118 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M No.17935 of 2024 (O&M)
Reserved on:10.04.2024
Pronounced on:18.04.2024

Vijay Kumar ...Petitioner

Versus

State of Haryana and another ...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Gaurav Vir Singh Behl, Advocate
for the petitioner.

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<u>HARPREET SINGH BRAR J.</u>

1. The present petition has been preferred under Section 482 Cr.P.C. seeking quashing of impugned order dated 14.03.2024 passed by learned Additional Sessions Judge (Fast Track Special Court under POCSO Act), Yamunanagar at Jagadhari whereby application filed by the complainant under Section 311A Cr.P.C. in FIR No.19 dated 02.02.2022 registered under Sections 354, 354-A of the IPC and Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'the POCSO Act') at Police Station Women, District Yamunanagar, was allowed.

<u>FACTUAL MATRIX</u>

2. Briefly, the facts, as discernible from the FIR (supra), are that the petitioner is the brother-in-law (*jeth*) of the complainant. It is alleged that since the respondent no.2-complainant got married, the petitioner has been molesting her and even attempted to rape her. On 02.08.2021, 03.08.2021,

05.10.2021 and 21.10.2021, the petitioner kissed the 2 months old daughter of the complainant on her lips and private parts.

3. Respondent No.2 had previously moved an application under Section 173(8) read with 156(3) Cr.P.C. seeking directions to the investigating authorities to place on record a CD purported to be containing a conversation with the petitioner wherein he admits his guilt along with the confessional statement of the accused dated 05.05.2022. The same was dismissed by the learned trial Court vide order dated 17.07.2023 (Annexure P-5). Aggrieved by the same, respondent No.2 filed a revision petition before this Court which was dismissed as withdrawn with the liberty to avail remedy available under Section 311 Cr.P.C., vide order dated 24.08.2023 (Annexure P-6). Thereafter, respondent No.2 got a document containing the alleged self-incriminating statement of the petitioner, exhibited as Ex.P-37-Ex.P-39. The petitioner filed an application to de-exhibit the same, however it was dismissed by the learned trial Court vide order dated 14.02.2024. Subsequently, another application was moved by respondent no. 2 under Section 311-A Cr.P.C. seeking specimen signatures of the petitioner to compare with the ones on the exhibited document, which was allowed by the learned trial Court vide impugned order dated 14.03.2024.

CONTENTIONS

4. Learned counsel for the petitioner *inter alia* contends that the learned trial Court has gravely erred by allowing respondent No.2 to exhibit the said document as it was neither taken into possession during investigation nor was it a part of the final report under Section 173 Cr.P.C. The said document allegedly is self-incriminating in nature, as such, the petitioner cannot be forced to supply his specimen signatures as it would be

violative of his rights under Article 20(3) of the Constitution of India. Learned counsel further submits that the respondent No.2-complainant did not approach the learned trial Court with clean hands and has misled the Court. As per the order dated 24.08.2023 passed by this Court, the revision petition filed by respondent No.2-complainant was dismissed with liberty to avail the remedy under Section 311 of Cr.P.C before the trial Court. However, the complainant deceptively filed an application under Section 311A of Cr.P.C. and as such, the impugned order is liable to be set aside on this ground alone.

5. Further, respondent No.2 was granted liberty to avail remedy available under Section 311 Cr.P.C. vide order dated 24.08.2023 (Annexure P-6) but she wrongly filed an application under Section 311A Cr.P.C. As a matter of fact, the learned trial Court being a Sessions Court cannot consider an application under Section 311-A Cr.P.C since the same is only maintainable before a Magistrate. Also, since the word 'trial' is not specifically mentioned in the bare provision of Section 311A Cr.P.C. unlike Section 311, therefore, the said application under Section 311A Cr.P.C. could have been moved by respondent No.2 only at the time of investigation and not later on during the trial. He further submits that the manner in which the learned trial Court allowed the exhibition of the alleged self-incriminating statement dated 05.05.2022 (Annexure P-12) as Ex.P37-Ex.P39 is wrong and illegal since the complainant neither made a mention regarding the same in her deposition nor in her statements under Section 161 and 164 Cr.P.C. Further, the said document was never a part of the investigation and finds no mention in the final report under Section 178 Cr.P.C. submitted by the investigation agency. Moreover, the petitioner was

in custody on 05.05.2022, the date of the alleged confessional statement, as is clear from the bail order dated 04.07.2022(Annexure P-4). The said fact was concealed by respondent no. 2 which only goes to show that the entire case of the prosecution is concocted. In order to support his contentions, learned counsel for the petitioner places reliance on the judgments rendered in ***Ritesh Sinha vs. State of Uttar Pradesh & Another 2019(3) R.C.R.(Criminal) 952, Sethuraman vs. Rajamanickam 2010(5) R.C.R.(Criminal) 512*** and ***Mukesh & Another vs. State of Haryana CRR-2289 of 2013, decided on 30.07.2013.***

OBSERVATIONS & ANALYSIS

6. Having heard the learned counsel for the petitioner and after carefully perusing the record with his able assistance, it transpires that following points that need consideration for disposal of the present petition:

(i) *Whether direction to the accused for submitting his specimen signatures is violative of Article 20(3) of the Constitution?*

(ii) *Whether application under Section 311A can be entertained during trial?*

(iii) *Whether the Court of Additional Sessions Judge, being a Special Court under POCSO Act has the jurisdiction under Section 311A Cr.P.C?*

(iv) *Whether the trial Court can permit the prosecution to exhibit a document which is not a part of the final report under Section 173 Cr.P.C. and is also not supplied to the accused under Section 207 Cr.P.C., without filing any formal application regarding the same?*

7. However, for proper adjudication of the case at hand, it is pertinent to discuss the relevant statutory provisions, which are reproduced below:

"***<u>Section 91 Cr.P.C</u>: Summons to produce document or other thing.***

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed--

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

<u>Section 173 (8) Cr.P.C.</u>: ***Report of police officer on completion of investigation.***

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

<u>Section 207 Cr.P.C.</u>: ***Supply to the accused of copy of police report and other documents.***

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:--

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

Section 294 Cr.P.C.: ***No formal proof of certain documents.***

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

<u>Section 311 Cr.P.C:</u> ***Power to summon material witness, or examine person present.***

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

<u>Section 311A Cr.P.C:</u> ***Power of Magistrate to order person to give specimen signatures or handwriting.***

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting;

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

<u>Section 165 Evidence Act:</u> ***Judge's power to put questions or order production***.

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to *produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.*

8. As far as the argument regarding self-incrimination is concerned, it is imperative to note that obtaining a specimen for handwriting or signature of the accused under Section 311A during criminal proceedings is not hit by the bar of Article 20(3) of the Constitution of India. The issue was resolved by an eleven Judge bench of the Hon'ble Supreme Court in ***The State of Bombay vs. Kathi Kalu Oghad, 1961 AIR 1808*** wherein the following observations were made:

"10. To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that-though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject-they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice…

11. The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness.""To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be *communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorized to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision is Sharma's case, that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore; the observation of this court in Sharma's case, that Section 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an*

> *accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony.' The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation, cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness."*

9. Further, a Constitution Bench of the Hon'ble Supreme Court in ***Selvi vs. State of Karnataka (2010) 7 SCC 263*** and a Division Bench of this Court in ***Dewan Singh @ Ram Singh v. State of Haryana 2023(4) R.C.R. (Criminal) 17***, have categorically held that there is a distinction between the physical evidence and testimonial evidence. Physical evidence can be utilized for explaining relevant facts within the meaning of Sections 9 and 11 of the Indian Evidence Act, 1872. As such, there is no bar in directing the accused to give his fingerprints, blood sample, signatures specimen etc. Thus, providing such physical evidence lies outside the scope of Article 20(3) of the Constitution of India.

10. Further, this Court is unable to appreciate the contention of the learned counsel for the petitioner that the said section can only be availed during the stage of investigation. The words *"proceeding under this Code"* should naturally include the stages of enquiry and trial. If the argument of the learned counsel is accepted, it would lead to a situation where this provision would be rendered purposeless. At this juncture it would be profitable to cite the judgment of a Coordinate Bench of the Kerala High

Court in ***A.S. Subin vs. State of Kerala and another 2012(1) KLT 82***. The relevant part of the said judgment reads as follows:

> *"11. The words "proceeding under this Code" should receive wider meaning. If such a wider meaning is given it can be reasonably held that it includes inquiry and trial as well. Though the word 'trial' is not specifically mentioned in Section 311A, the reasonable interpretation should be that the expression 'proceeding under this Code 'Code' includes in and trial. In other words, inquiry and trial are proceedings under the Code. Therefore, the argument advanced by the learned counsel for the petitioner that Section 311A has no application, as the case is now pending trial also cannot be countenanced.*
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> *12. In the decision in* ***State of U.P. v. Ram Babu, (AIR 1980 Supreme Court 791)*** *the Apex Court suggested that suitable legislation may be made on the analogy of Section 5 of the Identification of Prisoners Act to provide for the investiture of Magistrates-with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. It was in view of the suggestion made by the Apex Court in the decision cited supra. Section 311A was inserted in the Code as per Act 25 of 2005. Therefore, there can be no doubt that the Magistrates are invested with the power to issue directions to any person including an accused person to give specimen signatures and writings, in any proceeding under the Code which would include inquiry and trial also. By sending the entries in the register/account books and the specimen handwriting and signature of the accused for comparison, no prejudice, what so ever, is likely to be caused. As such I find no reason to differ from the view taken by the learned Magistrate."*

11. In the case at hand, the impugned order wherein the application under Section 311A Cr.P.C. moved by respondent No.2 was allowed, has been passed by the learned Court of Additional Sessions Judge (Fast Track Special Court under POCSO Act). Being a Special Court under the POCSO Act, it is the Court of original jurisdiction and hence, is empowered to pass an order under Section 167 Cr.P.C. As such, a Special Court would certainly have the power to deal with an application filed under Section 311A Cr.P.C. as there would be no occasion otherwise to entertain such an application by a

Magistrate. Reading the said provision in the way contended by the learned counsel would only lead to absurdity. Further, a similar matter has been dealt in detail by a Division Bench of Madras High Court in the case of ***The Registrar (Judicial) High Court, Madras, 2017 Cri.LJ 4519***, wherein, the Court speaking through Justice S. Nagamuthu has made the following observations:

> *"23. In Essar Tele holdings Ltd v. Registrar General, Delhi High Court & Ors. reported in 2013 (8) SCC 1 wherein the power of a Special Judge appointed under the Prevention of Corruption Act to take cognizance was under challenge, the Hon'ble Supreme Court has held as follows:-"The Special Judge alone can take the cognizance of the offence specified in sub-Section (1) of Section 3 and conspiracy in relation to them. While trying any case, the Special Judge may also try an offence other than the offence specified in sub-Section (1) of Section 3, in view of sub-Section (3) of Section 4.A magistrate cannot take cognizance of offence as specified in Section 3(1) of the PC Act.*
>
> *24. Applying the same law to the POCSO Act, there can be no doubt that by empowering the Special Court to take cognizance of an offence under the Act, either on a police report or on a complaint, the Legislature has, by implication, excluded the power of the Magistrate to take cognizance of the offence as provided in Section190 of the Code. Thus, when the Special Court exercises the exclusive jurisdiction to take cognizance of any offence under the POCSO Act, and to try the same, undoubtedly, he has to necessarily exercise certain incidental powers of a Magistrate including the power to remand an accused under Section 167 of the Code.*
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> *25. Now, turning to the power of remand of an accused pending investigation of any offence, it has been explicitly conferred on a Magistrate. Under sub-section (2) of Section 167 of the Code, the Magistrate to whom an accused person is forwarded under this Section, may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole and if he has no jurisdiction to try the case or commit it for trial and consider further detention unnecessary, he may order the*

accused to be forwarded to the Magistrate having such jurisdiction. Section 167 of the Code does not refer either to a Court of Session, or a Sessions Judge or an Additional Sessions Judge. Of course, the power to remand an accused either by a Sessions Judge or an Additional Sessions Judge is provided in Section 309 of the Code during trial. In this provision also, neither the term "Sessions Judge" nor an "Additional Sessions Judge" is employed. The term "Court" alone is employed.

26. A bird's eye view of these two provisions may give an impression that the special Court under the POCSO Act, being a Court of Session, has no power to remand an accused pending investigation. But, a deep reading of these provisions would bring to light that though the Special Court under the POCSO Act is a Court of Session, the said Court has the power to remand an accused during investigation as provided in Section 167 of the Code as the Court having jurisdiction to try the case.

27. The Special Court under the POCSO Act, as per Section 33 of the Act, may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. But, for this enabling provision, a special court being a Court of Session cannot take cognizance upon receipt of a complaint or a police report.

28. As indicated above, in Section 33 of the POCSO Act, a Special Court under the said Act can entertain a complaint of facts, like a Magistrate having power under Sections156 or 190 of the Code. Undoubtedly, a Magistrate may refer a complaint to the police for registration of a case under Section 156(3) of the Code, if the complaint makes out a cognizable offence. Like Section 156(3) of the Code, there is no provisioning the POCSO Act explicitly empowering the Special Court under the POCSO Act to refer a complaint to the police for investigation. Section 156(3) of the Code speaks only of the power of a Magistrate and it has no specific reference to a Special Court under any Special Act. If it is so narrowly interpreted that Section 156(3) of the Codes applicable only to a Magistrate and not to a Special Court under the POCSO Act, then, the Special Court cannot refer any complaint to the police at all for investigation. This interpretation would only lead to absurdity. Therefore, such kind of narrow interpretation to Section 156(3) of the Code cannot be given.

Thus, the term "Magistrate" as employed in Section 156(3) of the Code should be read as "the special court" in the context of the POCSO Act.

29. Similarly, Section 167 of the Code, of course, has not specifically referred to any Special Court under any special enactment. It refers only to a Magistrate. Should it, therefore, be interpreted that the expression "Magistrate" employed in Section 167of the Code shall mean only a Judicial Magistrate?" Should it not include the Special Court under the POCSO Act?

30. In this regard, we may look into the judgment of the Hon'ble Supreme Court in ***State of Tamil Nadu v. V. Krishnnaswami Naidu & Anr., (1979 (4) SCC 5****). That was a case under the Criminal Law Amendment Act of 1952. In the said judgment, it has-been held as follows:-*

> *"We will now examine the provisions of Section 167 of the Criminal Procedure Code. Section 167 of the Criminal Procedure Code requires that whenever any person is arrested and detained in custody and when it appears that the investigation cannot be completed within a period of 24 hours the police officer is required to forward the accused to the Magistrate. The Magistrate to whom the accused is forwarded if he is not the Magistrate having jurisdiction to try the case may authorize the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. If he has no jurisdiction to try the case and if he considers that further detention is necessary, he may order the accused to be forwarded to any Magistrate having jurisdiction. The Magistrate having jurisdiction may authorize the detention of the accused person otherwise than in custody of the police beyond the period of 15 days but for a total period not exceeding 60 days. In the present case the accused were produced before the Special Judge who admittedly is the person who has jurisdiction to try the case. The contention which found favour with the High Court is that the words 'Magistrate having jurisdiction' cannot apply to a Special Judge having jurisdiction to try the case. No doubt the word 'Special Judge' is not mentioned in section 167 but the question is whether that would exclude the Special Judge from being a Magistrate having jurisdiction to try the*

case. The provisions of chapter XII Cr.P.C. relate to the information to the police and their powers of investigation. It is seen that there are certain sections which require the police to take directions from the Magistrate having jurisdiction to try the case. Section 155(2) requires that no police shall take up non-cognisable case without an order of the Magistrate having power to try such case or commit the case for trial. Again Section 157 requires that when the police officer has reason to suspect the commission of an offence which is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Section 173 requires that on the completion of every investigation under the Chapter the Officer-in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence a police report as required in the form prescribed. Section 8 of the Criminal Law Amendment Act specifically empowers the Special Judge to take cognizance of the offence without the accused being committed to him. In taking cognizance of an offence without the accused being committed to him he is not a Sessions Judge for Section 193 Cr.P.C. provides that no Court of Sessions Judge shall take cognizance for any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Strictly he is not a Sessions Judge for no Sessions Judge can take cognizance as a Court of Session without committal. The Criminal Law (Amendment) Act being an amending Act the provisions are intended to provide for a speedy trial of certain offences. The Criminal Law (Amendment) Act is not intended to be a complete code relating to procedure. The provisions of the Cr.P.C. are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. Thus read there could be no difficulty in coming to the conclusion that the Cr.P.C. is applicable when there is no conflict with the provisions of Criminal Law (Amendment) Act. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and

> *after the expiring of the period if the Magistrate having jurisdiction to try the case does not include the Special Judge, it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be a Magistrate having jurisdiction, a charge sheet under Section 173cannot be submitted to him. It is relevant to note that the General Clauses Act, 1897 Section 32 defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word 'Magistrate' may include Magistrates who are not specified in the Section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167."*

12. In the present case, an application was moved on behalf of respondent No.2-complainant under Section 173(8) read with Section 156(3) Cr.P.C. to get the CD as well as the alleged confessional statement of the petitioner-accused dated 05.05.2022, on record. However, the learned trial Court proceeded to dismiss the said application on the ground that the written confession of the petitioner as well as the CD being available with the complainant does not require further investigation. A perusal of the order dated 17.07.2023 (Annexure P-5) indicates complete non-application of mind as contradictory stands have been taken by the learned Judge in this regard. Learned trial Court has tended to the matter in a perfunctory manner which cannot be ignored by this Court. The alleged confession of the petitioner was allowed to be exhibited as Ex. P-37 to Ex.P-39 without passing any effective order under Sections 91, 294, 311 of Cr.P.C or by the Court under Section 165 of the Indian Evidence Act, 1872. Conspicuously,

no such prayer has been made by the prosecution or respondent No.2-complainant by filing a formal application by invoking the relevant provisions. Such an approach adopted by the learned trial Court is thoroughly a bad precedent. This Court also finds it totally arcane as to how respondent No.2 has been allowed to file an application under Section 311A of Cr.P.C. when this Court, vide order passed in CRR No.1895 of 2023 (Annexure P-6), has only granted respondent No.2 the liberty to avail the remedy available under Section 311 Cr.P.C. The provisions of Section 311 Cr.P.C. and Section 311A Cr.P.C. are for entirely different purposes. The justification given by the learned trial Court in its order dated 14.02.2024 (Annexure P-9) that the provisions of Section 311 Cr.P.C. are of a restricted sphere whereas Section 231 Cr.P.C. allows the Court to examine all such evidence produced by the prosecution *"as is essential for just decision of the case"*. The aforementioned reasoning is not in consonance with the scope of Section 231 Cr.P.C. and certainly improper and unpalatable. Section 231 Cr.P.C. provides for the power of the Judge to take all such evidence which may be produced in support of the prosecution. The only discretion vested with the Judge is to defer the cross-examination or recall any witness for further cross-examination. Section 231 Cr.P.C. does not bestow any such discretion to the trial Court to take such evidence which it deems essential for the just decision of the case.

13. The discovery and vindication of truth is the solemn duty of the Court during the trial which ensures the conviction of the guilty and protection of the innocent. Every trial is a voyage of discovery in which truth is the quest. However, the trial must be conducted under the settled practices and the procedure laid down by the legislature in its wisdom. As

such, the Courts must proceed with an intention to seek the truth and make genuine efforts within judicial sphere to ensure that the foundational right of the accused to a fair trial is not trampled and all stakeholders are insulated from any prejudice caused by deviating from the prescribed procedure. Procedural justice cannot be sacrificed on the altar of substantive justice. Judicial and procedural justices are essential components of administration of justice. The bypassing of procedural justice often prejudices the trial and impedes the constitutional right of the parties to free and fair trial. While it is true that procedure is the handmaid of justice, however, pragmatic judicial practice requires that only when it is expedient in the interest of justice and does not cause prejudice to the prosecution or the defence, that deviation from the procedure may be made. Otherwise, any such deviation from the procedural safeguards would be impermissible and would defeat the ends of justice. The Hon'ble Supreme Court in ***Avtar Singh and another Vs. State of Punjab AIR 2023 SC 1588*** has categorically held the following:

> "*It is a settled law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods are necessarily forbidden. Reference can be made to* ***Dharani Sugars and Chemicals Ltd. Vs. Union of India and others*** *reported in* ***(2019) 5 SCC 480.***"

14. The Courts must ensure that the chaff is separated from the grain and the stream of justice is not clogged by unnecessary impediments. It is the onerous duty of the Court to not merely conclude a trial but seek out the truth within the established judicial realms by following the procedural laws provided for this purpose. The Hon'ble Supreme Court in ***Mohan Lal Shamji Soni Vs. Union of India (1991) Supp. 1 SCC 271*** has observed that the role of the Presiding Officer of a trial Court is not limited to that of an

umpire solely responsible for declaring the result at the end of a contest. The Presiding Officer is duty bound to play an active role in the proceedings, independent of the parties.

15. If the Court deems production of any documents necessary in order to render substantial and effective justice, it may allow production of the same at any stage of the trial. However, it must be ensured that permitting such evidence is only done after following the drill of the prescribed procedure and not merely at the *ipse dixit* of either the prosecution or the accused so that no prejudice is caused to the other party. If such an approach is allowed, a party may produce any document at any stage to startle the other party by introducing a new twist or fresh material which would make it well-nigh impossible for the criminal courts to conclude its proceedings and the concept of free and fair trial would get jeopardized. It would also deprive the other party of his right of effective cross-examination. A delicate balance must be struck between the rights of the parties to the trial thus, making a complete divulgence of such evidence an indispensable feature of the right to a fair trial. It is in this context that time and again, Section 207 Cr.P.C. has been held to be mandatory in nature. The accused can only reasonably prepare and defend himself against the charges levied on him if he is made aware of all the incriminating evidence relied upon by the prosecution to prove his guilt.

16. The documents relied upon by the prosecution are brought on record by the investigating agency before the Court concerned by filing the final report under Section 173 Cr.P.C. In the case at hand, the investigation agency has not taken into possession the said material during the investigation. The complainant-respondent No.2 was aware of the existence

of the said material from the very inception but, in a most cavalier manner, she only produced it on 01.02.2024 when the prosecution concluded its evidence and the matter was fixed for 07.02.2024 for recording of the statement of the petitioner under Section 313 Cr.P.C. The conduct of the learned trial Court in exhibiting the said document, has virtually disrobed the petitioner of his right to effectively cross-examine the complainant. As such, it is of the utmost importance that if any fresh material is sought to be produced before the Court, the same is done after seeking its permission by making an application under the relevant provisions i.e., either under Section 91, 294, 311 of Cr.P.C. or by investigating agency by filing supplementary report under Section 173(8) Cr.P.C. or by the trial Court under Section 165 of the Indian Evidence Act, 1872. Curiously, the said material was exhibited as Ex. P-37 to Ex. P-39 without any application made to that effect before the learned trial Court. This Court cannot appreciate this approach of the learned trial Court as it is opposed to the scheme of the Cr.P.C.

CONCLUSION

17. In view of the aforesaid discussion and the elucidation of the relevant provisions, the following conclusion is drawn:

(i) Obtaining the handwriting or signature specimen of the accused under Section 311A Cr.P.C. during criminal proceedings is not hit by the bar of Article 20(3) of the Constitution of India.

(ii) The words *"proceeding under this Code"* mentioned in Section 311A Cr.P.C should naturally include the stages of inquiry and trial and as such, the provisions can be invoked during investigation as well as during trial.

(iii) Since the Special Court under the POCSO Act is the court of original jurisdiction, it has the power to pass order under Section 167 Cr.P.C., therefore, it certainly has power to deal with the application under Section 311A Cr.P.C. as there would be no occasion otherwise to entertain such an application by a Magistrate.

(iv) No fresh material can be produced before the trial Court, without seeking its permission by making an application under the relevant provisions i.e., either under Section 91, 294, 311 of Cr.P.C. or by investigating agency by filing supplementary report under Section 173(8) Cr.P.C. or by the trial Court under Section 165 of the Indian Evidence Act, 1872.

18. Accordingly, as an upshot of the above discussion, the impugned order dated 14.03.2024 (Annexure P-13) is set aside and the matter is remanded back to the learned trial Court to decide it afresh strictly in accordance with law.

19. Nothing observed hereinabove shall be construed as expression of opinion of this Court on merits of the case and the trial Court shall proceed without being prejudiced by the observations made above.

20. The instant petition stands disposed of in the aforesaid terms.

21. Pending miscellaneous application(s), if any, also stands disposed of.

(HARPREET SINGH BRAR)
JUDGE

April 18, 2024
Pankaj*

	Whether speaking/reasoned	Yes/No
	Whether reportable	Yes/No