IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL REVISION APPLICATION NO. 374 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE V.P. PATEL

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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NAVINBHAI BIJALBHAI DHARMANI(DALIT)
Versus
STATE OF GUJARAT

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Appearance:
TIRTH N BHATT(8487) for the Applicant(s) No. 1
MR. MITESH R. AMIN, PUBLIC PROSECUTOR with MR. K.L.PANDYA, APP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE V.P. PATEL**

Date : 08/05/2019
ORAL JUDGMENT

1. This Criminal Revision Application is filed by the Applicant – Child in Conflict with Law (for short "CCL") under Section 102 of the Juvenile Justice (Care & Protection of Children) Act, 2015 (hereinafter referred to as "the Act 2015") and Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr. P.C.") being aggrieved and

dissatisfied with the order 10.8.2017 passed by the learned Principal Magistrate, Juvenile Justice Board (for short "Learned PM JJB"), Palanpur in the proceedings of JCC No. 51/2016 and the order dated 4.2.2019 passed by the learned 3rd Additional District and Sessions Judge, Disa District Banaskantha in Special (POCSO) Case No. 27/2017.

2. Heard learned Advocate Mr. Tirth N. Bhatt for Applicant - CCL and learned Public Prosecutor Mr. Mitesh R. Amin with learned APP Mr. K.L.Pandya for the Respondent – State of Gujarat.

3. The Applicant has challenged the impugned orders by way of this Criminal Revision Application and has prayed for the below mentioned relief:

"*(B) Your Lordships may be pleased to quash and set aside the impugned dated 04.02.2019 passed under Ex. 1 by the Ld. Third Additional District & Sessions Judge, Banaskantha in the proceedings of Special (POCSO) Case No. 27/2017 as well as the order dated 11.8.2017 passed by the Ld. Principal Magistrate, Juvenile Justice Board, Palanpur in the proceedings of JCC No. 51/2016 (Annexure-A) as well as the order framing charge under Exhibit 20 dated 04.02.2019 passed by the Ld. Special POCSO Judge and Third Additional Sessions Judge, Deesa (Annexure-1) + order dated 30.6.2017 (Annexure G1) passed by the Principal Magistrate, Juvenile Justice Board;"*

4. <u>Order under challenge:</u>

The Applicant – CCL has challenged three orders as under:

4.1 <u>Order dated 30.6.2017 passed by the Principal Magistrate,</u>

JJB – It is stated that during the deposition of the complainant, learned Learned PM JJB has held that the FIR discloses that incident took place on 6.4.2016. The age of the CCL is between 16 to 18 years. The allegation against the CCL is for heinous offence as defined under the Act of 2015. In these circumstances, it is necessary to call for the report of preliminary assessment. That in the present case also provisions are attracted. Thereafter the case was adjourned and order dated 30.6.2017 was passed to call for report of preliminary assessment.

4.2 Order dated 11.8.2017 passed by PM JJB – After receiving the report from the Psychologist, the below mentioned order was passed by the learned P.M. JJB under Section 18(3) of the Act 2015. Relevant portion of the order reads as under:

" *3. Considering the report submitted by Dr. Vaid, it is made out that the child in conflict with law has not committed the alleged offence in any compelling circumstances. On the contrary, it appears that he did have the knowledge of the alleged act which he was committing as well as the consequences which might follow from such act. In view of this finding, I am of the clear view that this is a fit case where there is a need for trial of the said child as an adult. Under these circumstances, this Board is required to order transfer of the trial of the present case to the Hon'ble Children's Court. It is, therefore, ordered accordingly. Further, the record and proceedings of this case is also ordered to be forwarded to the Hon'ble Children's Court by letter under my signature.* "

4.3 Order dated 4.2.2019 passed by Children Court – The case was transferred by learned P.M. JJB to the Children Court. On receiving the R & P by the Children Court - 3rd Additional District Judge, Deesa, passed order to proceed the matter under Section

19(1) (i) of the Act 2015. Relevant part of the order reads thus;

"*6. Therefore, this Act and said provisions came into force 15.01.16 and thereafter, rules are come into force on 21.09.16. Rules never takes place of the Act and Rules are generally in aid to the main provision of the Act and therefore, since Act has come into force 15.01.16 and therefore, this Court is having jurisdiction to conduct the trial because concerned Board has after inquiry as contemplated Section 15(1) of the said Act, this matter has been transferred under Section 18(3) of the said Act and therefore, again this matter is not required to be transferred before the Board and therefore, I pass following order:-*

ORDER

This matter shall be proceeded by this Court because it has been transferred by the Concerned Board after holding inquiry under Section 14(1)."

5. Facts of the case:

5.1 The alleged incident took place on 4.4.2016 for which the complaint was lodged before the Deesa Police Station on 6.4.2016. The same is registered vide I-CR No. 34/2016 for the offences punishable under Section 377 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act").

5.2 That the Applicant - CCL was apprehended on 11.4.2016 and was produced before the learned P.M. JJB on the same day. The Applicant had applied for bail which was granted on 18.4.2016. That the investigation was carried out and completed and charge sheet is filed on 25.7.2016. That the case is registered as Juvenile Criminal Case No. 51/2016 (hereinafter referred to as "JCC 51/2016") on 30.9.2016.

5.3 Pursuant to the filing of the charge sheet, learned P.M. JJB has framed charge against the present Applicant – CCL on 20.10.2016. The Applicant – CCL has pleaded not guilty to the charge and claimed to be tried.

5.4 The trial of JCC 51/2016 was proceeded in ordinary course and the testimony of PW-1 - Minaben Jayeshbhai Waghela, mother of the victim was recorded on 3.3.2017.

5.5 That the PW-2 – Jayantibhai Kanjibhai Waghela – Original Complainant has been examined on 30.6.2017. During the deposition of the Complainant, learned PM JJB has abruptly stopped the recording of testimony of the complainant and ordered **(impugned order no.1)** that a preliminary assessment under Section 15 of Act 2015 be conducted as the Applicant is between the age group of 16 to 18 years and the alleged offence is the heinous offence. The case was adjourned for report of preliminary assessment.

5.6 A letter dated 7.7.2017 was sent by learned P.M. JJB, addressed to Dr. Bharatbhai Maganbhai Vaidya, Psychologist for preliminary assessment, who has examined the Applicant - CCL and submitted his report on 15.7.2017. Considering the report of the psychologist, the learned PM JJB has passed order dated 11.8.2017 **(impugned order no.2)** under Section 18(3) of the Act 2015 that the Applicant – CCL is required to be tried as adult.

5.7 The order was made to transfer the case to the Children Court on 18.8.2017. Thereafter, vide outward no. 3575/2017 dated 12.9.2017, Record and Proceeding was sent to the learned 3rd Additional Sessions Judge Deesa, District Banaskantha. The same is registered as Special (POCSO) Case No. 27/2017 on 4.10.2017.

5.8 After hearing the learned Advocate for Applicant - CCL, the learned 3rd Additional District and Sessions Judge, Deesa, District Banaskantha has passed the below mentioned order on 4.2.2019 **(impugned order no.3)** under Section 19(1)(i) of the Act 2015:

"*This matter shall be proceeded by this court because it has been transferred by the concerned board for holding inquiry under Section 14(1).*"

The said order is challenged by the Applicant - CCL before this court.

6. <u>Arguments on behalf of the Applicant:</u>

6.1 Learned Advocate Mr. Tirth N. Bhatt for Applicant has argued that the impugned judgments and orders are bad in law. That the courts below have shown sheer disregard and have bluntly ignored the procedure under the Act 2015. That the impugned orders are passed mechanically without adhering the mandatory provisions of law. That the preliminary assessment is required to be conducted within the time specified under Section 14(3) of the Act 2015 (i.e. three months). It is vehemently argued that the provision of Section 14(3) of the Act 2015 is mandatory in nature and not directory. That in this case the preliminary assessment under Section 15 of the Act 2015 is done after one year i.e. after

the expiry of statutory limitation.

6.2 It is further argued that the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (hereinafter referred to as "Juvenile Justice Rules 2016") came into force on 21.9.2016. That the alleged incident took place on 4.4.2016. Therefore the Juvenile Justice Rule 2016 are not applicable in this case.

6.3 It is further submitted that as per Rule 10(A) of the Juvenile Justice Rule 2016 as well as Section 14(3) of the Act 2015, the preliminary assessment is required to be carried out within three months is mandatory because the legislature has used the word 'shall'. That considering the aim and object of the Juvenile Justice Act, the interpretation is required to be made in favour of the juvenile or a child in conflict with law.

6.4 Learned Advocate for Applicant therefore submitted that the orders of preliminary assessment dated 30.6.2017 and 11.8.2017 passed by the JJB and also the order dated 4.2.2019 passed by the Children Court are required to be quashed and set aside on the grounds stated in the memo of Revision Application.

7. Submission on behalf of the Respondent – State:

7.1 The first argument of learned PP is that as per Section 34(1) of the POCSO Act, if any offence under the POCSO Act is committed by a child, such child shall be dealt with under the

provisions of Juvenile Justice (Care and Protection of Children) Act 2000 (for short "the Juvenile Justice Act, 2000"). He argued that in the present case, the victim is child. The offence punishable under Section 4 of the POCSO Act is alleged and therefore the child in conflict with law shall be dealt with the Juvenile Justice Act 2000. It is further argued that there is no provision as regards to the preliminary assessment in the Juvenile Justice Act 2000. Therefore, the impugned order dated 4.2.2019 passed by the learned 3rd Additional and District and Sessions Judge, Deesa to proceed with the trial against the Applicant is legal in the eye of law.

7.2 Second argument of learned PP is that as per Section 1(4) of the Act 2015, this Act would apply to all the matters concerning the children in conflict with law which includes apprehension, detention, prosecution, etc. Preliminary assessment is not covered u/s 1(4) of the Act 2015.

7.3 The third argument of learned Public Prosecutor is that in this case the victim is a minor child. The offence under Section 4 of the POCSO Act is made out. That as per Section 30 of the POCSO Act, presumption of culpable mental state is required to be drawn. That the culpable mental state includes, intention, motive, knowledge of the act and the belief or reason to believe a fact. Therefore the impugned orders as regards to conduct trial against present applicant as an adult is correct in eye of law.

7.4 Learned PP has fairly conceded that the order dated 11.8.21017 passed by the learned P.M. JJB is bad in law in view of proviso under Section 7(3) of the Act 2015 as the decision u/s 18(3) is required to be taken by at least two members including the PM of JJB. Here in this case, the decision u/s 18(3) of the Learned Act 2015 dated 11.8.2017 is signed by only learned P.M. JJB.

8. Alleged Offence Against the Applicant – CCL:

8.1 As per the charge sheet and the charge framed vide Exh. 20 by the learned Additional Sessions Judge, Children Court, the offence is punishable under Section 377 of IPC and Section 4 of the POCSO Act which reads as under:

Section 377 IPC – ***"Unnatural offences.*** *- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal,* ***shall be punished with imprisonment for life****, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

Section 4 of POCSO Act – *"****Punishment for penetrative sexual assault. -*** *Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which* ***shall not be less than seven years but which may extend to imprisonment for life****, and shall also be liable to fine."*

8.2 The heinous offence is defined under Section 2(33) of the Act 2015 reads as under:

"***heinous offence –*** *includes the offences for which* ***the minimum punishment under the Indian Penal Code (45 of 1860) or any other*** *law for the time being in force is* ***imprisonment for seven years or more****;"*

8.3 Considering the definition of the heinous offence and

punishment prescribed under Section 377 of IPC and offence punishable under Section 4 of the POCSO Act, the alleged offence against the Applicant – CCL falls under the definition of heinous offence.

9. Requirement of Preliminary Assessment:

9.1 As per Section 14(1) of the Act 2015, the Board shall hold an inquiry in accordance with the provisions of the Act 2015 and pass orders in relation to the child under Section 17 and 18. In this case, the case is not made out for Section 17 of the Act 2015. Therefore the board has to proceed under Section 18 of the Juvenile Justice Act.

9.2 As per Section 18(1) of the Act 2015, the order is required to be passed by the JJB if the child irrespective of age, has committed a petty offence or serious offence or child below the age of sixteen year has committed a heinous offence.

9.3 In this case the incident took place on 4.4.2016. The birth date of the Applicant – CCL is 25.10.1998. It means the age of the Applicant – CCL at the time of incident was 17 years 5 months and 9 days. The Applicant – CCL is above the age of sixteen years.

9.4 Here in this case, as discussed above, the allegation is for heinous offence and age of Applicant – CCL is between 16 and 18 years. Therefore, Section 18(3) will be applicable which reads as

under:

"*Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."*

9.5 To be proceeded by the board under Section 18(3), the board has to conduct first preliminary assessment under Section 15 of the Act 2015. In present case case preliminary assessment is required to be conducted and learned PM JJB has conducted such preliminary assessment. Let us see what procedure is adopted for preliminary assessment.

10. What is to be assessed in preliminary assessment?

10.1 As per Section 15(1) of the Juvenile Justice Act, the JJB has to conduct the preliminary assessment. The provision is as under:

"Sec. 15(1) - *In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:*

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts."

Explanation: For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

10.2 If the case falls under the heinous crime committed by a child who has completed the age of 16 years, the board has to conduct the preliminary assessment. For conducting the preliminary assessment, the board may take assistance of the experienced Psychologist or Psycho-Social Worker or other experts.

10.3 As per Section 15(1) of the Act 2015 the preliminary assessment is required to be conducted by the JJB. The same is required to be carried out with regard to the following aspects:

(a) Mental capacity (ability) to commit offence.
(b) Physical capacity to commie office.
(c) Ability to understand the consequence of offence.
(d) Circumstances in which the alleged offence is committed.

After assessing the above mentioned four parameters, the JJB has to satisfy and pass order under Section 15(2) of the Act 2015 as to whether the matter is required to be disposed of by the JJB or pass an order under Section 15(1) read with 18(3) of the Act 2015 that the trial is required to be conducted against the Applicant – CCL as an adult by the Children Court having jurisdiction to try such offences.

10.4 After passing the order of the preliminary assessment, the copy of the decision taken by the JJB is required to be communicated forthwith to the Applicant – CCL as per Section

10(A) (iv) of the Juvenile Justice Rules 2016. Here in this case copy of the order is provided on 4th day i.e. 14.8.2017.

11. Right of CCL in Preliminary assessment

11.1 As per Section 3(4) of the Act 2015 every child shall have right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child. Not only that, but, as per Section 8(3) (a) it is the responsibility of the JJB to ensure the informed participation of the child and the parent or guardian, in every step of the process. In view of this provision, at the time of process of preliminary assessment, the Applicant – CCL is required to be heard and given chance to participate in the proceedings.

Herein in this case, at the time of conducting the preliminary assessment, the copy of the report of psychologist is neither handed over to the Applicant – CCL nor the Applicant – CCL was heard on that aspect before taking decision.

11.2 As per Section 3(1) (i) of the Act 2015 every child shall be presumed to be innocent of any mala fide or criminal intent and as per Rule 10(A)(3) of the Juvenile Justice Rules while making the preliminary assessment, the child shall be presumed to be innocent unless otherwise proved.

11.3 As per Section 3(ix) of the Act 2015 no waiver of any right of the child is permissible or valid.

11.4 As per Section 3(xv) of the Act 2015, measures for dealing with children in conflict with law without resorting to judicial proceeding shall be promoted.

11.5 As per Explanation to Section 15(i) of the Act 2015 it is clarified that preliminary assessment is not a trial.

Preliminary assessment is required to be conducted keeping in mind the above provisions of the Act 2015 as well as the Juvenile Justice Rules 2016.

12. Procedure Adopted for the preliminary assessment and drawback:

12.1 In the present case, after the decision was taken by the Learned PM JJB on 30.6.2017, during the deposition of complainant, a letter dated 7.7.2017 was sent to Dr. Bharatbhai Maganbhai Vaidya, Psychologist, wherein it is stated that;

"*if the Applicant – CCL has been charged for the heinous offence and as per Rule 10(A) of the Juvenile Justice Rules 2016 the preliminary assessment is required to be made by the Psychologist. The Applicant – CCL has been directed to remain present on 10.7.2017 at 11 0' Clock and asked to report back within 3 days*."

12.2 Dr. Bharatbhai Maganbhai Vaidya, Psychologist has reported to the PM, JJB on 15.7.2017. The translated version of the report is as under:

"Name : Navinbhai Bijolbhai Dharmani
Date of Birth : 25/10/1998
Study : First Year B.C.A.
Village : Rajpur.

Case History:-

The subject (CCL) studies in the Second Year of BCA. There are grandmother, parents and three sisters in the Subject (CCL) family. All three sisters of the client are married and live at their respective matrimonial houses. The younger brother has appeared in the Board examination of 10th.

Looking to the I.Q. Test of the Subject (CCL), the Subject (CCL) possesses normal I.Q.. The Subject (CCL) is interested in studies. The Subject (CCL) comes from weak economical condition and therefore, he aims to study and make an excellent career. He is interested in computer programming.

Psychosocial developments of the subject (CCL) is proper. Social and religious tendencies of the subject (CCL) are positive. The subject (CCL) sexual development is proper. The subject (CCL) is attracted to opposite gender. Looking to psychosocial condition of the subject (CCL), he does not appear to have homogeneous attraction.

Findings:

1. *The client possesses normal I.Q..*
2. *The client's social, impulsive, mental and physical development is normal.*
3. *Sexual impulse is normal.*
4. *The client does not have homogeneous attraction.*"

12.3 On receiving report / opinion from the psychologist, the learned P.M. JJB has passed order dated 11.8.2017 under Section 15(1) read with Section 18(3) of Act 2015 that the Applicant – CCL is required to be tried as an adult and transferred the case to the children court.

12.4 It is relevant to note here that the JJB may take into consideration the documentary evidence on record that may be;

(a) Panchnama of scene of offence – which may reflect circumstances.

(b) Arrest panchnama of the Applcant – CCL – for physical capacity to commit offence.

(c) Medical history given by the Applicant – CCL before the Doctor – for mental capacity or ability.

(d) Contents of the statement of CCL except the confession part recorded by the police under Section 161 of Cr.P.C. for circumstances in which he allegedly committed the offence.

(e) Statement of the victim – for one or more aspects.

(f) Social Investigation Report (Form 6) submitted or which must be called for under Section 8(3) (e) of the Act 2015 within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed – for any or all the aspects.

12.5 It revealed from the order dated 11.8.2017 that the Learned PM JJB has considered the only report submitted by the psychologist and not considered SIR (Form 6) or any other documents or circumstances. It is pertinent to note here that, considering the order dated 30.6.2017 and the letter dated 7.7.2017 forwarded to the Psychologist, it appears that the learned P.M. JJB is in wrong belief that preliminary assessment is required to be carried out by the Psychologist. In fact as per Section 15 of the Act

2015, the preliminary assessment is required to be conducted by the JJB. Only the assistance can be asked from the Psychologist and the JJB has to come to the conclusion that whether the Applicant – CCL is required to be tried by the children court as an adult or not.

12.6 In the present case the preliminary assessment is conducted only by Learned PM JJB and not by at least two members including the PM of JJB. The order dated 11.8.2017 passed under Section 18(3) was passed and signed only by Learned PM JJB. The said impugned order is also hit by proviso under Section 7(3) of the Act 2015, which reads thus:

"*A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings:*

Provided that ***there shall be atleast two members including the Principal Magistrate present at the time of final disposal*** *of the case or in making an order under sub-section (3) of section 18."*

13. Time limit for preliminary assessment:

13.1 As per Section 14(3) of the Act 2015, the preliminary assessment in case of heinous offence under Section 15 is required to be carried within a period of three months from the date of first production of the child before the JJB which reads as such:

"14. Inquiry by Board regarding child in conflict with law.

1. Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.

3. A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board ***within a period of three months from the date of first production of the child before the Board.****"*

13.2 In the present case, the birth date of the Applicant – CCL is 25.10.1998 and the offence has taken place on 4.4.2016. Therefore, at the time of offences, the age of the Applicant – CCL is between 16 to 18 years. As stated herein above, the alleged offence is covered under the definition of heinous offence, therefore, preliminary assessment is required to be carried out.

13.3 As per the record, the Applicant – CCL was apprehended on 11.4.2016 and he was produced on the same date before the JJB. The order of preliminary assessment is passed on 11.8.2017 i.e. after 1 year and 4 months from the date of first production before the JJB. As per Section 14(3) of the Act 2015, the preliminary assessment is required to be carried out within 3 months. Here, in this case, the preliminary assessment is delayed by 1 year and one month.

13.4 The main contention of learned Advocate for the Applicant – CCL is that if the preliminary assessment is conducted within the time prescribed under Section 14(3) (up to 4.7.2016), the age of the Applicant – CCL at that time would have been below 18 years i.e. 17 years and 8 months and 9 days. Here, in this case, the preliminary assessment was done on 11.8.2017. At that time the age of the Applicant – CCL was 18 years and 9 months.

13.5 The grievance of the Applicant – CCL is that if the preliminary assessment is carried out at the relevant point of time i.e. within the prescribed time limit, the findings of the report of the Psychologist would have been different. That the reasons for result of different finding are;

(i) Age at 17.-19 of any young boy is fast growing age.

(ii) Mental ability and physical capacity also develop at a high rate.

(iii) Ability to understand the consequences is grown up at large extent.

The delay in conducting preliminary assessment causes prejudice to the Applicant – CCL. It is also argued that the JJB has to conduct the preliminary assessment within three months which is a mandatory provision.

13.6 Herein, in this case, this court has to decide as to whether the preliminary assessment is required to be conducted within three months is **mandatory or directory**.

14. Whether the time limit of 3 months is directory or mandatory?

14.1 Learned Advocate for the Applicant has submitted that due to late conducting of the preliminary assessment by more than one year, the Applicant's right is prejudiced. Therefore, the order dated 11.8.2017 is illegal due to breach of mandatory provision.

14.2 Firstly, the learned PP has submitted that as per Section 34(1) of the POCSO Act, when any offence is committed by a child, the child should be dealt with under the provisions of Juvenile Justice Act 2000. There is no provision in the Juvenile Justice Act 2000 as regards to the preliminary assessment and therefore no preliminary assessment is required to be carried out where the offence under the POCSO Act is committed.

"Section 34 – ***Procedure in case of commission of offence by child and determination of age by Special Court*** *– (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)"*

14.3 Against this, learned Advocate for the Applicant submitted that the Juvenile Justice Act 2000 may be read as Juvenile Justice Act 2015 because the POCSO Act came into force before the Act 2015 has been enacted. As per provision of Section 8 of the General Clauses Act, reference as regards to the Juvenile Justice Act 2000 is required to be read as Juvenile Justice Act 2015. Section 8 of the General Clauses Act reads as under:

"*8.* ***Construction of references to repealed enactments****. - (1) Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted.*

(2) Where before the fifteenth day of August, 1947, any act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any [Central Act] or in any Regulation or instrument to the provision so repealed shall, unless a different intention

appears, be construed as references to the provision so re-enacted."

14.4 While enacting the Act 2015, the intention appears to provide better condition by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child friendly approach in the adjudication and disposal of the matters in the best interest of children. Other intention appears to adhere the provision of Juvenile Justice Act 2000. In view of Section 8 of the General Clauses Act, the reference of the Act 2000 in Section 34(1) of the POCSO Act is required to be read as the Act 2015. Thus, this court is not accepting the argument of learned PP that preliminary assessment is not required.

15. The second argument of learned Public Prosecutor is that as per Section 1(4) of the Act 2015, this Act would apply to all the matters concerning the children in conflict with law which includes apprehension, detention, prosecution, etc. That the preliminary assessment is not covered under Section 1(4) of the Act 2015.

15.1 It is necessary to refer Section 1(4) of the Act 2015, which reads ad under:

"*1.Short title, extent, commencement and application. -*

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including-

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) produces and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

15.2 This sub section has non-obstacle clause on any other law and the provisions of the 2015 Act shall apply to all matters, which includes, apprehension, detention, prosecution, penalty, imprisonment etc. The preliminary assessment can be covered under prosecution, penalty or imprisonment. Therefore arguments as regards to preliminary assessment is not required are not convincing.

16. This court has come across the following judgments wherein the Hon'ble Supreme Court held the circumstances or cases in which the provision of particular enactment is interpreted as mandatory or directory:

(A) The Hon'ble Apex Court in case of **Delhi Airtech Services Private Limited and Anr. v. State of Uttar Pradesh and Anr.** reported in **(2011) 9 SCC 354** has observed as under:

126. The basic purpose of interpretation of statutes is further to aid in determining either the general object of the legislation or the meaning of the language in any particular provision. It is obvious that the intention which appears to be most in accordance with convenience, reason, justice and legal principles should, in all cases of doubtful interpretation, be presumed to be the true one. The intention to produce an unreasonable result is not to be imputed to a statute. On the other hand, it is not impermissible, but

rather is acceptable, to adopt a more reasonable construction and avoid anomalous or unreasonable construction. A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to the well settled rules of construction, but it may properly lead to the selection of one, rather than the other, of the two reasonable interpretations. In earlier times, statutes imposing criminal or other penalties were required to be construed narrowly in favour of the person proceeded against and were more rigorously applied. The Courts were to see whether there appeared any reasonable doubt or ambiguity in construing the relevant provisions. Right from the case of R. v. Jones, ex p. Daunton [1963(1) WLR 270], the basic principles state that even statutes dealing with jurisdiction and procedural law are, if they relate to infliction of penalties, to be strictly construed; compliance with the procedures will be stringently exacted from those proceedings against the person liable to be penalized and if there is any ambiguity or doubt, it will be resolved in favour of the accused/such person. These principles have been applied with approval by different courts even in India. Enactments relating to procedure in courts are usually construed as imperative. A kind of duty is imposed on court or a public officer when no general inconvenience or injustice is caused from different construction. A provision of a statute may impose an absolute or qualified duty upon a public officer which itself may be a relevant consideration while understanding the provision itself. (See `Maxwell on The Interpretation of Statutes', 12th Edition by P. St. J. Langan and R. v. Bullock.)

128. G.P. Singh in the same edition of the above-mentioned book, at page 409, stated that the use of the word `shall' with respect to one matter and use of word `may' with respect to another matter in the same section of a statute will normally lead to the conclusion that the word `shall' imposes an obligation, whereas the word `may' confers a discretionary power. But that by itself is not decisive and the Court may, having regard to the context and consequences, come to the conclusion that the part of the statute using `shall' is also directory. It is primarily the context in which the words are used which will be of significance and relevance for deciding this issue.

131. If I analyze the above principles and the various judgments

of this Court, it is clear that it may not be possible to lay down any straitjacket formula, which could unanimously be applied to all cases, irrespective of considering the facts, legislation in question, object of such legislation, intendment of the legislature and substance of the enactment. In my view, it will always depend upon all these factors as stated by me above. Still, these precepts are not exhaustive and are merely indicative. There could be cases where the word `shall' has been used to indicate the legislative intent that the provisions should be mandatory, but when examined in light of the scheme of the Act, language of the provisions, legislative intendment and the objects sought to be achieved, such an interpretation may defeat the very purpose of the Act and, thus, such interpretation may not be acceptable in law and in public interest."

(B) The Hon'ble Apex Court in a judgment in case of **May George vs. Special Tahsildar and Ors.** reported in **(2010) 13 SCC 98** has observed as under:

"15. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

16. In Dattatraya Moreshwar Vs. The State of Bombay & Ors., AIR 1952 SC 181, this Court observed that law which creates public duties is directory but if it confers private rights it is mandatory. Relevant passage from this judgment is quoted below:-

> *"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control*

over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

18. In Raza Buland Sugar Co. Ltd., Rampur Vs. Municipal Board, Rampur AIR 1965 SC 895; and State of Mysore Vs. V.K. Kangan, AIR 1975 SC 2190, this Court held that as to whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

19. In Sharif-ud-Din v. Abdul Gani Lone this Court held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance with the rule may be enough and where the statue provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory.

25. The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid."

(C) The Hon'ble Apex Court in case of **Ms. Eera, through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) and Anr.** reported in **AIR 2017 SC 3457** has observed as under:

"(Per R. F. Nariman, J.) Concurring). Reading of Act as whole in light of Statement of Objects and Reasons thus, makes it clear that intention of legislator was to focus on children, as commonly understood i.e. persons who are physically under age of 18 years. It is to determine whether Judge has only ironed out creases that he found in statute in light of its object, or whether he has altered material of which Act is woven. In short, difference is well-known philosophical difference between 'is' and 'ought'. Does judge put himself in place of legislator and ask himself whether legislator intended certain result, or does he state that this must have been intent of legislator and infuse what he thinks should have been done and had he been legislator. If latter, it is clear that Judge would add something more than what there is in statute by way of supposed intention of legislator and would go beyond creative interpretation of legislation to legislating itself. It is at this point that Judge becomes legislator, stating what law ought to be instead of what law is. Scrutiny of other statutes in pari materia would bring this into sharper focus.

(Per Dipak Misra, J.) To highlight Legislative intention and purpose of legislation regard being had to fact that context has to be appositely appreciated. It is foremost duty of Court while construing provision to ascertain intention of legislature, for it is an accepted principle that legislature expresses itself with use of correct words and in absence of any ambiguity or resultant consequence does not lead to any absurdity, there is no room to look for any other aid in name of creativity. Method of purposive construction to be adopted keeping in view text and context of legislation, mischief it intends to obliterate and fundamental intention of legislature when it comes to social welfare legislations. If purpose is defeated, absurd result is arrived at. Court need not be miserly and should have broad attitude to take recourse recourse to in supplying word wherever necessary. While interpreting social welfare or beneficent legislation one has to be guided by 'colour', 'content', and 'context of statutes'. Judge has to release himself from chains of strict linguistic interpretation and pave path that serves soul of legislative intention and in that event

he becomes a real creative constructionist Judge. Legislative intention must be gatherable from text, content and context of statute and purposive approach should help and enhance functional principle of enactment. That apart, if an interpretation is likely to cause inconvenience, it should be avoided, and further personal notion or belief of Judge as regards intention of makers of statute should not be thought of. For adopting purposive approach there must exist necessity. Judge, assuming role of creatively constructionist personality, should not wear any hat of any colour to suit his thought and idea and drive his thinking process to wrestle with words stretching beyond permissible or acceptable limit. That has potentiality to cause violence to language used by legislature."

17. For considering the particular provision of any enactment, one has to see the preamble of the Act.

17.1 The Hon'ble Apex Court in a judgment in case of **R.Venkataswami Naidu and Anr. v. Narasram Naraindas**, reported in **AIR 1966 SC 361** has observed as under:

"*A preamble is a key to the to the interpretation of a Statute but is not ordinarily an independent enactment conferring rights or taking them away and cannot restrict or widen the enacting part which is clear and unambiguous. The motive for legislation is often recited in the preamble but the remedy may extend beyond the cure of the evil intended to be removed."*

17.2 It will be beneficial to refer preamble of the Act 2015, which reads thus:

"*An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children*

and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

Whereas, the provisions of the Constitution confer powers and impose duties, under clause (3) of article 15, clauses (e) and (f) of article 39, article 45 and article 47, on the State to ensure that all the needs of children are met and that there basic human rights are fully protected;

And Whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child;

And Whereas, it is expedient to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments."

17.3 The Hon'ble Apex Court in a judgment in case of **Pratap Singh v. State of Jharkhand** reported in **(2005) 3 SCC 551** has observed as under for international obligation as regards to the juvenile justice which contain in the preamble:

"10. Thus, the whole object of the Act is to provide for the care, protection, treatment, development and rehabilitation of neglected delinquent juveniles. It is a beneficial legislation aimed at to make available the benefit of the Act to the neglected or delinquent juveniles. It is settled law that the interpretation of the Statute of

beneficial legislation must be to advance the cause of legislation to the benefit for whom it is made and not to frustrate the intendment of the legislation.

48. The purpose of the Juvenile Justice Legislation is to provide succour to the children who were being incarcerated along with adults and were subjected to various abuses. It would be in the fitness of things that appreciation of the very object and purpose of the legislation is seen with a clear understanding which sought to bring relief to juvenile delinquents.

64. The Juvenile Justice Act specially refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventions although may not be a part of our municipal law, the same can be referred to and followed by the Courts having regard to the fact that India is a party to the said treaties. A right to a speedy trial is not a new right. It is embedded in our Constitution in terms of Articles 14 and 21 thereof. The international treaties recognize the same. It is now trite that any violation of human rights would be looked down upon. Some provisions of the international law although may not be a part of our municipal law but the Courts are not hesitant in referring thereto so as to find new rights in the context of the Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of internatioal law. Constitution is a source of and not an exercise of, legislative power. The principles of International Law whenever applicable operate as a statutory implication but the Legislature in the instant case held itself bound thereby and, thus, did not legislate in disregard of the constitutional provisions or the international law as also in the context of Arts. 20 and 21 of the Constitution of India. The law has to be understood, therefore, in accordance with the international law, Part III of our Constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning to the statute is required to be assigned having regard to the constitutional as well as International Law operating in the field.

72. In terms of R. 20.1 of the Rules we may notice that some

statutes, as for example, the Family Court Act of some States of U.S.A. Contains provisions establishing time limitations governing each stage of juvenile proceedings, the purpose whereof is to assure swift and certain adjudication at all phases of the proceeding.

73. A similar issue was examined by the Supreme Court of California in Alfredo v. Superior Court, 849 P 2d 1330 (Cal 1993) wherein a juvenile sought habeas corpus to obtain release. The Court held that the Fourth Amendment provides the authority for the promptness required for a juvenile hearing. It was further held that a minor must be released upon expiration of the statutory time limit for detention due to the juvenile's interest in freedom from institutional restrains. The Court implied that the time allowed to have the hearing shall stand extended once the juvenile is released, and that dismissal is not the only necessary remedy.

79. This argument cannot be accepted for more than one reason. The said Act is not only a beneficent legislation, but also a remedial one. The Act aims at grant of care, protection and rehabilitation of a juvenile vis-a-vis the adult criminals. Having regard to Rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice, it must also be borne in mind that the moral and psychological components of criminal responsibility was also one of the factors in defining a juvenile. The first objective, therefore, is the promotion of the well being of the juvenile and the second objective bring about the principle of proportionality whereby and whereunder the proportionality of the reaction to the circumstances of both the offender and the offence including the victim should be safeguarded. In essence, Rule 5 calls for no less and no more than a fair reaction in any given case of juvenile delinquency and crime. The meaning of the expression 'Juvenile' used in a statute by reason of its very nature has to be assigned with reference to a definite date. The term 'juvenile' must be given a definite connotation. A person cannot be a juvenile for one purpose and an adult for other purpose. It was, having regard to the constitutional and statutory scheme, not necessary for the Parliament to specifically state that the age of juvenile must be determined as on the date of commission of the offence. The same is in-built in the statutory scheme. The statute must be construed having regard to the Scheme and the ordinary state of affairs and

consequences flowing therefrom. The modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility, that is, whether a child, by virtue of his or her individual discernment and understanding can be held responsible for essentially anti-social behaviour.

84. The statute, it is well known, must be construed in such a manner so as to make it effective and operative on the principle of Ut res magis valeat quam pereat. The Courts lean strongly against any constructions which tend to reduce a statute to a futility. When two meanings, one making the statute absolutely vague, wholly intractable and absolutely meaningless and the other leading to certainty and meaningful are given, in such an event the latter should be followed."

17.4 It can be stated that the Act 2015 is enacted to cater basic needs through proper care, protection, development, treatment, social reintegration **by adopting a child friendly approach in adjudication and disposal of matters in the best interest of child.** Therefore interpretation is required to be made in harmonious to the principle enshrined in preamble.

18. The Hon'ble Apex Court had noted differentia between criminal justice system and juvenile system and emphasis that juvenile justice system is not regulate the CCL but seeks to reform and rehabilitate the juvenile to make an honest living - in a judgment in case of **Dr. Supramanian Swami and ors. v. Raju Thr. Member, Juvenile Justice Board and Anr.** reported in **AIR 2014 SC 1649** which reads as under:

"38. The next significant aspect of the case that would require to be highlighted is the differences in the juvenile justice system and the criminal justice system working in India. This would have relevance to the arguments made in W. P. No. 204 of 2013. it may

be convenient to notice the differences by means of the narration set out herein under:

(A) Pre-trial Processes

(i) ***Riling of FIR: ...***

(ii) ***Investigation and Inquiry:***

Criminal Justice System: Ss. 156 and 157, Cr.P.C. deals with the power and procedure of police to investigate cognizable offences. The police may examine witnesses and record their statements. On completion of the investigation, the police officer is required to submit a Final Report to the Magistrate u/S. 173(2).

JJ System: The system contemplates the immediate production of the apprehended juvenile before the JJ Board, with little scope for police investigation. Before the first hearing, the police is only required to submit a report of the juvenile's social background, the circumstances of apprehension and the alleged offence to the Board (Rule 11(11)). In case of a non-serious nature, or where apprehension of the juvenile is not in the interests of the child, the police are required to intimate his parents/guardian that the details of his alleged offence and his social background have been submitted to the Board. (Rule 11(9)).

(iii) ***Arrest:*** ***...***

(iv) ***Bail:*** ***...***

(B) Trial and Adjudication

The trial of an accused under the criminal justice system is governed by a well laid down procedure the essence of which is clarity of the charge brought against the accused; the duty of the prosecution to prove the charge by reliable and legal evidence and the presumption of innocence of the accused. Culpability is to be determined on the touchstone of proof beyond reasonable doubt but if convicted, punishment as provided for is required to be inflicted with little or no exception. The accused is entitled to seek an exoneration from the charge(s) levellled i.e discharge (amounting to an acquittal) mid course.

JJ System: Under S. 14, whenever a juvenile charged with an offence is brought before the JJ Board, the latter must conduct an 'inquiry' under the JJ Act. A juvenile cannot be tried with an adult.

Determination of age of the juvenile is required to be made on the basis of documentary evidence (such as birth certificate, matriculation certificate, or Medical Board examination).

The Board is expected to conclude the inquiry as soon as possible under R. 13. Further, the Board is required to satisfy itself that the juvenile has not been tortured by the police or any other person and to take steps if ill-treatment has occurred. Proceedings must be conducted in the simplest manner and a child friendly atmosphere must be maintained (R.13(2)(b)), and the juvenile must be given a right to be heard (clause (c)). The inquiry is not to be conducted in the spirit of adversarial proceedings,a fact that the Board is expected to keep in mind even in the examination of witnesses (R.13(3)). R.13(4) provides that the Board must try to put the juvenile at ease while examining him and recording his statement; the Board must encourage him to speak without fear not only of the circumstances of the alleged offence but also his home and social surroundings. Since the ultimate object of the Act is the rehabilitation of the juvenile, the Board is not merely concerned with the allegations of the crime but also the underlying social causes for the same in order to effectively deal with such causes.

The Board must dispense with the attendance of the juvenile during the inquiry, if thought fit (S.47). Before the Board concludes on the juvenile's involvement, it must consider the social investigation report prepared by the Welfare Officer (R.15(2)).

The inquiry must not prolong beyond four months unless the Board extends the period for special reasons due to the circumstances of the case. In all non-serious crimes, delay of more than 6 months will terminate the trial (R.13(7)).

(C) ***Sentencing: ...***

(D) ***Post-trial Processes:***

JJ System: No disqualification attaches to a juvenile who is found

to have committed an offence. The records of his case are removed after the expiry of period of appeal or a reasonable period.

S. 40 of the JJ Act provides that the rehabilitation and social reintegration of the juvenile begins during his stay in a children's home or special home. "After-care organizations" recognized by the State Govt. conduct programmes for taking care of juveniles who have left special homes to enable them to lead honest, industrious and useful lives.

(F) ***Difference between JJ system and Criminal Justice System:***

1. *FIR and charge-sheet in respect of juvenile offenders is filed only in 'serious cases', where adult punishment exceeds 7 years.*

2. *A juvenile in conflict with the law is not "arrested", but "apprehended", and only in case of allegations of a serious crime.*

3. *Once apprehended, the police must immediately place such juvenile under the care of a Welfare Officer, whose duty is to produce the juvenile before the Board. Thus, the police do not retain pre-trial custody over the juvenile.*

4. *Under no circumstances is the juvenile to be detained in a jail or police lock-up, whether before, during or after the Board inquiry.*

5. *Grant of Bail to juveniles in conflict with the law is the Rule.*

6. *The JJ board conducts a child-friendly "inquiry" and not an adversarial trial. This is not to say that the nature of the inquiry is non-adversarial, since both prosecution and defence submit their cases. Instead, the nature of the proceedings acquires a child-friendly colour.*

7. *The emphasis of criminal trials is to record a finding on the guilt or innocence of the accused. In case of established guilt, the prime object of sentencing is to punish a guilty offender. The emphasis of juvenile 'inquiry' is to find the guilt/innocence of the juvenile and to investigate the*

underlying social or familial causes of the alleged crime. Thus, the aim of juvenile sentencing is to reform and rehabilitate the errant juvenile.

8. The adult criminal system does not regulate the activities of the offender once she/he has served the sentence. Since the JJ system seeks to reform and rehabilitate the juvenile, it establishes post-trial avenues for the juvenile to make an honest living."

19. This court has taken note of some of the provisions of Chapter II of the Act 2015 which provides General Principle of care and protection of children, which reads as under:

"*3 - **General Principles to be followed in administration of Act. -** The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:-*

*(i) **Principle of presumption of innocence** : Any child shall be presumed to be an innocent of any mala fide or criminal intent upto the age of eighteen years.*

*(iii) **Principle of participation**: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.*

*(iv) **Principle of best interest**: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.*

*(vi) **Principle of safety**: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.*

(xv) ***Principle of diversion****: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society a a whole."*

20. This court has come across an article i.e. "Erik Erikson's Stages of Psycholoocial Development" [simplypsychology.org /Erik. Erikson.html] by Saul McLeod [updated 2018]. The article reads thus:

"*Erikson's (1959) theory of psychosocial development has eight distinct stages, taking in five states up to the age of 18 years and three further stages beyond, well into adulthood.*

Like Freud and many others, Erik Erikson maintained that personality develops in a predetermined order, and builds upon each previous stage. This is called the epigenetic principle.

During each stage, the person experiences a psychosocial crisis which could have a positive or negative outcome for personality development. For Erikson (1963), these crises are of a psychosocial nature because they involve psychological needs of the individual (i.e. psycho) conflicting with the needs of society (i.e. social).

According to the theory, successful completion of each stage results in a healthy personality and the acquisition of basic virtues. Basic virtues are characteristic strengths which the ego can use to resolve subsequent crises.

Failure to successfully complete stage can result in a reduced ability to complete further stages and therefore a more unhealthy personality and sense of self. These stages, however, can be resolved successfully at a later time.

Stage	Psychosocial Crisis	Basic Virtue	Age
1.	Trust vs. Mistrust	Hope	0-1 ½
2.	Autonomy vs. Shame	Will	1 ½ -3

3.	Initiative vs. Guilt	Purpose	3-5
4.	Industry vs. Inferiority	Competency	5-12
5.	Identity vs. Role Confusion	Fidelity	12-18
6.	Intimacy vs. Isolation	Love	18-40
7.	Generativity vs. Stagnation	Care	40-65
8.	Ego Integrity vs. Despair	Wisdom	65+

5. ***Identity vs. Role Confusion***

The fifth stage is identity v. role confusion, and it occurs during adolescence, from about 12-18 years. During this stage, adolescents search for a sense of self and personal identity, through an intense exploration of personal values, beliefs, and goals.

The adolescent mind is essentially a mind or moratorium, a psychosocial stage between childhood and adulthood, and between the morality learned by the child, and the ethics to be developed by the adult (Erikson, 1963. p. 245)

This is a major stage of development where the child has to learn the roles he will occupy as an adult. It is during this stage that the adolescent will re-examine his identity and try to find out exactly who he or she is. Erikson suggests tht two identities are involved: the sexual and the occupational.

According to Bee (1992), what should happen at the end of this stage is "a reintegrated sense of self, of what to do or be, and of one's appropriate sex role". During this stage the body image of the adolescent changes.

Erikson claims that the adolescent may feel uncomfortable about their body for a while until they can adopt and "grow into" the changes. Success in this stage will lead to the virtue of ***fidelity****.*

Fidelity involves being able to commit one's self to others on the basis of accepting others, even when there may be ideological differences.

During this period, they explore possibilities and begin to form

their own identity based upon the outcome of their explorations. Failure to establish a sense of identity within society ("I don't know what I want to be when I grow up") can lead to role confusion. Role confusion involves the individual not being sure about themselves or their place in society.

In response to role confusion or identity crisis, an adolescent may begin to experiment with different lifestyles (e.g., work, education or political activities).

Also pressuring someone into an identity can result in rebellion in the form of establishing a negative identity, and in addition to this feeling of unhappiness."

20.1 As stated in the Article, development of the child and psychological crisis which could have a positive or negative outcome for personality development is up to the age of 18 years is more than relevant. The psychological assessment between 16 to 18 and 18 to 20 years will be influenced by the nature of development of man. The preliminary assessment conducted beyond the age of 18 will certainly affect the prejudice to the right of the Applicant – CCL.

21. In view of the ratio laid down by Hon'ble Apex Court in above referred cases, Preamble, Statements of objects and reasons, Goal to be achieved, General Principles to be followed while administration of the Act, obligation towards international instruments, benefit of future generation and congenial society, provision of the Act 2015, this court has to consider the procedural aspects to be substantive in nature.

21.1 It cannot be denied that the rate of mental and physical

growth of the child at the age of 16 to 20 is not only at peak point but also pinnacle. It is rightly said in Gujarati anecdotage that સોળે સાન વિસે ભાન i.e. (at the age of sixteen - Understanding and, at the age of twenty - Consciousness). It is known to all that a remarkable difference may be noted for mental and physical capacity, ability to understand the consequences of any particular act between age of 16 to 20.

21.2 Preliminary assessment is required to be conducted in cases of age group of 16 to 18 and alleged heinous offence against CCL. The CCL who has completed the age of 16 is covered for the age group of up to 18 for presumption of innocent under Section 3(1) of the Act 2015. Therefore while conducting the preliminary assessment, the JJB has to keep in mind the presumption of innocent.

21.3 If preliminary assessment is not carried out within prescribed time limit, can it be said in the best interest of child and to help the child to develop full potential under Section 3(iv) of the Act 2015? If any order passed by the Board / Court without considering the prejudice caused to the child that can neither be said to be child friendly approach nor disposal of matters in the best interest of children.

21.4 There may be many reasons, excuse and so called justification for not conducting the preliminary assessment within 3 months time limit, i.e. overburden work, absence of members of

the board due to non-appointment or otherwise, non-availability of Psychologist, etc. All these excuse should not be at the cost of proper care, protection, development, treatment, social reintegration of child which are ensured by the preamble or object of the Act.

21.5 Keeping in mind the above above principles, if preliminary assessment is not conducted within time limit or conducted which causes prejudice to the child that cannot be said that these general principles under Section 3 of the Act are followed, while implementing the provisions of the Act 2015. It can be concluded that effective administration of the Act is not done.

21.6 JJB is entrusted / conferred the power under Section 8(1) to deal exclusively with all the proceeding under the Act relating to CCL and allotted function and instill responsibility under Section 8(3)(f) to adjudicate and dispose of cases of CCL in accordance with process of inquiry specified under Section 14 which include preliminary assessment. If JJB fails to perform such duty cast upon it, the provision of time limit will remain mere formality and aim and object of the Act will be frustrated.

21.7 Considering the aim and object of the Act 2005, to be achieved, prejudice to be caused to the CCL by delaying in conducting the preliminary assessment, ratio laid down in above referred judgment, it is obligatory duty on part of JJB to conduct preliminary assessment within prescribed time limit. Hence it is

held as mandatory under normal circumstances..

22. Now, another view is required to be considered while interpreting the provision of the Act 2015, one has to see the statement of objects and reasons. Para 4 and 5 of the object and reasons is relevant to decide controversy in this case which reads as under:

"4. *Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.*

5. Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the abovementioned issues and therefore, it is proposed to repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re-enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and offences committed against children. This legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child in mind."

23. One has to think over on causes for the legislative change. The society is changing at every level with time and place. The law cannot be stand still. Law has to keep pace with change in society. It appears that to cope up the situation the need is raised

for new enactment.

23.1 As submitted by learned Public Prosecutor in this case the victim is a child and the alleged offence under Section 4 of the POCSO Act registered. Therefore Section 30 of the POCSO Act is required to be kept in mind. In view of Section 30 of the POCSO Act, in any prosecution for any offence under POCSO Act the culpable mental state on the part of the Applicant, (herein the Applicant – CCL), the court shall presume the existence of the mental State. As per Explanation to Section 30, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

23.2 Keeping in mind the reasons for legislative change and aim and object of POCSO Act, one has to keep balance in deciding such crucial question of mandatory or directory nature of provision of law. If preliminary assessment within time limit of three months is made compulsory and mandatory in such situation it may happen that culprit may go free without adequate punishment. Target and intent to achieve goal of new enactment will be disappointed. There should be balance between two thoughts.

23.3 To cope up the situation, one has to think about retrospective psychological assessment which may help in conducting the preliminary assessment by JJB.

24. If preliminary assessment is conducted by JJB considering

the mental and physical capacity to commit offence, ability to understand consequences of offences and circumstances in which offence is committed prevailing at the time of incident took place, by adopting retrospective psychological assessment of the CCL (subject) by help of expert / psychologist, there will not be a chance of prejudice to be caused to the CCL.

25. Further, learned Public Prosecutor has submitted that preliminary assessment is a procedural aspect and therefore this cannot be held to be a mandatory. During the course of argument, learned PP has kept present Ms. Shukla, Deputy Director, Psychology Department, FSL, Gandhinagar and in consultation with Ms. Shukla, learned PP has submitted that the preliminary assessment may be done or carried out with retrospective effect.

26. Learned PP has referred to a Book titled *Psychological Evaluations for the Courts* – A handbook for Mental Health Professionals and Lawyers *(Fourth Edition)* by *Gray B. Melton, John Pertrila, Norman G. Poythress, Christopher Slobogin, Randy K. Otto, Douglas Mossman and Lois O. Condie* published by *The Guilford Press New York London.*

26.1 In Chapter 4 – Legal Contours of Evaluation on page 70 of the said book, Psychological Tests and Diagnostic Procedures it is mentioned as under:

"As in the competence context, the Fifth Amendment not only dictates when the prosecution can compel an MSO evaluation; it also places restrictions on when the state may use its results. The

modern trend, similar to that in the competence context, is to limit trial use of disclosures made during such an evaluation to issues of mental state. To this effect, the Model Penal Code formulation, which has been adopted in several states, reads: "A statement made by a person subjected to a psychiatric examination or treatment ... shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition.

The Federal Rule of Criminal Procedure concerning this issue provides even more comprehensive protection:

No statement made by the defendant in the course of any [psychiatric] examination... whether conducted with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant has introduced evidence of incompetence or [mental] state at the time of the offense.]"

26.2 In Chapter 8 – Mental State at the Time of the Offense (MSO), on page 249 of the said book, Psychological Tests and Diagnostic Procedures have been stated about retrospective psychological assessment which reads as under:

"*Some instruments that focus on the defendant's phenomenology (thoughts, feelings, perceptions, beliefs) may be more useful. Certainly, when malingering is suspected, a number of instruments can help.* ***Furthermore, Rogers suggests that the Schedule of Affective Disorders and Schizophrenia, which has very good reliability, can help mental health professionals guage symptom severity at specific times and can (with slight modifications) held in retrospective assessments of defendants' functioning around the time of an alleged offense and of whether mental illness is feigned.*** *Similarly, although they do not describe their recommendations as formal instruments, Knoll and Resnick have published useful lists that can help examiners think through whether information from the defendant and other sources can*

provide evidence of MSO-related considerations such as knowing wrongfulness or loss of control at the time of an alleged offense, spurious and genuinely exculpatory relationships between symptoms and criminal acts, and clinical signs of malingering. Given the centrality of delusional thinking to many forms of psychosis, and the prevalence of phychotic disorders among insanity acquittees [see Table 8.1 and accompanying text), these approaches may be more useful than more general personality and diagnostic measures in the assessment of MSO.

As a general matter, however, laboratory and psychological tests have much less relevance to the MSO evaluation than has previously been claimed. ***These procedures can be in some cases provide valuable supplementary data to interview and investigative procedures, but we urge forensic examiners to acknowledge the limited use of these techniques for reconstructing mental states.*** *Expert witnesses should be prepared to concede the limitations on reliability and validity of tests they use, and to make other appropriate qualifications to prevent the trier of fact from being misled about the precision of these techniques."*

27. Learned PP has referred to another Book titled '*Understanding, Assessing, And Rehabilitating Juvenile Sexual Offenders'* by 'Phil Rich' with a foreword by *Robert E. Longo*, published by *John Willey & Cons, Inc. [ISBN : 0-471-26635-3***.** In Chapter 8 – Conducting the Juvenile Sexual Offender Assessment, on page nos. 154 and 155 of the said book, the **Assessment Tools And Types** have been elaborated as under:

"As shown in Figure 7.1, the sexual offender assessment can include and incorporate many types of assessment tools.

Psychosocial assessment refers to gathering information about the developmental, psychological, and social history of individuals and is often referred to as a psychosocial history, with the emphasis on gathering information about and understanding the individual in the context of his or her life.

Psychosexual assessment is a specific and more limited form of psychosocial assessment that is often overlaid and woven into

the psycholocial history and explores and examines the development of sexual knowledge, sexual interests, and sexual behaviors.

The clinical interview involves the process of meeting face to fact with the client or other individuals who will serve as informants to the assessment for the specific purposes of gathering information about things that occurred and the juvenile in assessment, and sometimes the person providing the information. In conducting the clinical interview, the clinician is able to make assessments about the quality and meaning of that information and the source of the information.

The Mental Status Examination is a typically brief and basic screening assessment used to evaluate the general mental clarity and condition of an individual at the time of the assessment.

Risk assessment is intended to predict future dangerous behaviour or related conditions if the current condition goes untreated or to signify the potential for such behaviour.

Psychological evaluation includes standardized methods and measurements of psychological states and traits, including feelings and thoughts, attitudes and values, behaviours, intellectual functioning, and cognitive and thought processes.

Educational testing measures academic achievement, the acquisition of information, and cognitive states and intellectual functioning, as well as other measures related to learning, cognitive processing, and retention of learned information.

Neuropsychological tests examine and screen for the possibility of neurological problems that may have an impact on psychological (cognitive, emotional, and behavioral) functioning.

Psychometric tests are psychological, neuropsychological, and educational tests based on statistical concepts and quantitative measures that allow meaningful comparison both between the individual tested and other individuals in the general or specific population and amount psychological test measures (not all evaluations are psychometric in nature).

Measures of function and interest are typically nonpsychometric questionnaires and scales that identify and measure interests, attitudes, functioning, and so forth.

Psychiatric evaluations are conducted by a psychiatrist (a physician who specializes in the diagnosis and treatment of mental

disorders) and often focus on, but are not limited to, assessment of disturbances in emotions, behaviors, or thinking that may be helped through the prescription of psychiatric medication but also may include a wide psychosocial assessment that follows a medical perspective.

Physiological measures attempt to measure honesty, sexual arousal, sexual interests, and other psychological conditions through physical correlates such as changes in blood pressure, galvanic skin response, respiration, physical (including visual) reaction time, and changes in penile tumescence.

These measures and processes can each be tied into a comprehensive assessment process, illustrated in Figure 8.4."

28. Investigation Timing / Schedule to Deal with CCL:

28.1 Section 8(3) (e) of the Act 2015 provides for preparation of Social Investigation Report (SIR) which reads as under:

"*8 – **Powers, functions and responsibilities of the Board -***

(3) The functions and responsibilities of the Board shall include - (e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;"

28.2 As per Rule 10(5) of the JJ Rule 2016 the completion of the investigation is to be carried out within one month which reads as under:

"10(5) In cases of heinous offences alleged to have been committed by a child, who has completed the age of sixteen years, the Child Welfare Police Officer shall produce the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the

date of first production of the child before the Board, a copy of which shall also be given to the child or parent or guardian of the child."

Thus one month is prescribed for investigation and the remaining two months for preliminary assessment. It is sufficient time to complete the procedure of preliminary assessment. The legislation has aptly fixed three months from the first production for the CCL before JJB.

28.3 If preliminary assessment is conducted within period of three months then there will not be any prejudice to CCL because the legislature has prescribed reasonable period. That can be said to be the procedure established by law. Prescribing time limit of three months is balancing the two statute I.e. the Act 2015 and a JJ Act 2000.

28.4 As discussed above and concluded in paragraph 21 above that the time limit of three months from the date of first production of the child before the Board under Section 14(3) of the Act 2015 is held mandatory in normal circumstance. The JJB has to conduct preliminary assessment within three months from the date of first production of the CCL before it. If it is not concluded within three months, the right of the CCL will be prejudiced. In such a situation, the trial is not vitiated but it is required to be conducted as an inquiry to be conducted by the JJB under Section 14(4) read with Section 18 of the Act 2015 as if he is alleged for serious offence. If the case is pending before the children court, the same

may be proceeded and disposed of under Section 19(1) (ii) of the Act read with Rule 13(7) of the JJ Rules 2016.

29. Now, if preliminary assessment is not done within a prescribed time limit and it is done at a later point of time and the finding under Section 18(3) of the Act 2015 reveals that preliminary assessment is done considering the retrospective effect i.e. prevailing circumstances at the time of the incident. The CCL will not be prejudiced. The psychology is a science. This subject of science is not undeveloped in this 21st century due to technological era. The faculty of psychology get advanced. The report of the psychologist can be said to be an opinion of expert under Section 45 of the Evidence Act. The court has to take care and consider the ground of such opinion under Section 51 of the Evidence Act, while responding to the retrospective psychological assessment opinion of the Psychologist.

29.1 In such retrospective psychological preliminary assessment, if done beyond the period of three months, the provision can be said to be a directory. The JJB and / or the Children Court will act on preliminary assessment as if it is done within the period of limitation. In such circumstances, the proceedings shall not be vitiated. The trial may be proceeded under Section 19(1) (I) of the Act read with Rule 13 (8) of JJ Rules 2016.

30. Conclusion:

The decision taken by the learned PM JJB to conduct the

preliminary assessment on 30.7.2017 while recording the deposition of the complainant and the second decision dated 11.8.2017 under Section 18(3) of the Act 2015 is bad in law on following grounds:

(a) The preliminary assessment is required to be done by the JJB consisting of at least two Members including the Principal Magistrate under Section 7(3) of the Act 2015. Here in this case, the decision under Section 18(3) is taken only by the learned Principal Magistrate of the JJB.

(b) The Principal Magistrate has believed that the preliminary assessment is required to be done by the Psychologist in his order dated 30.6.2017 and correspondence letter dated 7.7.2017. This is an erroneous belief as well as misconception of law of the learned Principal Magistrate JJB.

(c) After receiving the report from the Psychologist dated 15.7.2017 and before taking decision dated 11.8.2017 under Section 18(3) of the Act 2015, the concerned CCL is not heard which breach the Section 3(iii) read with Section 8(3) (a) of the Act 2015 - principle of participation in the proceedings.

(d) The preliminary assessment is not conducted within three months from the date of first production of the CCL before the Board under Section 14(3) of the Act 2015.

31. On perusing the order dated 4.2.2019 (impugned order No.3) passed by the learned Children Court i.e. learned 3rd Additional District and Sessions Judge, Deesa, following facts emerged:

(a) Children Court has considered that the victim and CCL are children.

(b) Charge sheet under Section 173 of Cr.PC is filed against the CCL.

(c) PM JJB has transfer case being consider the CCL is mature enough as trial is to be conducted as an adult. Therefore he has transferred the case.

(d) Learned Children Court has taken note of Section 15 and 18(3) of the Act 2015.

(e) Learned Children Court has considered the Act 2015 came into force 15.1.2016, Juvenile Justice Rule 2016 came into force on 21.9.2016 and the incident took place on 4.4.2016.

(f) Learned Children Court came to conclusion that Rule never takes place of Act. Rules are in Aid of provision of Act. earned Children Court has jurisdiction to conduct the trial is inquiry under Section 15 contemplated and case is transferred under Section 18(3) of the Act 2015. Learned Children Court has concluded that matter is not required to be send back to JJB and the same is to be proceeded.

31.1 In view of the provision under Section 3, 8(2), 15 and 19 of the Act 2015 and Rule 13 of the Rules 2016, the following duty is

cast upon the learned Children Court:

(a) Upon receipt of the order of preliminary assessment from board the learned Children Court has to independently decide whether there is a need for trial of the child as an adult or as a child and pass appropriate order under Section 19(1) of the Act 2015 read with Rule 13(1) of the J.J.Rule 2016.

(b) Before deciding the same the CCL is required to be heard by the learned Children Court under Section 3(ii), Section 8(3) (a) of the Act 2015 on principle of participation.

(c) While taking decision under Section 19(1), the learned Children Court has to consider the aspects / factors to be considered as enumerated in Section 15 of the Act, 2015.

(d) The learned Children Court has to record its reasons under Rule 13(6) while arriving at the conclusion whether the child is to be treated as an adult or as a child.

(e) If the children court decides that there is a need for trial of the child as an adult under Section 19(1)(i) of the Act, it has to follow the provision of Rule 13(8) of the Juvenile Justice Rules 2016.

(f) If the children court decides that there is no need for the trial

of the child as an adult under Section 19(1) (iii) of the Act may conduct an inquiry as a Board and pass appropriate orders in accordance with the provision of Section 18 read with Rule 13(7) of Juvenile Justice Rules 2016.

31.2 As far as the order dated 4.2.2019 passed by the Children Court [3rd Additional Sessions Judge] under Section 19(1)(i) of the Act 2015 is concerned, the same is also bad in law on following counts:

(a) The learned Children Court has not considered the provision of Section 19(1)(i) of the Act 2015 read with Rule 13 of the JJ Rules 2016 which cast duty on the Children Court that after receipt of the preliminary assessment from the Board, it has to come to the conclusion independently that there is a need for trial of the child as an adult or as child.

(b) The learned Children Court has considered only the conclusion reached by the JJB that preliminary assessment is proper.

(c) The learned Children Court has also not considered the Psychologist report, ground of opinion of the Psychologist on which the opinion is based, the social investigation report in form 6 and other material on record.

(d) The learned Children Court has not stated proper reasons for

conclusion whether the child is to be treated as an adult or as a child. The children court has directly framed the charge against CCL.

32. In view of the above discussion this court comes to the conclusion that order dated 30.7.2017 and 11.8.2017 passed in Juvenile Criminal Case No. 51/2016 by the learned Principal Magistrate, Palanpur and order dated 4.2.2019 in Special POCSO Case No. 27/2017 passed by the learned Children Court are not legal, proper and correct in eye of law, which are required to be quashed and set aside. Hence, this Criminal Revision Application is allowed and the impugned orders are set aside.

The learned Children Court and learned 3rd Additional Sessions Judge, Deesa is hereby directed to proceed the matter under Section 19(1) (ii) of the Act 2015 read with Rule 13(7) of the Juvenile Justice Rules 2016 in accordance with law.

33. Considering the importance of issue involved in this matter and impact of order on litigation, Mr. Mitesh R. Amin, Public Prosecutor, High Court of Gujarat was requested to argue the matter. He has devoted enough time and argued the matter at length. Mr. Amin has very ably assisted this court. The court expresses its appreciation of the efforts put in by him and the very able assistance rendered by him.

34. Registry is directed to provide copy of this judgment to

Registrar General, High Court of Gujarat and Principal Secretary, Social Welfare and Empower Department, State of Gujarat. Registrar General, High Court of Gujarat is requested to circulate through e-mail among all the Principal Magistrate, Juvenile Justice Boards and Presiding Officer and Special Judges of the POCSO Courts of the State. Principal Secretary, Social Welfare and Empower Department, State of Gujarat is requested to circulate the judgment through e-mail or otherwise among all the Members of the Juvenile Justice Boards of the State.

35. Rule is made absolute. Record and Proceedings be sent back to the concerned court forthwith.

(V. P. PATEL,J)

J.N. W