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Crl.M.C No.5970 of 2021

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 20<sup>TH</sup> DAY OF DECEMBER 2024 / 29TH AGRAHAYANA,

1946

CRL.MC NO. 5970 OF 2021

CRIME NO.1130/2019 OF OLLUR POLICE STATION, THRISSUR

SC NO.811 OF 2020 OF ADDITIONAL SESSIONS COURT-I, THRISSUR

PETITIONER/ACCUSED NO.2:

GEORGE P.O.,  
AGED 72 YEARS,  
S/O. OUSEPH, PARANIKKULANGARA HOUSE,  
OLLUKKARA DESOM, OLLUKKARA VILLAGE,  
THRISSUR, PIN-680 655

BY ADVS.  
V.JOHN SEBASTIAN RALPH  
VISHNU CHANDRAN  
RALPH RETI JOHN  
APPU BABU  
SHIFNA MUHAMMED SHUKKUR  
MAMATHA S. ANILKUMAR  
ANILA T.THOMAS

RESPONDENTS/COMPLAINANT:

1 STATE OF KERALA,  
REPRESENTED BY THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, COCHIN-682 031



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2 BENNY JACOB,  
INVESTIGATING OFFICER (CW34) ,  
INSPECTOR OF POLICE, OLLUR POLICE STATION,  
THRISSUR,PIN-680 006

BY ADV  
SRI.G.SUDHEER, PUBLIC PROSECUTOR  
SRI.M.K.SREEGESH, AMICUS CURIAE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON  
20.12.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



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**'C.R'**

**K.BABU, J.**

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**Crl.M.C No.5970 of 2021**  
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Dated this the 20<sup>th</sup> day of December, 2024

**ORDER**

The petitioner seeks to quash the proceedings against him in S.C No.811/2020 on the file of the Additional Sessions Court-I, Thrissur. The petitioner is the former chairman of the Child Welfare Committee, Thrissur. He functioned as such for a period from 2009 to 2019. He has been arrayed as accused No.2 (Crime No.1130/2019 of Ollur Police Station) in the Sessions Case.

2. The offences alleged are punishable under Sections 450, 354(A), 376(2)(l), 376(2)(i) and 506 of the IPC and Sections 4, 3(b), 6, 5(k), 12 read with Section 11 (iii) and Section 21 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The petitioner has been arrayed as accused No.2, alleging the offence under Section 21 read with Section 19(1) of the POCSO Act for non-



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reporting of the matter to the police.

3. The incident came to light after many years while the victim was sexually abused by an auto driver for which Crime No.1028/2019 was registered. In that crime, the provisions of the POCSO Act were not included as the victim had attained 19 years on the date of the second crime.

4. The allegation against the petitioner is that he had not reported the incident to the police, when it was informed to him in 2014.

5. The allegation in the present crime is that accused No.1 had shown the victim porn videos digitally and committed penetrative sexual assault on her.

6. The case of the petitioner is as follows:

(A) The petitioner had duly intimated the matter to the police. He had informed the matter to the police over the phone and made an endorsement in the relevant file "directed to police" sd/-



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06.02.2014.

- (B) The CWC got information regarding the incident only on 05.02.2014. The petitioner reported the matter to the police on the very next day.
- (C) During 2014, in the office of the CWC, infrastructure like internet facilities, secretarial staff, etc, were not available. The petitioner himself would do all the typing work on his personal computer. In the present case, the petitioner himself prepared a letter directing the police and transferred to the CWC for necessary action.

7. The learned counsel for the petitioner raised the following contentions:

- (i) The petitioner had directly informed the matter to the police over the phone and also taken steps to report the matter to the police.



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(ii) Sanction under Section 197 Cr.PC is required to initiate the prosecution as the alleged act was committed during the course of his official functions.

8. This Court appointed Advocate Sri.M.K.Sreegish as Amicus Curiae.

9. The learned Amicus Curiae extensively addressed arguments on the subject. The learned Amicus Curiae submitted that principles governing the interpretation of the non-obstante clause in Section 19 of the POCSO Act are to be ascertained keeping in mind the objects of the acts. The learned Amicus Curiae submitted that the best interest and well-being of the child are the relevant factors of paramount importance while constructing Section 19 of the POCSO Act so as to see whether sanction under Section 197 of the Cr.PC is required when the prosecution alleges that any public servant failed to report offences under the POCSO Act that came to his/her notice. The learned Amicus Curiae



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submitted that being a child Centric legislation, the legislative mandate is intended to overcome the tendency of non-reporting of the incident to protect the child.

10. The learned counsel for the petitioner submitted that the non-obstante clause in Section 19 of the POCSO Act does not exclude the applicability of Section 197 of the Cr.PC for an offence committed under Chapter V of the POCSO Act. The learned counsel for the petitioner submitted that reporting the information relating to the offence under the POCSO Act does not come under an act in the private capacity of the public servant.

11. The learned Amicus Curiae, relying on the relevant provisions in the POCSO Act and the Code of Criminal Procedure, submitted that the non-obstante clause in Section 19 of the POCSO Act is not inconsistent with the subject matter of Section 197 of the Cr.PC and therefore, does not exclude the applicability of Section 197 of the Cr.PC for an offence committed under Chapter V of the POCSO Act. The learned Amicus Curiae submitted that the mandate



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to report does not relate to the official character of the public servant. The mandate to report stipulated in Section 19 of the POCSO Act is to be performed in his private capacity.

12. The issues that arise for consideration:

- (1) Whether the non-obstante clause in Section 19 of the POCSO Act, excludes the operation of Section 197 of the Cr.P.C.
- (2) When a public servant fails to report the commission of an offence as ordained by Section 19 of the POCSO Act, whether sanction as contemplated by Section 197 of the Cr.P.C is required to take cognizance of such offence.

### **ISSUE NO.1**

13. For convenience of analysis, Section 19 of the POCSO Act is extracted below:

#### **“19 - Reporting of offences**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an





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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



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or criminal, for giving the information in good faith for the purpose of sub-section (1).

14. The learned Amicus Curiae enumerated the following principles governing the interpretation of a non-obstante clause relevant to the context:

- (a) The non-obstante clause is a legislative device to the provisions of law mentioned therein in specified circumstances [**Aswini Kumar Ghose v. Arabinda Bose, (1952) 2 SCC 237**].
- (b) It is a legislative device usually employed to give an overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment [**Union of India v. G.M. Kokil, 1984 Supp SCC 196**].
- (c) A non-obstante clause is appended to a section in the beginning so as to give the enacting part of the section an overriding effect over the



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provision of the Act specified in the non-obstante clause in case of conflict **[Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447]**.

- (d) The intention of the legislature is to be gathered by directing its attention not merely to the section to be construed but to the entire statute **[State of W.B. v. Union of India, 1962 SCC OnLine SC 27]**.
- (e) Interpretation of the non-obstante clause must depend on the text and the context. The statute deserves to be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word **[RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424]**.
- (f) If a statute is conceived in the context of its



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enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the contextual glass. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place **[RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424]**.

- (g) A non-obstante clause is intended to exclude the operation of conflicting provisions of the same statute or the provisions of other statute, but for that reason alone, the non-obstante clause deserves to be construed strictly **[Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85]**.



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- (h) When the section containing the non-obstante clause does not refer to any particular provisions which it intends to override, but refers to the provisions of the statute generally, it deserves to be interpreted bearing in mind that in such cases, the non-obstante clause does not exclude the whole Act and stands all alone by itself **[A.G. Varadarajulu v. State of T.N., (1998) 4 SCC 231 and Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85]**. In such cases, the provisions which are contrary/inconsistent deserve to be identified first.
- (i) If the legislature appends a non-obstante clause in a later enactment, it conveys that the legislature intends that the later enactment should prevail to the extent of inconsistency **[Madhav Rao Jivaji Rao Scindia v. Union of India,**



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**(1971) 1 SCC 85].**

(j) It is a settled rule of interpretation that if one construction leads to a conflict and another construction leads to the possibility of both Acts being harmoniously construed, then the latter must be adopted **[P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672].**

(k) The parliament is deemed to know the existing laws when it enacts a new enactment **[Kishorebhai Khamanchand Goyal v. State of Gujarat, (2003) 12 SCC 274].**

15. The learned Amicus Curiae has taken me to the objects of the POCSO Act to understand the import of the non-obstante clause in Section 19 of the POCSO Act. The statement of objects and reasons of the POCSO Act read thus:

**“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*,



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provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11<sup>th</sup> December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

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

4. It is, therefore, proposed to enact a self contained



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

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

6. The Notes on Clauses explain in detail the various provisions contained in the Bill.

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

16. The POCSO Act is a landmark legislation for the protection of child rights and to prevent the sexual abuse and exploitation of children. It was enacted with reference to Article 15(3) of the Constitution recognizing the constitutional obligation, realizing that the then-existing laws do not adequately address sexual offences against children. The best interest and well-being of the child are regarded as factors of paramount importance at every stage, and the interest of the child both as a child and as a witness is





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safeguarded by providing a child-friendly procedure.

17. The POCSO Act is a gender-neutral legislation. Chapters II to IV of the Act deal with various offences against children. Chapter V of the Act sets out the procedure for reporting cases. Chapter VI provides for recording the statement of the child. Chapters VII and VIII provide for Special Courts and the procedure and powers of Special Courts, including the recording of evidence. Section 31 of Chapter VII postulates that the provisions of the Cr.PC shall apply to the proceedings save as otherwise provided in the POCSO Act. Chapter IX sets out the miscellaneous provisions. Section 42A of Chapter IX stipulates that the provisions of POCSO Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. It further provides that in case of any inconsistency, the provisions of the POCSO Act shall have an overriding effect on the provisions of any such law to the extent of the inconsistency.

**Object of Section 19 of the POCSO Act**



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18. The mandate to report the offence/apprehension of commission of offence as envisaged by Section 19 of the POCSO Act is intended to achieve the following objects:

- (a) The mandate to report the apprehension that an offence is likely to be committed is a preventive measure intended to stall the possibility of commission of the offence.
- (b) The mandate to report is a legislative tool to overcome the tendency of witnesses of child abuse to be silent, giving undue weightage to factors like social stigma, community pressure, difficulties of navigating the criminal justice system, dependency on the perpetrator emotionally and economically and so on.
- (c) The legislative mandate is intended to overcome the tendency of even the parents and other members of the family not to report



such crimes believing that non reporting of the same would protect the child from social stigma which they believe would do more harm to the victim.

- (d) The legislative mandate subserves the purpose of curbing the growing tendency not to report the offences, which in turn encourages the perpetrator to remain silent and prowl for the next victim.
- (e) The mandate to report the offence is intended to obviate such tendency and to weed away any such loophole that would facilitate the perpetrator committing/repeating an offence, encouraged by the remote possibility of reporting the commission of offence.
- (f) Being a child-centric legislation, prompt reporting facilitates both prevention or



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commission of the offence and ensuring that in such cases the tormentor, shall not go scot-free.

- (g) To make the reporting effective and not dependent on the nature of the office on whom the statutory mandate to report is cast.
- (h) Section 19 casts such mandate on any person, including a child, who has knowledge about the commission of an offence/apprehension that an offence is likely to be committed, irrespective of the nature of the office held by such person. Hence the Act casts a mandate on every person who has knowledge of the commission of offence/apprehension that the offence is likely to be committed to report such offence, unlike Section 21(2) of the POCSO Act, which casts a mandate on any person being in



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charge of a company or institution to report the commission of an offence, under Section 19 (1) of the POCSO Act by his/her subordinates.

19. The Supreme Court in **Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546]** has taken judicial notice of the lack of statutory framework for prompt reporting of an offence which had caused the death of a minor child of moderate intellectual disability.

20. In **State of Maharashtra v. Maroti [(2023) 4 SCC 298]** the Supreme Court highlighted the importance of the legal obligation for reporting offences under the POCSO Act. The Supreme Court held that the provisions for reporting are included with a view to ensure strict compliance with the provisions under the POCSO Act to ensure that the tender age of children is not being abused and their childhood and youth are protected against exploitation. On the scope of Section 19(1) of the POCSO Act, the Supreme Court held that since the failure to discharge the obligation under the section



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is punishable only with imprisonment for a short duration, there exists a tendency not to attribute seriousness to the offence. The Supreme Court stressed the utmost importance of prompt reporting of the offence under the POCSO Act.

**Degree of inconsistency between Section 19 of the POCSO Act and the relevant provisions in the Cr.P.C .**

21. I shall now try to identify the provisions in the Code of Criminal Procedure which are inconsistent with the statutory mandate contained in Section 19 of the POCSO Act. Section 19 of the POCSO Act does not refer to any particular provision of the Code of Criminal Procedure. The non-obstante clause in Section 19 of the POCSO Act is to be constructed strictly so that its overriding operative effect is restricted only to the contradictory provisions of the Code of Criminal Procedure and not to the entire Code.

22. The provisions dealing with reporting of offence in the Code of Criminal Procedure are Sections 39 and 40. Those sections cast a mandate on the public, including the officers employed in



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connection with the affairs of a village, to report the commission of offences specified in the Section. Those sections are *pari materia*, with corresponding provisions being Sections 33 and 34 of the BNSS.

23. The inconsistencies between Section 39 of the Cr.PC and Section 19 of the POCSO Act are set out hereunder:

Section 39 of the Cr.PC	Section 19 of the POCSO Act
The mandate to report by every person is restricted to offences specified therein.	The mandate to report extends to all the offences under the POCSO Act.
The mandate extends to report the intent to commit an offence.	The mandate to report also includes the mandate to report when any person apprehends that an offence is likely to be committed.
The mandate to report the offence is subject to any reasonable excuse.	The POCSO Act does not offer any exception to the mandate to report the commission of offences.
The failure to report under Section 39 of Cr.PC by itself is not defined as an offence.	The act of non-reporting of an offence by itself is tantamount to an offence.

24. The above table will assist us to analyse the inconsistencies between Section 19 of the POCSO Act and Section



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39 of the Cr.PC on the principle of 'subject matter test'. The above table indicates that Section 19 of the POCSO Act and Section 39 of the Cr.PC, in respect of the subject matter mentioned above, appear to be inconsistent with each other. Therefore, when a person is to be tried for his failure to report under Section 19 of POCSO Act, he cannot resort to Section 39 of the Cr.PC and take protection on the ground that he had a reasonable excuse not to report the offence. Therefore, in the above context, Section 19 of the POCSO Act overrides the provisions of Section 39 of the Cr.PC.

25. The non-obstante clause of Section 19 of the POCSO Act is not intended to override the provisions of the Code of Criminal Procedure, which are not inconsistent with Section 19 of the POCSO Act.

26. In **Ismail. M v. State of Kerala [2019 (3) KLT 1117]** by applying the subject matter test, this Court laid down the proposition that Section 19 of the Act operates as a special provision in the matter of reporting of offences under the POCSO





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Act and Section 31 of the POCSO Act, mandates the applicability of the Code of Criminal Procedure which are not inconsistent with Section 19 of the POCSO Act.

27. In **State of A.P. v. Mangali Yadagiri (2015 SCC OnLine Hyd 579)**, the Hyderabad High Court applied the 'object test' while considering the issue pertaining to the jurisdiction of the Court to try a case when offences alleged against the accused are triable under two legislations that is, the POCSO Act and SC/ST (Prevention of Atrocities) Act, 1989. Following the 'object test' laid down by the Supreme Court in **Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750]** and **KSL and Industries Ltd. v. Arihant Threads Ltd. [(2008) 9 SCC 763]**, the Hyderabad High Court held that the test to be applied is that the later enactment must prevail over the earlier one. The Court observed that bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier.



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28. In Re: The Registrar (Judicial) High Court (MANU/TN/1941/2017) the Division Bench of the Madras High Court while considering a question regarding the jurisdiction of Court as to whether it is a special court under the POCSO Act or the exclusive special court or the special court under the SC/ST Act has the power to remand the accused during investigation, to take cognizance of the offences on a police report or on a private complaint and also to try the offender held thus:

**“46.** Even otherwise, applying the standard norms of the rules of interpretation, when there are two analogous provisions in two different special enactments indicating overriding effect on the other Act, then, the Court has to look into the object of the two enactments and if the object is also more or less, one and the same, the Court shall hold that the Act which is subsequent in point of time shall have overriding effect over the Act which is earlier in point of time.”

29. The Delhi High Court in **Independent Thought v. Union of India [(2023) 2 HCC (Del) 634]**, addressing the issue concerning the overriding effect of Section 19 of the POCSO Act over the restrictions imposed by Section 198(1) read with Section 198(3) of the Cr.PC held that Section 19 of the POCSO Act, read with Section



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21, shall override the restrictions imposed by Section 198(1), read with Section 198(3) of the Cr.PC.

**The amendment to the Indian Penal Code, Code of Criminal Procedure and POCSO Act by Act 13 of 2013 and the corresponding provisions in the BNSS, 2023**

30. In the light of the Criminal Law (Amendment) Act, 2013 (Act 13 of 2013), amendments were incorporated into the Indian Penal Code, the Indian Evidence Act and the POCSO Act. By Act 13 of 2013, in the Code of Criminal Procedure, the following explanation was incorporated to sub-section (1) of Section 197 of the Cr.PC. The explanation reads thus:

**“197. Prosecution of Judges and public servants.-**

xxx    xxx    xxx

Explanation.--for the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code (45 of 1860)”

31. The Act 13 of 2013 also introduced Section 42A to the



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POCSO Act. Section 42A reads thus:

**“Section 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.”

32. Act 22 of 2018 substituted Sections 376A, 376AB, 376C, 376D, 376DA and 376DB in the Explanation to Section 197 Cr.PC for "Sections 376A, 376C and section 376D".

33. The section corresponding to Section 197 of the Cr.PC in the BNSS, 2023 is Section 218. The third proviso to Section 218 of the BNSS is the provision corresponding to the Explanation to Section 197 Cr.PC. The third proviso reads thus:

**“218. Prosecution of Judges and public servants.-**

xxx    xxx    xxx

Provided also that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 64, section 65, section 66, section 68, section 69, section 70, section 71, section 74, section 75, section 76, section 77, section 78, section 79, section 143, section 199 or section 200 of the Bharatiya Nyaya Sanhita, 2023.”

34. The legislature only added Section 69 of the BNS, 2023



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(sexual intercourse by employing deceitful means etc.) an offence of the same nature, in the exception provided in Section 218 BNSS.

35. The above extracted legislations manifest that:

- (i) Those legislations were made after appreciating the interplay of all the four Acts, that is, the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act and the POCSO Act.
- (ii) Even though the legislature was conscious of the immunity granted to the public servant under Section 197 Cr.PC and the provisions of the POCSO Act, the legislature did not incorporate an offence under Section 19 read with Section 21 of the POCSO Act, as to carve the same out of Section 197 of the Cr.PC or Section 218 of the BNSS as an exception to the applicability of the



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immunity provided under those sections.

36. Section 42A of the POCSO Act also indicates that the Act shall operate not in derogation of the provisions of the Code of Criminal Procedure. The non-derogative provision in Section 42A of the POCSO Act expresses the legislative intent not to detract from or abrogate the provisions of the Code of Criminal Procedure altogether in its applicability to the offences under the POCSO Act.

37. The principle of the *subject matter test* and the *particular perspective test* makes it clear that the operation of the non-obstante clause in Section 19 of the POCSO Act is restricted to the overlapping subject matters prescribed in the Code of Criminal Procedure or in the BNSS. Section 42A of the POCSO Act has restricted the operation of the non-obstante clause to the subject matters over which the special law shall have an overriding effect on the general law.

38. Section 197 of the Cr.PC and Section 218 of the BNSS are intended to operate as a safeguard against public servants from



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being dragged into vexatious proceedings for having discharged their official duties. The legislature appears to have perceived that the defence of having committed the offences in the course of discharge of duty is not available in most of the offences under the POCSO Act. Such defences are available only in cases of physical examination by medical practitioners, physical education teachers, etc. In those cases, it is possible for the court to adjudicate the applicability of the safeguard extended by Section 197 of the Cr.PC after considering the facts.

39. The offences under Chapter V of the POCSO Act are not carved out as an exception to Section 197 of the Cr.PC or in Section 218 of the BNSS.

40. Applying the *lex posteriori rule*, it is manifest that the parliament has consciously did not include the offence under Section 19 read with Section 21 of the POCSO Act as an exception to Section 197 of the Cr.PC or under Section 218 of the BNSS.

41. The resultant conclusion is that the non-obstante clause



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in Section 19 of the POCSO Act is not inconsistent with the subject matter of Section 197 of the Cr.PC or Section 218 of the BNSS and does not exclude the applicability of Section 197 of the Cr.PC or Section 218 of the BNSS.

### **ISSUE NO.2**

42. The following are the conditions to be satisfied for extending the protection of Section 197 of the Cr.PC or Section 218 of the BNSS:

- (A) The accused was a Judge, Magistrate or public servant, not removable from his office by or with the sanction of the Government.
- (B) He faces any offence alleged to have been committed while acting or purporting to act in the discharge of his official duties.

43. In **Dr. Hori Ram Singh v. Crown (1939 SCC OnLine FC 2)**, the Federal Court considered the necessity of seeking sanction under the relevant provisions of the Government of India Act, 1935.





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The Federal Court held that the necessity for sanction must be determined with reference to the nature of the allegations made against the public servant. The Court observed that if the allegations cannot be held to relate to any act done or purporting to be done in the execution of his duty the consent of the authorities would not be necessary for the institution of the proceedings. The Court held that the act/omission should be attributable to the official character of the person doing it. The Court rejected the requirement of sanction in those cases in which the official character of the person provided him an opportunity for commission of crime.

44. In **H.H.B. Gill v. King (1948 SCC OnLine PC 10)** the Privy Council approved the ratio laid down in **Dr. Hori Ram Singh (supra)** and laid down the proposition that a public servant can only be said to act or purport to act in the discharge of his official duty, if his act or omission is such as to lie within the scope of his official duty.

45. In **Amrik Singh v. State of Pepsu (1955 SCC OnLine SC 102)**,



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the Supreme Court laid down the proposition that if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, and then sanction is necessary.

46. In **P. Arulswami v. State of Madras [(1967) 1 SCR 201]** a Three-Judges Bench of the Supreme Court after referring to **Dr. Hori Ram Singh** (supra), **H.H.B. Gill** (supra) held that the act of criminal misappropriation was not committed by the accused while he was acting or purporting to act in discharge of his official duties and the offence had no direct connection with the duties of the accused as a public servant and his official status only furnished him with the opportunity to commit the offence.

47. A Constitution Bench of the Supreme Court in **Matajog Dobey v. H.C. Bhari, (AIR 1956 SC 44)** while holding that Section 197 Cr.PC was not violative of the fundamental rights under Article 14 of the Constitution of India observed thus:

**"15.....Public servants have to be protected from harassment in the discharge of official duties while**



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ordinary citizens not so engaged do not require this safeguard. It was argued that Section 197, Criminal Procedure Code vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction....”

48. The Supreme Court in **Matajog Dobey** (supra) on the test to be adopted for finding out whether Section 197 of the Code was attracted or not observed thus:

“17. Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; ‘any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty’. But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the



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accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.”

49. In **Pukhraj v. State of Rajasthan [(1973) 2 SCC 701]**, the Supreme Court held thus:

“2.....While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the ‘capacity in which the act is performed’, ‘cloak of office’ and ‘professed exercise of



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the office' may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty...."

50. In **Rakesh Kumar Mishra v. State of Bihar [(2006) 1 SCC 557]**, the Supreme Court reiterating the earlier decisions, held thus:

"12....The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in the discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned...."

51. In **D. Devaraja v. Owais Sabeer Hussain (2020) 7 SCC 695]**, the Supreme Court elucidated the import of Section 197 of the Cr.PC. The Supreme Court held that the protection under Section 197 of the Cr.PC is available only when the alleged act/omission committed by the public servant is reasonably connected with the discharge of his official duty and the offence committed outside the scope of his duty will certainly not require sanction.

52. The principles that crystallised from the aforesaid precedents are:



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- (a) The application of Section 197 of the Cr.PC or Section 218 of the BNSS varies from facts to facts.
- (b) The act or omission must have a reasonable connection with the discharge of official duty.
- (c) It should come within the scope of his official duty.
- (d) Section 197 of the Cr.PC does not apply to acts done purely in a private capacity by a public servant.
- (e) The protection of Section 197 of the Cr.PC applies even if the act/omission is committed in excess of his official duty.

53. Section 19 of the POCSO Act casts a mandate on any person to report the commission of an offence. The mandate to report does not relate to his official character. The mandate to report contained in Section 19 of the POCSO Act is to be performed



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in his private capacity.

**The present case**

54. The petitioner was the chairman of the Child Welfare Committee, Thrissur during 2009 to 2019. The case of the victim came to the CWC from Child Line through a letter dated 05.02.2014 addressing the Chairman, CWC. The details of the abuse were not mentioned in the letter. There was a general mention of the abuse. On the very next day, the petitioner informed the matter to the police over the telephone. He made an endorsement to the effect “directed to police” sd/- 06.02.2014 on the letter (Anx.2).

55. The charge against the petitioner is that he failed to report the matter. The petitioner got information only on 05.02.2014. He reported the matter to the police on the very next day. The necessary conclusion is that the petitioner has discharged the mandate cast on him in his private capacity under Section 19 of the POCSO Act.

56. True that there are positive assertions against the



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petitioner. Annexure 2 and the other materials produced by the accused show that the petitioner informed the police regarding the abuse.

57. I am conscious of the principle that when a prayer for quashing the final report is made, the Court has to only consider whether the allegations disclose the commission of the cognizable offence or not and the Court is not required to consider on merits whether or not the allegations make out a cognizable offence.

58. It is equally settled that if the High Court is fully satisfied that the materials produced by the accused are such that would lead to the conclusion that his defence is based on sound, reasonable and indubitable facts or the same rule out or displace the assertions in the final report or the complaint or the materials relied on by the accused reject and overrule the veracity of the allegations, the judicial conscience of the High Court would persuade to exercise its power under Section 482 of the Cr.P.C and to quash such criminal proceedings to avoid or to prevent the





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abuse of the process of the court and secure the ends of justice {Vide: **Rajiv Thapar v. Madan Lal Kapoor [(2013) 3 SCC 330]**, **Prashant Bharti v. State (NCT of Delhi) [(2013) 9 SCC 293]** and **Divya S Rose v. State of Kerala [2023 (7) KHC 132]**}.

59. The materials relied on by the petitioner overrule the veracity of the allegations against him in the final report. The prosecution failed to place any material to refute those materials relied on by the petitioner. Therefore, the proceedings initiated against him would result in the abuse of the process of the Court and would not serve the ends of justice.

60. **In the result**, Annexure 1 Final Report in Crime No.1130/2019 of Ollur Police Station and all further proceedings pursuant to it, as against the petitioner, stand quashed. It is made clear that the observations made in this order are restricted to the petitioner, and the Trial Court may proceed with the other accused in accordance with the law.

**Non-disclosure of the identity of the victim**



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61. The learned Amicus Curiae, after appreciating the records annexed to the petition, submitted that the final report revealed the identity of the victim that goes against the very object of the mandate of the non- disclosure of the identity under the POCSO Act.

62. Sub-section (7) of Section 33 of the POCSO Act mandates that the Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial.

63. As per Section 228-A of IPC, whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376 is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Under Section 228-A, disclosure of the identity of the victim is permitted only under certain special circumstances provided therein. Section 23(1) of the POCSO Act prevents the media from making any report or presenting



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comments on any child from any form of media or studio or photographic facilities without having complete and authentic information which may have the effect of lowering his reputation or infringing upon his privacy. The Section further prevents the disclosure of the identity of a child, including his name, address and photograph, family details, neighbourhood, or any other particulars that may lead to the disclosure of the identity of the child. As per the said provision, the disclosure of identity is allowed only when the Special Court competent to try the case under the Act permits it to do so.

64. Sections 66 and 67 of the Information Technology Act, 2000 make publishing or transmitting obscene materials or sexually explicit materials or evidently doing any act violating the privacy of an individual punishable. Section 74 of the Juvenile Justice Act also prohibits disclosure of identity of children.

65. In **Nipun Saxena v. Union of India [(2019) 2 SCC 703]** the Supreme Court issued the following directions:



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

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

50.2. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.

50.3. FIRs relating to offences under Sections 376, 376-A, 376- AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E IPC and the offences under POCSO shall not be put in the public domain.

50.4. In case a victim files an appeal under Section 372 CrPC, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.

50.5. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.

50.6. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty- bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent



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in a sealed cover to the investigating agency or the court.

50.7. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228-A(2)(c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228- A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations.

50.8. In case of minor victims under POCSO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.

50.9. All the States/Union Territories are requested to set up at least one "One-Stop Centre" in every district within one year from today."

66. Those provisions and guidelines manifest that the interest of the victim of sexual offences are to be taken care of by the judiciary, executive and all organs of the State. It is painful to note that the police in the present case failed to protect the paramount interest of the victim in this regard.

67. The State Police Chief is directed to see that the mandate of the POCSO Act that the identity of the victim is not revealed is scrupulously followed by the members of the police force.



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**The lacuna in sub-section (5) of Section 19 of the POCSO Act.**

68. The learned Amicus Curiae brought to the notice of the Court that the lacuna in sub-section (5) of Section 19 of the POCSO Act requires to be addressed. The learned Amicus Curiae submitted that whereas sub-section (1) of Section 19 of the POCSO Act casts a duty on even a child to report the commission of an offence/apprehension to commit an offence, the protection extended by sub-section (5) of Section 19 of the POCSO Act is restricted to the victim and not to the child reporting the offence/apprehension to commit the offence. The professed mandate of the POCSO Act is that the safeguard under sub-section (5) of Section 19 of the POCSO Act deserves to be extended to a child who is reporting the commission of an offence/apprehension of commission of an offence. If such protection is not accorded, the very object of the Act would be defeated. Therefore, it is made clear that the safeguard under sub-section (5) of Section 19 of the POCSO Act is applicable to the child who is reporting the



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commission of an offence/apprehension of the commission of an offence.

69. The Criminal M.C is disposed of as above.

Before parting with the matter, this Court places on record its profound appreciation to the learned counsel Sri.M.K.Sreegesh, for his valuable assistance as Amicus Curiae.

Sd/-  
K.BABU,  
JUDGE

KAS



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APPENDIX OF CRL.MC 5970/2021

PETITIONER ANNEXURES

- |            |  |
|------------|--|
| Annexure 1 | THE CERTIFIED COPY OF THE FINAL REPORT<br>IN CRIME NO.1130/2019  |
| Annexure 2 | CERTIFIED COPY OF THE LETTER ADDRESSED<br>TO THE CHAIRMAN, CWC THRISSUR DATED<br>05.02.2014  |
| Annexure 3 | THE CERTIFIED COPY OF THE CASE FILE IN<br>NO.CWC/TSR/CSA-6/2014, ISSUED TO P.O.<br>GEORGE FROM THE CHILD WELFARE<br>COMMITTEE, THRISSUR DISTRICT, ALONG<br>WITH COVERING LETTER DATED 16.06.2020 |
| Annexure 4 | A TRUE COPY OF THE LETTER DATED<br>26.02.2014 OF CHILD WELFARE COMMITTEE,<br>THRISSUR DISTRICT   |