Appropriate Procedure for Remand of Accused under Protection of Children from Sexual Offences Act:

Rakesh Kumar Singh*

Parliament with a view to provide more deterrent effect on the offenders of sexual offences legislated a new Act called Protection of Children from Sexual Offences Act in the year 2012 which came into effect from 14.11.2012. The Act provides for stringent punishment. However, it seems that the Act suffers from bad drafting and the same is giving tough time to judicial establishment which naturally will result in irregular/illegal orders being passed by the judiciary. The most glaring defect is in respect of production and remand of arrested accused. The question being raised is about the authority who is competent to remand such accused. The Act does not have any direct provision in this respect and the Code prescribes (so far as subsequent remand is concerned) for the magistrate having jurisdiction. Whereas the Act does not give jurisdiction to the Magistrate. In such circumstances, courts are facing problem as in some areas Magistrates are compelled to remand the accused, in some areas Magistrates are voluntarily remanding the accused without any discussion and in some areas the Special Courts are making remand orders. Meaning thereby that same provisions are being interpreted differently in Delhi by different courts which can not be said to be a healthy practice. The present paper is a humble attempt to prepare a correct procedure for such cases.

2. In the normal course, following provisions deal with the after effect of the arrest of any person. Section-56 Cr.PC reads as under:

> **"56. Person arrested to be taken before Magistrate or officer in charge of police station**.-
>
> A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station."

* *Metropolitan Magistrate, Karkardooma Court, New Delhi*

Section-57 Cr.PC reads as under:

"57. Person arrested not to be detained more than twenty-four hours.- No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."

Article-22(2) of the Constitution of India reads as under:

"22(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

2.1. Clearly, an arrested person has to be produced before a Magistrate within 24 hours and there cannot be any escape from it. What will be the procedure after production of the accused has been dealt with in Section-167 Cr.PC which to the extent of relevancy in present context reads as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the **nearest Judicial Magistrate** a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or not jurisdiction to try the case, from time to time, authorise 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 considers further detention

unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:"

2.2. Police is obliged to produce the accused before the nearest Magistrate. In the context of Delhi, the nearest Magistrate is bound to be the Ilaqa Magistrate or on holidays, the duty Magistrate and the police is not required to search any other executive magistrate as the administrative policy adopted in Delhi does not allow absence of Magistracy on any occasion.

2.3. In the present paper, however, we will see that in the context of POCSO Act, we have to read "Special Court" instead of "Magistrate" in Section-167. Therefore, nearest magistrate can also be the nearest special court for POCSO Act.

2.4. From the above provisions, it appears that when the accused is produced before such Magistrate, he has discretion to remand the accused to such custody as he thinks fit for a total period of 15 days irrespective of the jurisdictional competence.

3. Proceeding in respect of offences under other laws is governed by Section-4 and Section-5 of Cr.PC and Section-42A of POCSO Act which read as under:

"4. Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provision hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

"5. **Saving**.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

"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."

3.1. Clearly, unless the POCSO Act provides some different procedure, we have to follow the provisions of CrPC. The present discussion is about the remand proceeding for an offence punishable under a special Act i.e. POCSO Act. We have to see whether POCSO Act provides any other procedure for production or remand of accused or not.

4. **CHAPTER-V:** of the Act is titled as PROCEDURE FOR REPORTING OF CASES and its Section-19 to the relevant extent reads as under:

"19. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who apprehends that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, (a) the Special Juvenile Police Unit; or (b) the local police. (2) Every report given under sub-section (1) shall be (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit. ***** (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 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."

4.1. Pertinently, Section-157 Cr.PC obliges the police to send the report to the Magistrate empowered to take cognizance, whereas Section-19(6) of POCSO Act obliges the police to send a report to the Special Court. To this extent procedure prescribed in the special Act is different and therefore by virtue of subject clause of

Section-4(2) and Section-5, the same has to be followed.

4.2. However, there is no provision in the POCSO Act corresponding to or similar in nature of Section-56, 57 and 167 Cr.PC. Therefore, by virtue of Section-4(2) Cr.PC, the procedure prescribed in the Cr.PC for production and remand of accused have to be followed.

5. Such procedure has already been discussed above. As such, even for the offences under POCSO Act, the arrested accused has to be produced before the Ilaqa/Duty Magistrate as the case may be so far as Delhi is concerned. Such Ilaqa/Duty Magistrate may remand the accused for first 15 days.

5.1. However, Section-167(2) Cr.PC further provides that if such Magistrate does not have jurisdiction to commit or try the case, he may forward the accused to the Magistrate having such jurisdiction. Certainly, this prescription is not for the first production of the accused as provision provides in the starting phase that Magistrate may authorize detention irrespective of jurisdiction (for convenience this Magistrate may be called as "Initial Magistrate"). It is clear that such Magistrate has to consider jurisdictional prescription upon first remand. Though seemingly, the forwarding part uses an expression "may" and therefore some fertile mind can contend that the Magistrate is not required to forward the accused to the Magistrate having jurisdiction (for convenience this Magistrate may be called as "Jurisdictional Magistrate"). It however seems that such a contention can not be accepted. If this was the intention of the legislature, there was not even a need for enacting such prescription. It is well settled law that in certain circumstances even an expression "may" can be deemed to be mandatory. The "Initial Magistrate" has to forward the accused to the "Jurisdictional Magistrate" upon the expiry of the first 15 days.

5.2. **Who will be the "Jurisdictional Magistrate"?** A Magistrate who has jurisdiction to commit the case or to try the case may be called "Jurisdictional Magistrate" for Section-167. Which Magistrate can try a case? A Magistrate who has taken

cognizance of an offence or a Magistrate to whom a case has been transferred or made over in accordance with the law can try the case. Transfer and making over concept can not apply at the initial stage and therefore we are required to consider the cognizance part. Which Magistrate can take cognizance? The Magistrate who has power to take cognizance under section-190 Cr.PC can take cognizance. The same Magistrate shall also have the jurisdiction to commit the case.

5.3. For any trial or committal, the pre-requisite is cognizance. And for taking cognizance there must be a power to take cognizance. If there is no such power available with the Magistrate, he can not take any cognizance. If he can not take cognizance, he can not commit the case or try the case. And therefore he can not be a "Jurisdictional Magistrate".

6. We have to see whether Ilaqa Magistrate has jurisdiction to commit or try the case under POCSO Act or not. Generally, in Delhi all Ilaqa Magistrates do have jurisdiction to commit or try the case by virtue of relevant provisions in the Cr.PC. However, for offences under other laws such as POCSO Act, the procedure prescribed in Cr.PC can only be followed if such law does not provide any other procedure. We have to see whether POCSO Act provides any other procedure for cognizance, committal or trial.

7. Section-31 of POCSO Act would be relevant which reads as under:

"33. (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts."

7.1. Clearly, power to take cognizance lies with the Special Court. The first and foremost power of the special court is to take cognizance of offence without any committal of the accused. Since the provision is having a non-obstinate clause vis a vis Cr.PC, the restriction of Section-193 thereof can not come in the way of such sessions court while exercising power of special court. Some fertile mind can contend that since the provision uses an expression "May", it can not restrict any other court from taking

cognizance. However, this contention can not be accepted. Pertinently Section 190 Cr.PC also uses the expression "May" but no one is saying that any other court can take cognizance under Section-190 Cr.PC. In fact, the expression "May" has been provided only as a discretion to the Court to take cognizance of the matter or not to take cognizance. The expression "May" in Section-190 Cr.PC and in Section-31 POCSO Act is indicative of making of choice on merits and not on making of choice on forums.

7.2. Though, there is now a decision of Hon'ble Supreme Court in ***State vs. V Arul Kumar*** (2016) SCC OnLine SC 582 holding as under:

"Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-bye. Both the alternatives are available. In those cases where chargesheet is filed before the Magistrate, he will have to commit it to the Special Judge."

7.3. The aforesaid cannot be treated as precedent as the same runs contrary to the earlier dictum in ***Essar Teleholdings Ltd. vs. Delhi High Court***, (2013) 8 SCC 1 where the Hon'ble Supreme Court had taken the following view:

*"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."*

7.2. It has to be accepted that Section-31 POCSO Act excludes the jurisdiction of Magistrate so far as taking cognizance is concerned. Further, since a Special Court can take cognizance without committal of an accused, the necessity of committal can not be insisted upon. And therefore, the Magistrate can also not have any jurisdiction for committal. Even otherwise, for any committal proceeding, the per-requisite is taking of cognizance which is not available for the Magistrate in POCSO Act. So he can not exercise any committal jurisdiction.

8. Special court can take cognizance upon complaint or police report and that too without committal. Clearly, there is no necessity that a Magistrate first looks after the police report or complaint. Means, complaints and police reports are not required to be filed before the Magistrate because he cannot do anything on such complaints or police reports. So the complaints or police reports should be filed with the special court.

9. It is at this stage the basic problem comes into picture. As discussed earlier, in POCSO Act cases, a Magistrate does not have any jurisdiction. Then where would the accused be forwarded to by the initial Magistrate upon expiry of first 15 days? The answer lies some where else.

10. POCSO Act only provides that a Special Court can take cognizance of offence upon complaint or police report. But it does not provide anything as to what will happen thereafter or who will comply with pre-cognizance formalities if any. Section-4 (2) Cr.PC provides that offences even under any other law shall be dealt with according to the provisions of Cr.PC subject to any other law providing separate provisions. Section-5 Cr.PC further saves the special procedure provided by any other enactment.

10.1. POCSO Act does not provide anything about the procedure to be adopted after/before taking cognizance by the Special Court. As such by virtue of Section-4 (2) Cr.PC, the procedure prescribed in Cr.PC has to be followed.

10.2. In a complaint case, Cr.PC requires that procedure prescribed in Section-200 to 204 has to be complied with. There is no doubt that a Special Court under POCSO Act can take cognizance upon a complaint. As such it has to follow the procedure prescribed in Section-200 to 204 Cr.PC. These sections however use the word "Magistrate". Is anyone going to say that since these sections use the word "Magistrate", the Special Court is not required to follow the procedure prescribed in Section-200 to 204? I think, the answer has to be in negative. The Special Court has to follow the procedure. And therefore we have to read "Special Court" in section-200 to 204 instead of "Magistrate".

10.3. Even upon taking cognizance on police report, a process (summons or warrant) has to be issued under Section-204 Cr.PC. Even this section uses the expression "Magistrate". Since the Special Court has to follow the same procedure, we have to read "Special Court" in all such sections instead of Magistrate.

10.4. 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 alongwith the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for several provisions of CrPC.

11. At this stage, some fertile mind is bound to quote some other sections of the POCSO Act to contend that jurisdiction must be exercised by the Magistrate. And one of these, Section 33 reads as under:

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

11.1. At the first blush, a contention is bound to arise that since provisions of Cr.PC are applicable and Special Court has to be treated as the Court of Sessions for those provisions, it should not be equated with the Magistrate and therefore, the Special Court can not exercise any power under Section-167 Cr.PC for remand of the accused. However, a deeper scrutiny goes to show otherwise. The special court is not a Court of Sessions. It has only been provided with the position by a deeming fiction and therefore it can not stretch such deeming fiction to create a non-existing jurisdiction in some other person or to destroy the other provisions of the Act. Secondly, even this deeming fiction is subject to other provisions of the Act. Certainly, the other provision will include Section-31of the POCSO Act which empowers the Special Court to take cognizance upon complaint or police report. Meaning thereby that for the purpose of Section-31of the POCSO Act, the deeming fiction will not apply and the Special Court can not be treated as the Court of Sessions. Further, in the absence of any contrary provision, the procedure prescribed in Section-200 to 208 Cr.PC have to be followed by the Special Court on taking cognizance. But those sections of the Cr.PC do not talk about the Sessions Court and relate to the Magistrate. However, on the other hand, by virtue of Section-33 of the POCSO Act, the Special Court is a deemed Sessions Court for the provisions of Cr.PC.

11.2. In such circumstances, we can not apply the literal rule of construction. We can not say that Special Court is equivalent to Magistrate for any provisions of the Cr.PC as it would go against the deeming fiction. However, we also can not say that Special Court being a deeming Court of Sessions is not required to follow

the procedure prescribed in Section-200 to 207 Cr.PC as it would go against the Section-4(2) Cr.PC. We have to harmonize the deeming fiction with cognizance power and other applicable procedure. As such, we have to read an expression "Special Court" in Section-200 to 208 Cr.PC instead of "Magistrate".

11.3. Similar stand has been taken by a three judges bench of Hon'ble Supreme Court in ***Harshad S. Mehta v. State of Maharashtra***, (2001) 8 SCC 257though in the context of Criminal Law Amendment Act, 1952. Following extract may be relevant:

"We may note an illustration given by Mr Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section 157 of the Code will have to be sent to the Special Court though the section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of other provisions of the Code. ***If the expression "Special Court" is read for the expression "Magistrate"****, everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation."*

12. Now if we are reading the expression "Special Court" in place of "Magistrate" in several provisions of Cr.PC on the basis of jurisdictional competence of taking cognizance, there seems to be no reason as to why we should not read the same expression "Special Court" in Section-167 Cr.PC when it talks about the jurisdictional competence.

12.1. We should and have to read section-167 Cr.PC as if it uses "Special Court" instead of "Magistrate". Once read in such manner, no doubt will remain on the board. Upon expiry of first 15 days, the "Initial Magistrate" has to forward the accused to the "Special Court" having jurisdiction.

12.2. Hon'ble Supreme Court was once dealing with special judge's power to remand under Section-167 CrPC in the context of Criminal Law Amendment Act 1952 and made following observations in ***State of T.N. v. V. Krishnaswami Naidu,***(1979) 4 SCC 5:

"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 authorise 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 authorise 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 CrPC 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-cognizable 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 he 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 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 CrPC provides that no Court of Session 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 Magistrate for no Magistrate 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 CrPC 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 CrPC 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 expiry 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 173 cannot be submitted to him. It is relevant to note that the General Clauses Act, 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."

12.3. The aforesaid ratio and reasoning has been accepted by a three judges bench in ***Harshad S. Mehta vs. State of Maharashtra***, (2001) 8 SCC 257 when it stated "Mr Jethmalani, of course, contends that to the aforesaid extent, *Krishnaswami Naidu case* is not correctly decided. We are unable to accept the contention".

12.4. In view of the above, it is clear that we have to read "Special Court" instead of "Magistrate" in Section-167 CrPC. So even the nearest special court can be treated as nearest magistrate under Section-167 apart from the fact that it has to be treated as jurisdictional magistrate.

13. However, there is one more provision in the POCSO Act which prima facie gives trouble to any interpretation. Section-25(2) of POCSO Act provides as under;

"25(2) The magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code."

13.1. On the basis of this provision, one will say that it casts a duty upon the Magistrate to provide copy of certain document to the victim upon final report being filed and therefore the final report should be filed before the Magistrate.

13.2. I however consider that such interpretation will destroy the other

provisions of the Act. If the final report is to be filed before the Magistrate, he has to act on such final report. The initial act on any such report can only be the consideration of the report for taking or not taking the cognizance. By virtue of Section-28, only Special Court is empowered to try the offence and the same is a deeming sessions court under Section-31, therefore, the Magistrate has to commit the case. But the committal is not required for the trial of offences under POCSO Act and power of cognizance has been given to the Special Court by virtue of Section-33. Therefore, the Magistrate can not take the cognizance neither commit the case. As such, the Magistrate can not act upon the final report filed before it. But the Cr.PC does not leave any discretion with the Magistrate not to act upon the final report. Both the situations can not exist at the same time. So the final report can not be filed before the Magistrate.

13.3. If final report can not be filed before the Magistrate, he obviously can not have any document with him to be provided to the victim. At this stage, nature of provision is required to be understood. This particular provision falls in the Chapter-VI titled as Procedures for Recording Statement of the Child and is a sub-section included after sub-section-(1) of Section-25 which talks about recording of statement of child by the Magistrate under Section-164 Cr.PC.

13.4. Section-25(1) and 25(2) POCSO Act have used an expression "The Magistrate". Use of definite article "The" is indicative of singularity and specification. Section-25(1) starts with a condition "If" and provides for the condition for applicability of the Section. The condition prescribed is the form "If the statement of the child is being recorded under Section-164".

13.5. Pertinently, Section-164 Cr.PC provides that any Metropolitan/ Judicial Magistrate can record the statement irrespective of jurisdictional competence. Since, there is no contrary provision in the Act on this specific issue, by virtue of Section-4(2) Cr.PC we have to accept that even under POCSO Act, any Metropolitan Magistrate in Delhi can record the statement of child.

13.6. From the above, it is clear that for the initial part of Section-25(1) POCSO Act the Magistrate may be any Metropolitan/Judicial Magistrate. But then this sub-section thereafter starts using a definite article "The" before "Magistrate" and has obliged the Magistrate to record the statement as spoken by the child. Clearly, once a Magistrate has been chosen from "Any", he has to become "The Magistrate".

13.7. Second sub-section of Section-25 again uses an expression "The Magistrate". If we take into account the fact that this second sub-section falls in the same section-25 and in the Chapter relating to the recording of statement of child, we can arrive at a conclusion that expression "The Magistrate" appearing in Section-25(2) is indicating the same Magistrate who is recording the statement of the child under Section-25(1). Otherwise without existence of "a Magistrate", there cannot be "The Magistrate" and in Section-25 only one Magistrate exists i.e. the Magistrate who is recording the statement of the child.

13.8. Now if any Metropolitan/Judicial Magistrate irrespective of jurisdiction can become "The Magistrate" for the purposes of Section-25 POCSO Act, how can we expect that he will supply the copy of document to the child? But the provision says so. What to do? There can not be any doubt that the provision has been very badly drafted. But we can not do anything on such drafting causalities. Therefore we have to construe the provision in a manner which fulfills its purpose.

14. Inclusion of this provision in the Chapter-VI titled as Procedures for Recording Statement of the Child and after the sub-section-(1) of Section-25 POCSO Act of which talks about recording of statement of child shows the intention of the Parliament in enacting the provision. Clearly it relates only to the statement of the child. Therefore, the only thing which is to be provided under section-25(2) of the POCSO Act to the child is a copy of the statement. In this light if we see this provision, use of the expression "document" will become significant. There are several documents specified in Section-207 Cr.PC and one of the specified documents is the statement recorded

under Section-164. Absence of plural expression in relation to the document in Section-25(2) indicates that the same does not talk about other documents mentioned in Section-207 Cr.PC in the contextual sense.

14.1. Now, if only one document is to be provided to the child, the same can be done in certain ways. We have already noted that the provision is a result of bad drafting and we are dealing with the situation for providing purposive construction to the provision. Therefore we have to fill the gaps until the Parliament chooses to re-draft the provision. The ways of providing copy may be indicated as following:

i. The Magistrate recording the statement may prepare a copy of the same and send to the Special Court in separate envelope with the original proceedings with a request to provide the same to the child at appropriate stage so that upon filing of final report the copy can be given to the child. After all, the provision does not say that the Magistrate has to give the copy to the child by his own hand;

ii. The Magistrate recording the statement may prepare a copy of the same and retain with his office with a direction that whenever intimation of filing of the final report is received, the same may be given to the child;

iii. The Magistrate recording the statement may prepare a copy of the same and may provide the same then and there to the child as the purpose of the provision is to provide the copy and not to implement a strict "stage wise requirement".

☞ 14.2. The second way is clearly not feasible and practicable. First and third ways may be adopted. The first way does not have any problem. All the requirements of Section-25(2) would be fulfilled by adopting the first way. So far as third way is concerned, this can also not give much trouble if we read a judgment of ***Division Bench of Hon'ble High Court of Delhi in Court on Its Own Motion vs State WP(Crl.) No.-468/2010 decided on 06.12.2010.*** The said judgment held that copy of FIR should be given to the accused even prior to the stage of Section-

207 Cr.PC. Otherwise, the only stage at which an accused was entitled to get a copy of FIR was the stage of Section-207 Cr.PC which comes only after filing of final report by the police. However, the Hon'ble Division Bench made the accused entitled to get a copy of FIR even prior to Section-207 Cr.PC. If we follow the same line, there can not be any hesitation to adopt the third way indicated above for providing a copy of the statement recorded u/s-164 to the child even prior to filing of final report. Be that as it may. Achievement of purpose is more important than the way adopted for it so long as the way is not illegal. The Parliamentary purpose behind enacting Section-25(2) seems to be providing a copy of statement made u/s-164 to the child and the same may be achieved by adopting the first or the third way indicated above.

15. Hon'ble High Court of Bombay in ***Km. Shraddha Meghshyam Velhal vs. State*** (Criminal Application No. 354 of 2013 in High Court of Judicature at Bombay, dated 08.07.2013) has taken a view that all the remand proceedings have to be dealt with only by a special court and magistrate has no jurisdiction at all. It took support from the statement of objects and reasons for enacting the POCSO Act which says that special court is to be established for trial of such offences and for matters connected therewith or incidental thereto and that the Act is enacted for safeguarding the well being of child at every stage of the judicial proceeding. This can hardly be accepted for holding that it provides different procedure for remand so as to bring the same within the exception of Section-4 and 5 CrPC. The aforesaid judgment therefore cannot be followed.

16. From the discussion held above, we can safely say that a person arrested for the offence under POCSO Act has to be produced and dealt with in the following manner:

    a. If Special Court of the area is available, the first production shall be before only such court and remand shall be dealt with by such court only;

    b. Any remand after first one shall be dealt with only by the Special Court;

c. If Special Court is not available for first production, the accused shall be produced before the Illaqua MM/Duty MM as the case may be treating him as the nearest Magistrate and irrespective of any jurisdiction;

d. Such MM can grant remand upto 15 days but thereafter has to forward the accused to Special Court;

e. If Special Court grants remand for a period less than 15 days on first production and for further remand, it is not available for any reason, MM cannot extend the custody. Reason is obvious. Only first production can be made irrespective of jurisdiction and not further production. It is for the system to arrangement for such situation by making a link roaster of appropriate judges who in the absence of presiding officer of Special Court can deal with his work; Similarly, if Special Court after some remand is not available, MM cannot extend the custody.

17. There are several other laws which provides for similar situations such as Electricity Act, MACOCA (applicable to Delhi), UAPA, NIA Act etc. It is learnt that in such laws, the Special Courts are dealing with all or further remand proceedings. There seems to be no reason as to why the same procedure should not be adopted for POCSO Act.

****