***
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of1974) 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 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."

251. Thus, it is evident that, to achieve the avowed purpose, a legal obligation has been imposed under the POCSO Act on any person to report an offence to the relevant authorities specified therein if they have knowledge that an offence under the Act has been committed. This obligation also extends to individuals who have reason to believe that an offence under the Act is likely to be committed. In addition to imposing this legal duty under Section 19, the legislature being in *seisin* of the paramount importance in collectively addressing the problems of child abuse and exploitation, deemed it expedient to make the failure to discharge this obligation punishable under Section 21 of the Act. Such provisions have been inserted with a view to ensure strict

compliance of the provisions under the POCSO and thereby to ensure that the tender age of children is not being abused and their childhood and youth is protected against exploitation.

252. In ***Shankar Kisanrao Khade v. State of Maharashtra,*** reported in **(2013) 5 SCC 546**, this Court expressing its anguish over the large number of cases of abuse and exploitation of children, held that such issues must be collectively dealt by all stakeholders in a child-centric manner by applying the *best interest of child standard*, since best interest of the child is paramount and not the interest of perpetrator of the crime. It further *inter-alia* laid down the manner in which all persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc. or wherever children are housed have to comply with the obligation(s) envisaged under Section(s) 19 & 21 of the POCSO. The relevant observations read as under: -

> *"72. I may also point out that, in large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord, etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on the perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report*

such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

73. In my view, whenever we deal with an issue of child abuse, we must apply the best interest of child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child-centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot-free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

74. The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the Juvenile Justice Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as parens patriae has a duty to do so because the Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

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76. Considering the entire facts and circumstances of the case, I am inclined to convert death sentence awarded to the accused to rigorous imprisonment for life and that all the sentences awarded will run consecutively.

77. In my opinion, the case in hand calls for issuing the following directions to various stakeholders for due compliance:

77.1. The persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have been committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest Special Juvenile Police Unit (SJPU) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow-up action casting no stigma to the child or to the family members.

77.2. Media personnel, persons in charge of hotels, lodges, hospitals, clubs, studios and photograph facilities have to duly comply with the provision of Section 20 of Act 32 of 2012 and provide information to the SJPU, or local police. Media has to strictly comply with Section 23 of the Act as well.

77.3. Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, if come across any act of sexual abuse, have a duty to bring to the notice of the Juvenile Justice Board/SJPU or local police and they in turn be in touch with the competent authority and take appropriate action.

77.4. Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

77.5. If hospitals, whether government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest Juvenile Justice

Board/SJPU and the Juvenile Justice Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of the child.

77.6. The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening the offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

77.7. Complaints, if any, received by Ncpcr, Scpcr, Child Welfare Committee (CWC) and Child Helpline, NGOs or women's organisations, etc., they may take further follow-up action in consultation with the nearest Juvenile Justice Board, SJPU or local police in accordance with law.

77.8. The Central Government and the State Governments are directed to constitute SJPUs in all the districts, if not already constituted and they have to take prompt and effective action in consultation with the Juvenile Justice Board to take care of the child and protect the child and also take appropriate steps against the perpetrator of the crime.

77.9. The Central Government and every State Government should take all measures as provided under Section 43 of Act 32 of 2012 to give wide publicity to the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act."

253. This Court in its decision in ***State of Maharashtra & Anr. v. Maroti*** reported in **(2023) 4 SCC 298** examined and explained the true purport of the obligations envisaged under Section(s) 19 & 21 of the POCSO. It held that prompt and proper reporting of offences under the POCSO is the bedrock of the obligations that have been cast under the said provisions, and any other

view would defeat the very purpose and object of the Act. It further observed that merely because the failure to discharge the obligation under Section(s) 19 & 21 is punishable with imprisonment for a short duration, does not mean that such an offence is not to be taken seriously. Accordingly, it held that strict compliance of such provisions must be ensured to protect the tender age and youth of children against exploitation. The relevant observations read as under: -

> *"11. To achieve the avowed purpose, a legal obligation for reporting of offence under the POCSO Act is cast upon on a person to inform the relevant authorities specified thereunder when he/she has knowledge that an offence under the Act had been committed. Such obligation is also bestowed on person who has apprehension that an offence under this Act is likely to be committed. Besides casting such a legal obligation under Section 19, the Legislature thought it expedient to make failure to discharge the obligation thereunder as punishable, under Section 21 thereof. True that under Section 21 (1), failure to report the commission of an offence under Sub Section 1 of Section 19 or Section 20 or failure to report such offence under Sub Section 2 of Section 19 has been made punishable with imprisonment of either description which may extend to six months or with fine or with both. Sub section 2 of Section 21 provides that any person who 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 punishable with imprisonment with a term which may extend to one year or with fine. Certainly, such provisions are included in with a view to ensure strict compliance of the provisions under the POCSO Act and thereby to ensure that the tender age of children is not being abused and their childhood and youth is protected against exploitation.*
>
> *12. Looking at the penal provisions referred above, making failure to discharge the obligation under Section 19 (1) punishable only with imprisonment for a short duration viz., six*

months, one may think that it is not an offence to be taken seriously. However, according to us that by itself is not the test of seriousness or otherwise of an offence of failure to discharge the legal obligation under Section 19, punishable under Section 21 of POCSO Act. We are fortified in our view, by the decisions of a three Judge Bench of this Court in Vijay Madanlal Choudhary & Ors. v. Union of India & Ors. and a two Judge-Bench in Shankar Kisanrao Khade v. State of Maharashtra.

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14. [...] the length of punishment is not only the indicator of the gravity of offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognized by the Legislature in the specific international context. In this context, it is also relevant to note that the United Nations Convention on Rights of Children, which was ratified by India on 11.12.1992, requires the State parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc. Articles 3 (2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse.

15. Prompt and proper reporting of the commission of offence under the POCSO Act is of utmost importance and we have no hesitation to state that its failure on coming to know about the commission of any offence thereunder would defeat the very purpose and object of the Act. We say so taking into account the various provisions thereunder. Medical examination of the victim as also the accused would give many important clues in a case that falls under the POCSO Act. [...] We refer to the aforesaid provisions only to stress upon the fact that a prompt reporting of the commission of an offence under POCSO Act would enable immediate examination of the victim concerned and at the same time, if it was committed by an unknown person, it would also enable the investigating agency to commence investigation without wasting time and ultimately to secure the arrest and medical examination of the culprit. There can be no two views that in relation to sexual offences medical evidence has much corroborative value."

(Emphasis supplied)

254. The role of "intermediaries" as defined under Section 2(w) of the IT Act in checking the proliferation of child pornography is significant. Section 79 of the IT Act, 2000 which relates to due diligence that is to be observed by an intermediary, provides an exemption from liability to such intermediaries in certain cases if they are in compliance with the due-diligence requirements prescribed under the said provision, more particularly sub-section (3)(b), this is known as the "safe harbour" protection or provision. "Safe Harbour" protection means that an intermediary will not be held liable for any third-party information, data, or communication link made available or hosted by him. As per sub-section (2), in order to avail such protection, the intermediary foremost must not in any manner be involved in either initiating the transmission, or the receipt or the modification of the third-party data or information in question, and further is required to observe due diligence while discharging his duties under the IT Act and to also observe such other guidelines as the Central Government may prescribe in his behalf. Sub-section (3) (b) of the above-mentioned provision stipulates that if an intermediary receives actual knowledge or is notified by the appropriate government or its agency that any information, data, or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit an unlawful act, the intermediary must expeditiously remove or disable access to that material on that resource without compromising the evidence in any manner. It further states that the

protection under Section 79 lapses and does not apply if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act, or if upon receiving "actual knowledge", or if the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act. The relevant provision reads as under: -

> *"**79. Exemption from liability of intermediary in certain cases.—***
> *(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.*
>
> *(2) The provisions of sub-section (1) shall apply if—*
> (a) *the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or*
> (b) *the intermediary does not—*
> (i) *initiate the transmission;*
> (ii) *select the receiver of the transmission; and*
> (iii) *select or modify the information contained in the transmission;*
>
> (c) *the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*
>
> *(3) The provisions of sub-section (1) shall not apply if—*

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

255. Rule 11 of the Protection of Children from Sexual Offences Rules, 2020 (for short, the "**POCSO Rules**"), places an obligation on the intermediaries to not only report offences under POCSO but also to hand over the necessary material including the source from which such material may have originated to the Special Juvenile Police Unit or the local police, or the cyber-crime portal. As per a MOU between the National Crime Records Bureau (NCRB) under the Ministry of Home Affairs (MHA) and the National Centre for Missing & Exploited Children (NCMEC), a US based NGO, all social media intermediaries are required to report cases of child abuse and exploitation to the NCMEC, which in turn reports these cases to the NCRB and the NCRB forwards this to the concerned State authorities in India through the national cybercrime reporting portal.

256. It has been brought to the notice of this Court that social media intermediaries do not report such cases of child abuse and exploitation to the local authorities specified under POCSO and rather only comply with the requirements stipulated in the MOU. In view of the salutary object and the mandatory character of the provisions of Sections 19 and 20 of the POCSO read with Rule 11 of the POCSO Rules, we are of the considered view, that an intermediary cannot claim exemption from the liability under Section 79 of the IT Act for any third-party information, data, or communication link made available or hosted by it, unless due diligence is conducted by it and compliance is made of these provisions of the POCSO. We are also of the view that such due diligence includes not only removal of child pornographic content but also making an immediate report of such content to the concerned police units in the manner specified under the POCSO Act and the Rules thereunder.

257. Section 42A of the POCSO provides that the Act shall be in addition to and not in derogation of the provisions of any other law and further provides that it shall have overriding effect on the provisions of any such law to the extent of the inconsistency. The relevant provision reads as under: -

> *"**42A. 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."

258. In view of the overriding effect of the POCSO Act and the rules thereunder, merely because an intermediary is in compliance of the requirements specified under Section 79 of the IT Act, will not absolve it of any liability under the POCSO, unless it duly complies with the requirements and procedure set out under it, particularly Section 20 of POCSO Act and Rule 11 of the POCSO Rules. It is a settled position of law, that when a statute describes or requires a thing to be done in a particular manner; it should be done in that manner or not at all. Thus, social media intermediaries in addition to reporting the commission or the likely apprehension of commission of any offence under POCSO to the National Centre for Missing & Exploited Children (NCMEC) is also obligated to report the same to authorities specified under Section 19 of POCSO i.e., the Special Juvenile Police Unit (SJPU) or the local police.

259. We endorse the view and the directions issued by this Court in ***Shankar Kisanrao Khade*** (supra) and are of the considered view that a meaningful effect to the provisions of the POCSO can only be given if such directions are complied with to the letter and spirit. We further caution the courts to refrain from showing any form of leniency or leeway in offences under Section 21 of the POCSO, particularly to schools/educational institutions, special homes, children's homes, shelter homes, hostels, remand homes,

jails, etc. who failed to discharge their obligation of reporting the commission or the apprehension of commission of any offence or instance of child abuse or exploitation under the POCSO. Section(s) 19, 20 and 21 of the POCSO are mandatory in nature, and there can be no dilution of the salutary object and purport of these provisions. Merely because Section 21 prescribes a lesser threshold of punishment, the same in no way derogates or detracts from the gravity or severity of the offence which has been sought to be punished as held in ***Maroti*** (supra). It is a settled position of law that the length of punishment is not the only indicator of the gravity of the offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognized by the legislature in the specific international context i.e., the United Nations Convention on Rights of Children, particularly Article(s) 3(2) and 34 of the said Convention.

ii. <u>Suggestions to the Union of India and to the courts</u>.

260. We propose to suggest the following to the Union of India in its Ministry of Women and Child Development: -

(i) The Parliament should seriously consider to bring about an amendment to the POCSO for the purpose of substituting the term "child pornography" that with "child sexual exploitation and abuse material" (CSEAM) with a view to reflect more accurately on the

reality of such offences. The Union of India, in the meantime may consider to bring about the suggested amendment to the POCSO by way of an ordinance.

(ii) We put the courts to notice that the term "child pornography" shall not be used in any judicial order or judgment, and instead the term "child sexual exploitation and abuse material" (CSEAM) should be endorsed.

(iii) Implementing comprehensive sex education programs that include information about the legal and ethical ramifications of child pornography can help deter potential offenders. These programs should address common misconceptions and provide young people with a clear understanding of consent and the impact of exploitation.

(iv) Providing support services to the victims and rehabilitation programs for the offenders is essential. These services should include psychological counselling, therapeutic interventions, and educational support to address the underlying issues and promote healthy development. For those already involved in viewing or distributing child pornography, CBT has proven effective in addressing the cognitive distortions that fuel such behaviour. Therapy programs should focus on developing empathy,

understanding the harm caused to victims, and altering problematic thought patterns.

(v) Raising awareness about the realities of child sexual exploitative material and its consequences through public campaigns can help reduce its prevalence. These campaigns should aim to destigmatize reporting and encourage community vigilance.

(vi) Identifying at-risk individuals early and implementing intervention strategies for youth with problematic sexual behaviours (PSB) involves several steps and requires a coordinated effort among various stakeholders, including educators, healthcare providers, law enforcement, and child welfare services. Educators, healthcare professionals, and law enforcement officers should be imparted training to identify signs of PSB. Awareness programs can help these professionals recognize early warning signs and understand how to respond appropriately.

(vii) Schools can also play a crucial role in early identification and intervention. Implementing school-based programs that educate students about healthy relationships, consent, and appropriate behaviour can help prevent PSB.

(viii) To give meaningful effect to the above suggestions and work out the necessary modalities, the Union of India may consider constituting an Expert Committee tasked with devising a comprehensive program or mechanism for health and sex education, as well as raising awareness about the POCSO among children across the country from an early age, for ensuring a robust and well-informed approach to child protection, education, and sexual well-being.

(ix) We urge the Parliament to consider amending Section 15 sub-section (1) of POCSO so as to make it more convenient for the general public to report by way of an online portal, any instance of storage or possession of CSEAM to the specified authorities for the purpose of the said provision.

G. FINAL ORDER

261. For all the foregoing reasons, we have reached the conclusion that the High Court committed an egregious error in passing the impugned judgment. We are left with no other option but to set aside the impugned judgment and order passed by the High Court, and restore the criminal proceedings in Spl. S.C. No. 170 of 2023 to the court of Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District. We accordingly pass such order.

262. We direct the Registry to send one copy each of this judgment to the Principal Secretary, Ministry of Law & Justice, Union of India and to the

Principal Secretary, Ministry of Women and Child Development, Union of India, for undertaking appropriate course of action.

263. Pending application(s) if any, also stand disposed of.

..... CJI.
(Dr. Dhananjaya Y. Chandrachud)

..... J.
(J.B. Pardiwala)

New Delhi
23rd September, 2024