Barun Chandra Thakur vs Master Bholu on 13 July, 2022

Author: Vikram Nath

Bench: Vikram Nath, Dinesh Maheshwari

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.950/2022
(arising out of SLP(Crl.) No.10123 of 2018)

BARUN CHANDRA THAKUR …APPELLANT(S)

VERSUS

MASTER BHOLU & ANR. …RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.951/2022
(arising out of SLP(Crl.) No. 6347 of 2022
@Diary No.25451 of 2019)

CBI …APPELLANT(S)

VERSUS

BHOLU …RESPONDENT(S)

JUDGMENT

VIKRAM NATH, J.

Delay condoned.

2. Leave granted.

3. This Court is called upon to examine the proceedings arising out of preliminary assessment made under section 15 of the Juvenile Justice (Care and Protection of Children) Act, 20151. In consonance with the provisions of section 74 of the Act, 2015 following the orders passed by the Courts below,

we have used the name 'Bholu' for the accused and 'Prince' for the victim.

4. These two appeals, one filed by the complainant and other by the CBI, question the correctness of the judgment and order dated 11.10.2018 passed by learned single Judge of Punjab and Haryana High Court at Chandigarh in Criminal Revision No.2366 of 2018, titled Bholu versus CBI, whereby the revision was allowed; the order dated 20.12.2017 passed by the Juvenile Justice Board2, Gurugram and the order dated 21.05.2018 passed by the Additional Sessions Judge/Children's Court were set aside and the matter was remanded to the Board for fresh consideration within a period of six weeks from the date of receipt of certified copy of the 1 The Act, 2015.

2 'Board' for short order. Certain other directions were also issued. The operative portion of the order dated 11.10.2018 is reproduced below: □"...In view of the facts and law position as discussed above, the present petition is allowed and impugned order dated 20.12.2017 passed by the Juvenile Justice Board, Gurugram and order dated 21.05.2018 passed by the Additional Sessions Judge, Gurugram are set aside. The case is remanded back to the Board for afresh consideration after assessing the intelligency, maturity, physical fitness as to how the juvenile in conflict with law was in a position to know the consequences of the offence. The necessary exercise be done within a period of six weeks from the date of receipt of certified copy of the order. It is also relevant to mention here that while conducting preliminary assessment, the opinion of psychologist of the Government hospital be obtained."

5. Facts relevant for the adjudication of the present appeals are as follows:

> (i) An unfortunate incident took place on 08.09.2017 in an institution in Gurugram where a Class II student (Prince) was found in the toilet with his throat slit in an unconscious state at about 08.30 am. He was rushed to the hospital but was declared brought dead. Initially the State Police on suspicion arrested three persons, a driver of the school vehicle and two officials of the school, but later on they were released on bail.
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> (ii) In the meantime, the State transferred the investigation to Central Bureau of Investigation 3.

The CBI, during its investigation, interrogated a Class XI student (Bholu) from the same institution on two□three occasions, thereafter arrested him on 07.11.2017 (respondent□1, in both the appeals) 4.

(iii) From the material collected, it was found that the date of birth of respondent was 03.04.2001. As the date of the incident was 08.09.2017, he was aged 16 years 05 months and 05 days as on the relevant date. There is no dispute about the date of birth of the respondent.

6. As required by section 10 of the Act, 2015, the respondent was produced before the Board by the CBI on 08.11.2017. The Board directed for placing the child in a safety home. The parents of the respondent were informed. Under section 13 of the Act, the Social Investigation Report 5 was

prepared by the Legal Probation Officer and submitted on 27.11.2017 in the prescribed Form No. 6.

3 “CBI” for short 4 “the respondent” for short 5 Referred to as “SIR”.

7. Section 15 of the Act, 2015 mandates that where a child in conflict with law has committed a heinous offence and is above the age of 16 years, the Board would make a preliminary assessment and pass appropriate orders in accordance with the provisions of sub-section (3) of section 18 of the Act, 2015.

8. In the present case, both the conditions required under section 15 of the Act, 2015 were fulfilled as such the Board undertook the exercise of making the preliminary assessment. In that process, the Board called for a report from the expert psychologist, also interacted with the respondent, considered the SIR as also other material placed before it and proceeded to pass an order on 20.12.2017 holding that there was need of trial of respondent as an adult and accordingly, directed for transfer of papers to the Children’s Court.

9. Against the order dated 20.12.2017, the respondent preferred an appeal before the Children’s Court under section 101 of the Act, 2015. The Children’s Court, vide judgment and order dated 21.05.2018, upheld the decision of the Board and dismissed the appeal.

10. Aggrieved by the judgment of the Children’s Court, the respondent preferred a Criminal Revision under section 102 of the Act, 2015, before the High Court. The learned single Judge vide judgment and order dated 11.10.2018 allowed the Revision, set aside the orders passed by the Board as also the Children’s Court and remanded the matter to the Board for a fresh consideration. It is this order of remand passed by the High Court, correctness of which has been assailed in the present two appeals by the CBI and also the complainant.

11. The judgment of the High Court is dated 11.10.2018 and as per its direction, Board was to decide the matter afresh within six weeks. Assailing the order of the High Court, two special leave petitions were filed before this Court. One by the complainant registered as SLP (Crl.) No. 10123 of 2018 and the other by the CBI registered as SLP (Diary No. 25451 of 2019). This Court while issuing notice in the first special leave petition filed by the complainant Barun Chandra Thakur, also passed an order of status quo on 19.11.2018. The special leave petition filed by the CBI was clubbed/tagged with the special leave petition of the complainant. These matters have remained pending for over 3 ½ years. From the record we do not find any effort on part of the parties for early hearing or disposal of the two petitions for over 3 years. It was only in January, 2022 that the counsel for the respondent requested that the matter may be taken up for hearing as the respondent is in custody for more than three years and very soon, he will be completing 21 years of age. The matters were taken up on a number of occasions and the arguments of both sides were heard at length.

12. We have heard Shri Vikramjit Banerjee, learned Additional Solicitor General for the CBI-appellant, Shri Sushil Tekriwal, learned counsel for the complainant-appellant and Shri Sidharth Luthra, learned senior counsel for the respondent and perused the material on record.

13. Before proceeding to deal with the submissions advanced, it would be appropriate to briefly refer to the statutory provisions, the scheme of the Act, 2015 and the necessity requiring a preliminary assessment under section 15 of the Act, 2015. Before coming of the Act, 2015, the Juvenile Justice (Care and Protection of Children) Act, 2000 6 was in force. Under the said enactment, all children below 18 years of age were to be treated as juveniles and tried as such by the Board. It was only after the coming of the Act, 2015, that a 6 Hereinafter referred to as 'Act, 2000' further category was carved out of juveniles between 16 to 18 years involved in heinous offences. They were subjected to a preliminary assessment to ascertain whether they are to be tried as a child by the Board or to be tried as an adult by the Children's Court. However, for those above the age of 16 years and below 18 years, if the Board was of the opinion that the said Juvenile should not be tried as an adult, the Board would continue with the trial as envisaged under the Act, 2015.

14. The Act, 2000 and the Act, 2015 were enacted with the following preamble:

> "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..." Relevant provisions of Act, 2015

15. Chapter I consists of sections 1 and 2 (which is the definition compendium). Section 2(9) defines the "best interest of the child"; section 2(12) defines a "child" to mean a person who has not completed 18 years of age; section 2(13) defines a "child in conflict with law"; 'Child friendly' is defined under section 2(15); the 'Children's Court' is defined under section 2(20); 'Heinous Offences' is defined under section 2(33) to include offences for which the minimum punishment is imprisonment for seven years or more.

16. Chapter II consists of section 3 which provides for the general principles of care and protection of children to be followed in the administration of the Act. According to it, the Central Government, the State Government, the Board and other agencies as the case may be, while implementing the provisions of the Act shall be guided by the fundamental principles enumerated in clauses (i) to (xvi). It would be worthwhile to refer to some of the principles; clause (i) Principle of presumption of innocence: any child shall be presumed to be an innocent of any mala fide or criminal intent; clause (iii) Principle of Participation: every child will have a right to be heard and to participate in all processes and decisions affecting his interest; clause (iv) Principle of best interest: primary consideration in all decisions regarding the child shall be in his best interest; clause (ix) Principle of non□waiver of rights: it does not permit waiver of any of the right of the child and even non□ exercise of a fundamental right would not amount to waiver; clause (xvi) Principles of natural justice: standards of fairness shall be adhered to including the right to fair hearing, rule against bias and right to review by all persons or bodies, acting in a judicial capacity under this Act.

17. Chapter III consisting of sections 4 to 9 deals with the constitution of the Board, the procedure in relation to the Board, powers, functions and responsibilities of the Board. Sub-section (1) of section 4 provides for establishment of a Board in every district which could be more than one, to exercise powers and discharge functions relating to children in conflict with law under the Act. Sub-section (2) of section 4 defines the constitution of the Board. Sub-section (3) provides for the eligibility of the social workers to be appointed to the Board. Sub-sections (4), (5), (6) and (7) further provide eligibility for selection, disqualification, term and training as a member of the Board. Section 5 provides that if during the course of any inquiry by the Board, the child completes the age of eighteen years then the Board will continue with the inquiry to pass final orders as if such person has continued to be a child. Section 6 provides that any person who has completed eighteen years of age and is apprehended for committing an offence when he was below the age of eighteen years, then, subject to the provisions of this section, he would be treated as a child during the process of the inquiry. Section 7 provides for sittings of the Board for transacting its businesses. It also refers to the coram of the Board. Section 8 defines the powers, functions and responsibilities of the Board. Section 9 provides for the procedure to be followed by a Magistrate, who has not been empowered to exercise the powers of Board under the Act, when he is of the opinion that any alleged offender brought before him is a child. In that case, the Magistrate would immediately record his opinion and forward the child along with the record of proceedings to the Board having jurisdiction.

18. Chapter IV comprising of sections 10 to 26 deals with the procedure in relation to children in conflict with law. Sections 10 and 11 provide for the apprehension of a child in conflict with law and as to how he should be dealt with. Section 12 deals with bail to a person who is apparently a child alleged to be in conflict with law. Section 13 provides that the parents, guardians to be informed forthwith. Section 14 requires the Board to hold an inquiry regarding a child in conflict with law, such inquiry to be conducted and appropriate orders passed under sections 17 and 18 of the Act, 2015.

19. Section 15 provides for preliminary assessment where the alleged offence is heinous and where the child has completed or is above the age of 16 years, the Board is required to conduct the 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 after such assessment, pass an order in accordance with sub-section (3) of section 18. If the Board is of the opinion that the child needs to be tried as an adult then the case be transferred to the Children's Court having jurisdiction to try such offence. Otherwise, the Board itself will proceed to try the matter as a summons case under the Code of Criminal Procedure, 1973.7 7 For short, 'Cr.P.C.

20. Section 16 confers power on the Chief Judicial Magistrate or the Chief Metropolitan Magistrate to review the pendency of cases before the Board once in three months and may issue necessary directions in that regard depending upon the pendency.

21. Section 17 requires the Board to pass appropriate orders where after inquiry, the Board is satisfied that the child has not committed any offence. The Board may also pass appropriate orders where the child is in need of care and protection and refer him to the Child Welfare Committee.

22. Section 18 requires the Board to pass appropriate orders where the child is found to be in conflict with law. Different categories are provided and various powers are conferred on the Board to take care of such children who are below the age of sixteen years and have committed heinous offence and for children up to the age of eighteen years who have committed petty offence or a serious offence. Sub-section (1) of section 18 and its various clauses from (a) to (g) confer a variety of powers on the Board for issuing necessary directions. Sub-section (2) gives additional power to the Board providing for education, training, counselling, de-addiction programmes and even restricting the movement of the child, in his interest. Sub-section (3) provides that the Board if after the preliminary assessment under Section 15 passes an order that there is a need for trial of the child as an adult, then the Board may order transfer of the trial of such a case to the Children's Court having jurisdiction.

23. Section 19 deals with the powers conferred on the Children's Court. The Children's Court upon receipt of the preliminary assessment from the Board will decide whether there is need for trial of a child as an adult in accordance with the Cr.P.C. and pass appropriate orders after trial subject to the provisions of this section as also section 21. However, if the Children's Court feels that there is no need for trial of child as an adult, then, it may conduct an inquiry as a Board and pass appropriate orders in accordance with provisions of Section 18. Sub-section (2) of section 19 provides that the Children's Court will ensure that the final order with regard to a child in conflict with law will include an individual care plan for rehabilitation of the child including other directions. Under sub-section (3), the Children's Court will ensure that a child in conflict with law remains in a place of safety till he attains the age of 21 years and thereafter is transferred to jail. Proviso to sub-section (3) ensures that reformative services including education, skill development, counselling, behaviour modification therapy and psychiatric support are provided during the period the child is in a place of safety. Under sub-section (4), the Children's Court is to ensure that there is a periodic follow up report annually either by the Probation Officer or the District Child Protection Unit or the Social Worker for evaluation of the progress of the child and also to ensure that there is no ill treatment to the child in any form.

24. Section 20(1) deals with the powers of the Children's Court with respect to the progress and evaluation of the child even after he attains the age of 21 years and has not completed the term of stay. Under sub-section (2) of section 20, the Children's Court after completing the procedure provided under sub-section (1) may pass an order either to release the child on such conditions for the remainder of the prescribed term of stay and or pass an order that the child will complete the remainder of his term in jail.

25. Section 21 prohibits the sentencing of a child in conflict with law to death or life imprisonment without the possibility of release.

26. Under section 22 of the Act, it is mandated that Chapter VIII of Cr.P.C., and any preventive detention law would not be applied against any child.

27. Under section 23, there is a bar that a child in conflict with law would not be tried with the person who is not a child.

28. Under section 24, a protection is provided that a child in conflict with law will not suffer any disqualification under any such law on account of offence being established against him. However, this protection will not be available to the child who has completed or is above the age of 16 years and is found to be in conflict with law by the Children's Court under Section 19(1)(i). Sub-section (2) of section 24 provides for destruction of records under different situations.

29. Section 25 provides that all pending proceedings before any Board or Court on the date of commencement of this Act would continue in the same Board or Court as if this Act had not been enacted.

30. Section 26 makes provisions with respect to run away children in conflict with law. The above takes care of the various provisions contained in Chapter IV dealing with the procedure in relation to children in conflict with law.

31. Under the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 8, it is only rule 10(A) which refers to preliminary assessment into heinous offences by the Board. Sub-rule (1) mentions that the first thing to be determined by the Board is the age of the child as to whether he is below or above the age of 16 years which is to be done as per section 14 of the Act. Sub-rule (2) mentions that the Board may take assistance of the experienced psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. It also provides that the 8 Hereinafter referred to as the "Model Rules" District Child Protection Unit would have a panel of such experts to be made available to the Board for its assistance or otherwise the Board could access such experts independently. Sub-rule (3) declares that the child shall be presumed to be innocent unless proved otherwise while making the preliminary assessment. Sub-rule (4) provides for the consequential order to be passed by the Board where it holds that the trial of the child is to be carried out as an adult for which, it is required to assign reasons and further to provide copy of order to the child forthwith.

32. We are not quoting all the provisions referred to above but only the provisions which are relevant, that are sections 4, 14, 15, 18 and 19 of the Act, 2015, as also rule 10A of the Model Rules. The same are reproduced below:

> "Section 4: Juvenile Justice Board (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.
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> (2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(3) No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for atleast seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

(4) No person shall be eligible for selection as a member of the Board, if he –– (i) has any past record of violation of human rights or child rights; (ii) has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence; (iii) has been removed or dismissed from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government;

(iv) has ever indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

(5) The State Government shall ensure that induction training and sensitisation of all members including Principal Magistrate of the Board on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment.

(6) The term of office of the members of the Board and the manner in which such member may resign shall be such, as may be prescribed.

(7) The appointment of any member of the Board, except the Principal Magistrate, may be terminated after holding an inquiry by the State Government, if he ––

(i) has been found guilty of misuse of power vested under this Act; or

(ii) fails to attend the proceedings of the Board consecutively for three months without any valid reason; or

(iii) fails to attend less than three-fourths of the sittings in a year; or

(iv) becomes ineligible under sub-section (4) during his term as a member.

xxx xxx xxx Section 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.

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum

period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(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. (4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

> Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.
>
> (5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:
>
> (a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;
>
> (b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;
>
> (c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;
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> (d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;
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> (e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973;
>
> (f) inquiry of heinous offences –
>
> (i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);
>
> (ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.

Section 15. Preliminary assessment into heinous offences by Board.

(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 subsection (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.
>
> (2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:
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> Provided that the order of the Board to dispose of the matter shall be appealable under sub□section (2) of section 101:
>
> Provided further that the assessment under this section shall be completed within the period specified in section 14.
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> xxx xxx xxx Section 18: Orders regarding child found to be in conflict with law.
>
> (1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—
>
> (a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;
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> (b) direct the child to participate in group counselling and similar activities;
>
> (c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to

(g) of sub-section (1), the Board may, in addition pass orders to—

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v) undergo a de-addiction programme.

(3) 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.

Section 19: Powers of Children's Court.

(1) After the receipt of preliminary assessment from the Board under section 15, the Children´s Court may decide that—

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section

18. (2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker.

(3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

> Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.
>
> (4) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.
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> (5) The reports under sub-section (4) shall be forwarded to the Children´s Court for record and follow up, as may be required.
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> xxx xxx xxx Rule 10A. Preliminary assessment into heinous offences by Board -(1) The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.
>
> (2) For the purpose of conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith." PROCEEDINGS BEFORE THE BOARD

33. In the present case, it is the preliminary assessment made by the Board under section 15 of the Act, 2015, that the respondent be tried as an adult, is under consideration.

34. The Board on record had the SIR submitted by the Probation Officer in the prescribed format. It had also interacted with the respondent on two occasions, firstly, when he was produced after being apprehended before the Board and secondly, at the time when it was conducting preliminary assessment and allowed the respondent to address the Board.

The Board on 22.11.2017 had also called for report from one expert psychologist.

35. On behalf of the respondent, applications were filed before the Board, to comply with the provision of section 74 of the Act, 2015; another application was filed to provide the copy of the SIR, a copy of the psychologist report and to lead evidence in rebuttal; and a third application was filed praying for deferment of the preliminary assessment till such time the investigating agency submits its report under rule 10(5) of the Model Rules. The Board vide order dated 13.12.2017 passed separate orders on these applications. Firstly, it allowed the application under section 74 to protect the identity of the child. Secondly, it rejected the other two applications. In so far as the application for providing documents was concerned, the Board observed that access to the same would be given during the time of hearing for 30 minutes. The third application for deferment of the proceedings was rejected simpliciter. The Board thereafter proceeded to pass the order of preliminary assessment on 20.12.2017.

36. Before the Board, the counsel for the respondent had raised the following arguments:

(i) The intent of legislature was never to send all Juveniles above the age of 16 years involved in heinous offences to be tried as adults.

(ii)The Investigating agency had not completed the investigation and no interim report or final report had been placed before the Board.

(iii) There was no compliance of rule 10(5) of the Model Rules, as such the Board could not proceed with the preliminary assessment under section 15 as it would be incapacitated to make an assessment.

(iv) Due and adequate opportunity was not provided as copies of the SIR and reports of the expert psychologists were not supplied to the respondent or his guardian or counsel.

(v) There was no previous history or criminal antecedents of the respondent. There was no report of any previous violence by the respondent.

(vi) Even the reports of the experts were not complete and the recommendation given for further assessment by superior organization was not resorted to by the Board.

(vii) The expert reports were not conclusive.

(viii)The SIR reflected that the respondent had good behavior with friends, teachers and neighbors.

(ix) Lastly, it was argued that the theory propounded by the CBI that the crime was committed to get the examinations postponed could not have been a probable reason.

37. The Board considered all the submissions and after discussing all the four aspects of section 15 regarding mental capacity and physical capacity to commit the offence, ability to understand the consequences of the offence and the circumstances under which allegedly the offence was committed, came to the conclusion that respondent should be tried as an adult and, accordingly, passed an order under section 18(3). Relevant portion of the Juvenile Justice Board's order dated 20.12.2017 is reproduced below:

"13. It is alleged that on dated 08.09.2017, Juvenile in conflict with law Bholu in the area of P.S. Bhondsi committed the Murder of Master Prince in the premises of Ryan International School, Bhondsi. On the day of commission of alleged Act age of Juvenile in conflict with law was above 16 years. It is relevant to mention here that for the purpose of preliminary assessment of Juvenile and to find out what is the physical and mental capacity of juvenile, ability to understand the consequences of offence by juvenile and the circumstances in which he committed the alleged offence, the juvenile has been heard personally by the board on 22.11.2017 and various questions have been put to him in order to assess his capacity to commit and understand the consequences of the acts which culminated in to registration of present F.I.R. against and juvenile in conflict with law Bholu gave answer to all questions very confidently. This board can well recall the time when juvenile in conflict with law produced before it during personal hearing of juvenile in conflict with law, he fairly explained the circumstances in which he committed the acts resulted in to present inquiry along with the manner of commission thereof and now during the time of recording his statement for preliminary assessment when juvenile in conflict with law narrated a different story excluding his role in the alleged incident well indicates that juvenile in conflict with law also knows to cook up a story in order to save himself which in turn goes to show that he has adequate mental

capacity.

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16. Over all conclusion of Social Investigation report of Juvenile in conflict with law shows that he is below average student in studies but good in music especially in piano. He is aggressive in nature and also shouted over other students. He used to consume liquor and also used mobile phone in school premises. He is very short tempered, restless boy and also lacks stability. Just after alleged incident he appeared in exam but was upset and not writing anything in exam and on asking by teacher Deepshikha he disclosed to her that he saw a child was fallen and blood was coming from his body and due to that reason he was upset. Juvenile also remain upset due to quarrel between his parents.

17. As per section 15 of the act in order to preliminary assessment of juvenile in conflict with law the board can take the assistance of any psychologist or any other expert. This board was of the opinion that in this matter there is need of assistance of a psychologist for the preliminary assessment of juvenile in conflict with law so report of psychologist also sought in this matter. Dr. Joginder Kairo Clinical Psychologist, P.G.I.M.S., Rohtak in his report conducted two tests on juvenile in conflict with law to prepare his report. After both tests he give his finding that IQ of juvenile in conflict with law noted to be 95 in the category of average intellectual functioning. I.Q□95 showing average intelligence. This report also shows that it is suggested by the expert that if require further assessment the juvenile in conflict with law may be sent to Institute of Mental Health, University of Health Sciences, Rohtak. This boards feels it not necessary to sent the juvenile to Institute of Mental Health, University of Health Sciences, Rohtak for any further assessment because from the report of psychologist it is clear that I.Q. level of juvenile in conflict with law is average.

18. After having considered all the record and having heard both the sides and the juvenile personally, this board is of the considered opinion that juvenile in conflict with law Bholu had sufficient mental and physical capacity to commit the offence alleged against him and also he had the adequate ability to understand the consequences of the acts committed by him.

19. Bholu is well built boy and is studied in 11th class. Juvenile himself stated before this board that he is physically and mentally fit and not suffering from any kind of disease.

His I.Q. level shows that he is mentally fit so it can not be said that he did not know the consequences of acts alleged to be committed by him. During the personal hearing, juvenile admitted that he confessed before this board but same was under

pressure of CBI. During his statement he was asked a specific question that he requested from this board that he wants to reside with CBI but he answered that he requested as CBI asked him to do so. It is not possible that CBI tortured him, beaten him but despite that he requested to stay with CBI just on their asking. He also stated that he knew very well that present case registered upon him regarding the murder of a child, he do not knew this name despite the fact that child also learn music with him. He also stated that he was the witness of this incident as he saw Prince first in injured condition. From the statement of juvenile recorded during his personal assessment, it indicates that he is mature enough and all these facts satisfied this board to conclude that juvenile Bholu was having sufficient maturity and ability to understand the consequences of action on the day of alleged occurrence.

20. In view of the above discussion, this board of the considered opinion that there is a need of trial of juvenile in conflict with law Bholu as an adult. Consequently, in view of Section 18(3) of Juvenile Justice (Care & Protection of Children) Act, 2015 the case stands transferred to the Ld. Special Children's Court, Gurugram. Case file be put up before Ld. District & Sessions Judge, Gurugram with a request to transfer the same to Ld. Children Court having jurisdiction to try the matter. Juvenile in conflict with law Bholu Singh... Raghav is also directed to produce before the Ld. District & Sessions Judge, Gurugram on 22.12.2017. File complete in all respect be sent to the court of Ld. District & Sessions Judge, Gurugram well in time.

(emphasis supplied)"

38. In appeal, on behalf of the respondent, similar arguments were raised before the Children's Court which also dealt with the same in detail and approved the decision taken by the Board. Relevant portion of Children's Court's order dated 21.05.2018 is reproduced below: ["17.....So impugned order cannot be said as having been passed without any application of mind and contrary to the statutory provisions. The statement of the 'JCL' before the Board recorded for the purposes of preliminary assessment, the Expert Reports, the sequence of the occurrence running narrated by the investigating agency all are well reflecting the mental and physical capacity of the 'JCL' and the circumstances in which he allegedly committed the murder of 'Prince' and his ability to understand the consequences of said offence and these all are straightaway running against the appellant.

18. It is not out of place to mention here that an order qua need for trial of child as an adult required to be passed by the Board as per provisions contained under Section 18(3) of the Act after making a preliminary assessment in case of heinous offences is only on the basis of satisfaction of the Board by exercising its judicious acumen for which calling of expert opinion is also left at his discretion. By adding explanation to Section 15(1) it is clarified that preliminary assessment is not a trial. No right to second appeal is provided under the Act against such an order. It all indicated that intention of legislation is to recognize the wisdom of the Board regarding forum of trial of a child falling in the age of 16□18 years running charged with heinous offence. If there is no blatant misuse of said authority and no irregularity going to the depth of the matter the discretion exercised by the Board is required to be honoured.

19. Before concluding, this court would also like to comment regarding statutory provisions contained under Sections 3(x) & 99 of the Act as learned defence counsel have argued at length for said provision. As per clause (I) of Section 99, all reports related to child and considered by the Committee or the Board shall be treated as confidential. The proviso attached to this clause prescribes that Committee or the Board, as the case may be, may, if it so thinks fit, communicate the substance thereof to another Committee, or Board or to the child or to the child's parent or guardian, and may give such Committee or the Board or the child or parent or guardian, an opportunity of producing evidence as may be relevant to the matter stated in the report. Clause (II) of Section 99 then prescribes that notwithstanding anything contained in this Act, the victim shall not be denied access to their case record, orders and relevant papers. Learned defence counsel has gone making much stress over the clause(II) and has gone asserting that since victim shall not be denied access to the case record and relevant papers as Section 3(x) while prescribing general principles to be followed in administration of Act recognizes the principle of equality and postulates that there shall be no discrimination against a child on any grounds including sex, caste and equality of access, opportunity and treatment, so child/'JCL' should also be given a right of access to the confidential reports also at par with the victim which Juvenile Justice Board has denied to the appellant. This court finds no discrimination with the child/'JCL' by the provisions of Section 99. Once Section 99 declares all reports to be treated as confidential, then they are confidential for both the parties and even victim would not be having a right to obtain the certified copy of such a report in the name that victim shall not be denied access to the case record, orders and relevant papers. The access to the victim to confidential reports is not permitted in very words while granting him access to all other relevant papers and the case record under clause (II) of Section 99, so clause (I) of Section 99 will prevail which restricts said access to all and sundry. Since in the present matter no copy of confidential report has ever been supplied to victim, so it does lie in the mouth of appellant/'JCL' that he is being discriminated so far the right to access to confidential reports is concerned.

20. In view of the above discussions, the impugned order show that the Juvenile Justice Board has considered the correctness, legality and propriety of the matter and did not act with any irregularity at the time giving findings of fact relating to appellant. There is no illegality, perversity or infirmity in the impugned order. The appeal lacks merits and is liable to be dismissed. The appeal is, accordingly, dismissed. Papers be tagged with the main case file of the trial titled as "State Vs. Bholu" running fixed for 04.07.2018 for hearing the parties on the aspect of charge."

39. The order of the Children's Court dated 21.05.2018 was challenged by way of criminal revision before the High Court. The High Court allowed the criminal revision and after setting aside both the impugned orders passed by the Additional Sessions Judge as also the Board, remanded the matter to the Board for fresh consideration after assessing the intelligence, maturity and physical fitness as to how the child in conflict with law was in a position to know the consequences. It also provided that the necessary exercise be taken within a period of six weeks and further that while conducting the preliminary assessment the certificate of the psychologist of the Government hospital be obtained.

40. What weighed before the High Court was:

(i) There was violation of principles of natural justice and fair play as adequate opportunity was not provided;

(ii) Copies of documents relied upon by the Board were not provided to the respondent;

(iii) The reports of the experts were incomplete;

(iv) The recommendation by the expert to refer the child to higher organization for assessment was not acted upon by the Board;

(v) The two tests conducted by the experts were apparently not relevant and related to children of different ages;

(vi) That the Board and the Children's Court had no material before them to assess as to how the respondent knew the consequences of the offence and also the circumstances in which he allegedly committed the offence; and

(vii) The findings by the Board and the Children's Court were without any material and reasoning.

41. Relevant extracts from the judgment of the High Court are as under:

"...The proviso to Section 15 enables the Board to take the assistance of any experienced psychologist or other experts to make the Preliminary Assessment. It is clearly mentioned in para No.17 of order dated 20.12.2017 passed by the Board that in case, the opinion/assistance of any expert is required, the same be taken. It is necessary to assess the mental capacity of the juvenile. It was mandatory for the Board to assess the mental capacity of the alleged offender to commit such an offence and also the ability to understand the consequences of the same. It is also clear from the order that the clinical psychologist has himself suggested that if any further assessment is required, the juvenile may be sent to the Institute of Mental Health at Rohtak. However, it has completely been ignored by the Board and the assessment is based on inappropriate tests, namely, coloured Progressive Matrices (CPM) and Malin's Intelligence Scale for India Children (MISIC) meant for children between the ages of 5□1½ and 5□15 has been taken as the basis for the determination of the mental capacity of a child of 16½ years. Both the Board as well as the Appellate Authority have completely ignored this fact. The petitioner wanted to cross examine the psychologist regarding the same but his request was declined and no permission was granted to him. The social investigation report is also self contradictory and the same is not worth considering. The copies of the tests, in question, were not provided to the petitioner/parents/guardian but were shown just prior to the hearing of arguments. It was not practically possible to understand 35 pages of the report by any layman in a time period of less than 30 minutes. However, in a time period of 30

> minutes, the petitioner got to have a look at the record of Dr. Joginder Singh Kairo, Clinic Psychologist. It came out that he had carried the assessment on the basis of two tests i.e (i) Coloured Progressive Matrices (CPM) and (ii) Malin's Intelligence Scale for Indian Children (MISIC). The petitioner (represented by his father) and his counsel were having no idea about these tests. Subsequently, they tried to find out and came to know that those tests were absolutely irrelevant to the case of the petitioner and could not be used for making the mental assessment of the petitioner. The basic book on Clinical Child Psychology written by Radhey Sham and Azizuddin Khan categorically states that Malin's test of Intelligence for children is made for 5 to 15 years of children. Since the petitioner was 16.75 years old, when these tests were conducted on him, which were not correct tests and have resulted in wrong results. Said expert himself stated in his report that it would be appropriate that further assessment be made by a higher authority. This resulted in the petitioner doubting the credentials of the so called experts. Only because of this reason, the petitioner not only sought copies of the reports but also wanted to cross examine them so as to check the veracity and the credentials of the experts and their reports. However, he was not allowed in spite of specific request and averments made to that effect, leading to travesty of justice. The IQ test of the petitioner was conducted when he was more than 16 years and 9 months of age. An IQ of 95 at the age 16.75 would necessarily translate to 15.67 years, going by the formula for determining the mental age of any child, which is mental age/Biological Age x 100. This means that the petitioner□s child has been determined to have a mental age of less than 16 years as per the report of so called expert. Even as per said report, the petitioner had to be necessarily treated to be below 16 years. As the tests in question, in any case, are for children below the age of 15 years, the IQ of 95, determined by these tests, would obviously translate to a mental age of much less than 15 years in any case....

xxxx The Appellate Court has further held that there was no requirement of giving any statement of witnesses or documents etc. to the petitioner/guardian/parent, which is absolutely in contradiction with the provisions of Rule 10(5) read with Sections 3(iii) and (xvi) read with Section 8(3) of the Act. As a matter of fact, all provisions of the Act as well as the Rules made thereunder have to be read harmoniously, to achieve the objective of the Act.

However, learned counsel for the respondent□CBI has tried to convince the Court by stating that the reports/documents are not required to be supplied by considering the factum of confidentiality.

The plea of confidentiality as submitted by learned counsel for the respondent□CBI is actually for the protection of the child from third party by considering the privacy of the child. It cannot be interpreted that a delinquent child would not get a fair hearing, whereas, it is the requirement of Section 8(3) of the Act that the participation of the child and the parent or guardian is to be at every step of the process. Section 3 especially states that a positive interpretation has to be given to ensure that an environment is created so that the child should feel comfortable. The confidentiality is required with regard to third party just to protect the interest of the child. All the reports related to the child and considered by the Committee or by the Board are required to be treated as confidential

subject to the proviso. Even the Central Bureau of Investigation has also admitted in the proceedings before the Board as well as the Appellate Authority that it does not have such officers, who are specially trained to undertake such investigation, involving children. Meaning thereby, it is clear that the Central Bureau of Investigation does not have such an infrastructure to conduct the investigation for reaching to its logical conclusion keeping in view the special provisons of the Act. All these grounds were mentioned before the Appellate Authority but were not taken into consideration.

The argument raised by learned counsel for the respondent–CBI that this Court has a limited jurisdiction to invoke in the revision petition, does not carry any weight because as per provisions of Section 102 of the Act, in case, there is any illegality and perversity or there is non–compliance of mandatory provisions, this Court has a power to exercise the revisional jurisdiction. This view has been supported by the law laid down in cases Jagannath Choudhary vs Ramayan Singh 2002(2) RCR (Criminal) 813 and Rajinder Singh vs Vishal Dingra 2015(8) RCR (Criminal)

453. In view of the facts and law position as discussed above, the present petition is allowed and impugned order dated 20.12.2017 passed by the Juvenile Justice Board, Gurugram and order dated 21.05.2018 passed by the Additional Sessions Judge, Gurugram are set aside. The case is remanded back to the Board for afresh consideration after assessing the intelligency, maturity, physical fitness as to how the juvenile in conflict with law was in a position to know the consequences of the offence. The necessary exercise be done within a period of six weeks from the date of receipt of certified copy of the order. It is also relevant to mention here that while conducting preliminary assessment, the opinion of psychologist of the Government hospital be obtained." ARGUMENTS ON BEHALF OF COMPLAINANT–APPELLANT:

> 42. The arguments of Mr. Sushil Tekriwal, learned counsel on behalf of the complainant–appellant are summarised below:
>
> (i) 'Best interest of child' or 'presumption of innocence' etc. does not mean immunity from criminal charges.

Intent of the act is to reform the child in conflict with law and also to subject them to penal consequences.

(ii) Children aged 16–18, prosecuted for heinous crimes have been assigned a separate class by legislature, therefore, they may be denied the protective cover. The purpose of this Act is not to give shelter to accused of heinous offences.

(iii) The respondent fulfils all the conditions laid down under section 15 of the Act, 2015 and the Board had rightly held that he should be tried as an adult.

(iv) Law is clear that the Board 'may' take help of experienced psychologists, psycho–social workers or other experts. The word 'may' has to be read as 'may' only and the legislative competency to make the enactment in question is not in controversy. Even section 101(2) of the Act, 2015 uses the word

'may' with respect to opinion of medical expert.

(v) Findings of the Medical Board should have been left to medical experts as Courts have no expertise in such matters. The opinion of the Medical Board is final and cannot be questioned before the Court.

(vi) Social and medical report was provided to all the stakeholders. However, the request for cross☐ examination was declined on the ground that section 15 is only a preliminary assessment and not a trial. Further, according to section 99 of the Act, 2015 all the reports related to the child considered by the Board be treated as confidential.

(vii) Revisional jurisdiction of the High Court under section 102 is limited with regard to the power to call for and examine the records of an inferior Court in order to satisfy itself of the legality and propriety of proceedings or orders made in cases.

(viii) There is no illegality in concurrent findings of the two Courts below. The High Court broadened its jurisdiction too far, going into correctness of the medical board report and the correctness of various other factual aspects.

(ix) The issue of remanding the case for fresh consideration is redundant now in terms of its impossibility of performance.

(x) In support of the above submissions, Mr. Tekriwal has placed reliance on the following judgments:

(a) Kishan Paswan v. UOI (Civil Misc. W.P. No. 5044 of 2020){paras 28(97) and 35 (v)},

(b) Mukarrab v. State of UP, (2017) 2 SCC 210 (para 27),

(c) Controller of Defense Accounts (Pension) and ors. v. S. Balachandran Nair (2005) 13 SCC 128,

(d) Amit Kapoor v. Ramesh Chander & Anr (2012) 9 SCC 469 (paras 12 and 13),

(e) Rajendra Rajoriya v. Jagat Narain Thapak and Anr (2018) 17 SCC 234,

(f) Jabar Singh v. Dinesh (2010) 3 SCC 757,

(g) Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (1986) 4 SCC 447,

(h) Madanlal Fakirchand Dudheya v. S. Changdeo Sugar Mills, 1962 AIR 1543,

(i) Chinnamar Kathiam v. Ayyavoo, AIR 1982 SC 137,

(j) Jyoti Prakash Rai @ Jyoti Prakash v. State of Bihar, (2008) 15 SCC 223 and

(k) Kent v. United States (383, US, 541, 1966).

ARGUMENTS ON BEHALF OF CBI□APPELLANT:

43. The arguments of Shri Vikramjit Banerjee, learned Additional Solicitor General on behalf of the CBI□appellant are summarised below:

(i) The counsel for the CBI drew attention to the Statement of Objects and Reasons of the Act, 2015, wherein the systems under the Act, 2000 are deemed as ill□equipped to tackle 16□18 year old offenders, and an observation about a rapid increase in heinous child offenders of the said age is also elucidated upon.

(ii)The counsel also highlighted the provisions under section 15 of the said Act which provide for preliminary assessment on commission of heinous crimes by children above 16 years to be conducted by the Board, which 'may' take the assistance of experienced psychologists, psycho□social workers, or other experts.

(iii) It was also submitted that this preliminary assessment is distinct from a trial.

(iv) The counsel also referred to section 103 of the Act, 2015, which lays down the requirement to follow as far as possible, procedure laid down by the Cr.P.C., during Board inquiries for trials of summons cases.

(v) The counsel accentuated rules 10 and 10A of the Model Rules. Rule 10A permits the Board to take assistance from psychological experts and social workers while making the preliminary assessment which has been followed by the Board.

(vi) Rule 10(5) which mandates the Child Welfare Police Officer to produce the statements of witnesses recorded by him and other documents produced during the course of investigation within a month from the date of the child's first production before the Board. Copies of the same to be given to the child or his parent/guardian, were also brought forth and highlighted.

(vii) There is no requirement under the Act, 2015 for the final investigation to be completed before the preliminary assessment takes place. Moreover, the Act, 2015 necessitates abidance by the Cr.P.C. to the maximum extent, therefore, in line with the same, the accused cannot be provided with the case diary during investigation. Reference is also made to section 99 of the Act, 2015 regarding confidentiality.

Hence, the counsel contends that rule 10(5) of the Model Rules must be read down. The High Court committed an error in holding otherwise.

(viii) For the preliminary assessment, the Board must consider the mental and physical capacity of the child to commit the offence, and this assessment has to be completed within three months of the child's first production before the Board after which, a re□assessment is impermissible.

(ix) The judgement of the High Court was also attacked by asserting that the requirement for cross□ examination of the psychologist, and supply of the expert's reports to the respondent or his guardians prior to the passing of the preliminary assessment was erroneous.

(x) The requirement to complete the investigation within a month from the first date of production of the child before the Board and to supply a copy of the final report to the child or his parents, prior to the making of the preliminary assessment was also called into doubt.

(xi) The CBI attempted to prove its proper conduct by asserting that Bholu was treated in a child□ friendly manner, and examined in line with the Act, 2015 and was apprehended in the presence of his father and other requisite authorities.

(xii) The CBI claims that Bholu was interviewed in a cautious and friendly manner, in the presence of the Probation and Child Welfare Officer, along with independent witnesses. Moreover, he voluntarily admitted his involvement in the murder of Prince, and was sent to an Observation Home, post his apprehension, instead of being held in a lock up.

(xiii) Since the CBI was not able to satisfactorily complete its investigation, the Board granted three days of judicial custody of Bholu, wherein he was to be accompanied by a Board member, and placed at Seva Kutir (Observation Home), post his custody.

(xiv) In support of the above submissions, Mr. Vikramjit Bannerji has placed reliance on the following judgments:

(a)Balkaram v. State of Uttarakhand & Ors. (2017) 7SCC 668,

(b) Shilpa Mittal v. State of NCT & Another, Crl. Appeal No. 34 of 2020,

(c) G. Sundarrajan v. Union of India & Ors. (2013) 6 SCC 620.

ARGUMENTS ON BEHALF OF RESPONDENT□BHOLU:

44. The arguments of Mr. Siddharth Luthra, learned Senior Advocate on behalf of the respondent are summarised below:

(i) The essential modification in the Act, 2015 is the exception created for the age of 16 to 18 years. In cases of heinous offences, as defined under section 2(33) of the Act, 2015, a child can be treated as an adult subject to the inquiry to be carried out in terms of sections 14 and

> 15. This Court held that, while interpreting the scheme of the Act, the interests of children should be protected and to treat them as adults is an exception to the rule.

(ii) While conducting an inquiry under the Act, the Board has to keep in mind the overall scheme of the Act.

(iii) The Act, 2015 provides that the Investigating Officer must be a trained Police Officer, capable of dealing with children and designated as a Child Welfare Police Officer (CWPO). However, in this case the IO was not a designated CWPO under the Act. Section 107 further requires the creation of a special juvenile police unit to "exclusively deal with the children" and with "aptitude, appropriate training and orientation".

(iv) The child was kept in police lock-up and subsequently a confession was extracted from him which was relied upon by the Board. The same is contrary to rule 8(3)(v) and to the principle of presumption of innocence enshrined under section 3(i) of the Act, 2015 read with rule 10 A (3) of the Model Rules.

(v) Due to the non-submission of documents to the child prior to the hearing, sections 8(3)(a) and 8(3)(b), section 14(5)(c) as well as section 3 of the Act, 2015 were violated. Additionally, granting only 30 minutes was insufficient to peruse and scan through the record.

(vi) On the date of the psychological assessment, the respondent was aged 16 years and 7 months. However, the tests administered to him were appropriate for children upto 11 years (CPM) and 15 years (Malins). According to the psychologist, Dr Kairo, the respondent was found to be cooperative and communicative. On the basis of the tests administered his IQ was noted to be 95, and it was further noted "If required further assessment, he may be sent to Institute of Mental Health, University of Health Sciences, Rohtak."

(vii) The entitlement of respondent to access the records before the preliminary assessment takes place, is challenged by the appellants under section 99 of the Act, 2015. Section 14(5)(c) provides that every child brought before the Board shall be heard and permitted to participate in the inquiry and rule 10(5) states that a copy of the statement of witnesses recorded by him shall also be given to the child or parent or guardian of the child.

(viii) Reliance has been placed on the statement of the Hon'ble Minister for Women and Child Development in the Lok Sabha during the discussion on the Juvenile Justice (Care and Protection of Children) Bill, 2014 stating that the assessment of the Board is not one-sided and the Board will take due notice of the views of the child.

(ix) With respect to the plea of CBI to read down rule 10(5) of the Model Rules, the counsel submitted that reading down the said rule was not raised before the High Court or this Court before filing of the written submissions. Alternatively, a provision can be read down to save it from being declared unconstitutional or illegal, which is not so in the present case. There being no challenge towards constitutionality, any attempt towards this would be in conflict with the objects of the Act.

(x) By using words such as “clever” and reading the alleged confession against him being a complete violation of Article 20(3), the Board has clearly gone contrary to the principle of presumption of innocence provided under section 3(i) of the Act, 2015 read with rule 10A(3) Model Rules and section 3(viii) which mandates that there shall be no adversarial or accusatory words used in involving a child.

(xi) The Board failed to take into account the statement of the respondent that CBI called him inside, beat him up and asked him to speak and erroneously concluded that the respondent had sufficient mental and physical capacity to commit the offence.

(xii) In the order dated 20.12.2017, the Board read the confession of the respondent against him but later the Board stated that at this stage it is not to be seen “whether juvenile in conflict with law is guilty or not, he confessed or not, if confessed then it was voluntary or under pressure.”

(xiii) The circumstances in which the child allegedly committed the offence were not put before the Board nor was the charge□sheet placed to enable it to form its opinion.

(xiv) The word “may" occurring in section 15 and section 101(2) has to be construed as “shall”.

(xv) It is to be noted that neither the SIR nor the report of Dr. Joginder Kairo indicate the mental age of the child. Dr. Kairo had advised a further assessment but the same was not done and the Board went ahead with determining the age of the child.

(xvi) Section 102 of the Act allows for exercise of revisional jurisdiction on the grounds of legality and propriety. The High Court correctly noted the perversity in reasoning of the Board and the Sessions Court, consequently it rightly set aside the aforementioned orders.

(xvii) Respondent continues to remain in the observation home and has completed 4.5 years in custody. During his stay he has interacted with people from all walks of life and was accused of different heinous offences. It would not be possible to assess his mental and physical capacity and understanding at this stage. It would be in the interest of justice that he may be treated as a child and not as an adult, since he has lost his valuable right under sections 14 and 15 of the Act, 2015.

(xviii) In support of the above submissions, Mr. Luthra has placed reliance on the following judgments: □

(a)Shilpa Mittal v. State of NCT & Another, Crl. Appeal No. 34 of 2020(paras 1, 30, 31 and 34),

(b) Bachahan Devi & Anr. v. Nagar Nigam, Gorakhpur, (2008) 12 SCC 372),

(c) Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6SCC 770 (paras 52 and

53),

(d)State of Bank of Travancore v. Mohammed Mohammed Khan (1981) 4 SCC 82 (paras 19 to 23)

(e) Som Prakash Rekhi v. Union of India (1981) 1 SCC 449 (para 63)

(f) Pratap Singh v. State of Jharkhand, (2005) 3 SCC 551 (Paras 7 and 10),

(g) Salil Bali v. Union of India & Another, (2013) 7SCC 705 (paras 43 and 63),

(h)Province of Bombay v. Kusaldas S. Advani, 1950 SCR 621 (para 16)

(i) State of Andhra Pradesh v. A.P. Wakf Board, 2022 SCC Online SC159 (para 143),

(j) Superintendent & Remembrancer of legal affairs West Bengal v. Satyen Bhowmik, (1981) 2SCC 109 (paras 20 to 22),

(k)Nitya Dharamananda v. Gopal Sheelum Reddy, (2018) 2SCC 93 (paras 5 to 9),

(l) In re: Criminal Trials Guidelines regarding inadequacies and Deficiencies v. State of Andhra Pradesh and ors. (2021) 10 SCC 598 (para 11),

(m) Union of India v. IND□Swift Laboratories Limited (2011) 4SCC 635,

(n) Nazir Ahmad v. King Emperor 1936 ILR 372 (pg. 378 to 383)

(o) The King v. Saw Min, 1938 SCC Online Rang 68 (pg. 1,10)

(p) Mahabir Singh v. State of Haryana (2001) 7scc 148 (pg. 19,21,22)

(q) Opto Circuit India Ltd. v. Axis Bank (2021) 6SCC 707 (para 14)

(r) Aloke Nath Dutta & Ors. v. State of Bengal, (2007) 12 SCC 230 (para 104)

(s) Sharat Babu Diguamarti v. NCT of Delhi, (2017) 2 SCC 18 (para 37),

(t) Philips India Ltd. v. Labour Court (1985) 3SCC 103 (paras 15 to17) (u) Municipal Corporation of Delhi v. Girdharilal Sapru, (1981) 2 SCC 758 (para 5)

(v) Ramgopal Ganpatrai Ruia v. State of Bombay, 1958 SCR 618 (para 15) (w) Emperor v. N.G. Chatterji, ILR 1946 ALL 553 (paras 5 to 8, 10, 14),

(x) Krishnan v. Krishnaveni (1997) 4SCC 241 (para

8) (y) Rajeshwar Singh v. Subrata Roy Sahara (2013) 14 SCC 257 (Para 26);

(z) Ashok Kumar Gupta v State of U.P. 1994 Supp (1) SCC 145 (Paras 58□60);

(aa) Union Carbide Corp. v. Union of India (1991) 4 SCC 584 (Para 83) and;

(bb) On molding of relief – M. Siddiq (Dead) Through Legal Representative (Ram Janmabhumi Temple Case) v. Mahant Suresh Das & Ors. (2020) 1 SCC 1 (Para 1024, 1026)

ANALYSIS:

EFFECT OF AN ORDER OF PRELIMINARY ASSESSMENT

45. The order of preliminary assessment decides whether the child in conflict with law, falling in the age bracket of 16□18 years and having committed heinous offence, is to be tried as an adult by the Children's Court or by the Board itself, treating him to be a child. There are two major consequences provided in the Act, 2015, if the child is tried as an adult by the Children's Court. First, that the sentence or the punishment can go up to life imprisonment if the child is tried as an adult by the Children's Court, whereas if the child is tried by the Board as a child, the maximum sentence that can be awarded is 3 years. The second major consequence is that where the child is tried as a child by the Board, then under section 24(1), he would not suffer any disqualification attached to the conviction of an offence, whereas the said removal of disqualification would not be available to a child who is tried as an adult by the Children's Court, as per the proviso to section 24(1). Another consequence, which may also have serious repercussions, is that as per section 24(2), where the Board or the Children's Court, after the case is over, may direct the police or the registry that relevant records of such conviction may be destroyed after the period of expiry of appeal or a reasonable period as may be prescribed. Whereas, when a child is tried as an adult, the relevant records shall be retained by the relevant Court, as per the proviso to section 24(2).

46. These consequences are serious in nature and have a lasting effect for the entire life of the child. It is well settled that any order that has serious civil consequences, reasonable opportunity must be afforded. The question is of what would be a reasonable opportunity in a case where a preliminary assessment is to be made by the Board under section 15.

SOCIAL INVESTIGATION REPORT (SIR)

47. Preparation of SIR is a statutory requirement for every child in conflict with law, which is to be prepared by the Probation Officer or any other agency as may be directed by the Board. Its format is also provided in Form 6 to the Model Rules. The object of getting an SIR prepared is to obtain as much as possible information about

the background of the child. It has as many as 48 columns to be filled up and thereafter, the Probation Officer is to submit his opinion also.

In the present case, the SIR was submitted by the Legal Probation Officer on 27.11.2017. The SIR is a relevant material to be considered by the Board to take a decision while passing any orders regarding bail or after inquiry or preliminary assessment.

PSYCHOLOGIST'S REPORT

48. The report of the psychologist dated 05.12.2017 only spells out the IQ of the child to be 95 and also that further assessment, if required, could be made. The relevant extracts from the aforementioned report are reproduced hereunder.

> "xxx xxx xxx
> For assessment of his mental capacity,
> assessment was carried out.

Impression: IQ □95, average intelligence.

xxx xxx xxx If required further assessment, he may be sent to the Institute of Mental Health, University of Health Sciences, Rohtak.

xxx xxx xxx"

49. A perusal of the above report clearly mentions that it was only for the purpose of assessing the mental capacity of the child. The report did not mention anything about the child's knowledge of the consequences of committing the alleged offence, nor did it mention about the circumstances leading to the alleged offence. No such assessment was carried out as, apparently the Board only required the opinion on the mental capacity of the child.

NATURAL JUSTICE/REASONABLE OPPURTUNITY

50. The Board and the Children's Court have relied upon section 99 of the Act, 2015 to hold that they were not required to provide the copies of the material on record available in the form of SIR, the report of the psychologist, and other material. On the other hand, the High Court relied upon rule 10(5) of the Model Rules to hold that the documents ought to have been provided to the child or his guardian or his lawyer as the case may be, and this having not been done, it was a case where reasonable opportunity had been denied.

51. Section 99 provides that all reports relating to the child and considered by the Committee or the Board are to be treated as confidential. The proviso to section 99(1) gives the power to the Committee or the Board to communicate the substance thereof to another Committee or Board or the child, his parents or guardian, and may also give such Committee or Board or the child or parent or guardian, an opportunity to produce evidence as may be relevant to the matter stated in the report. Section 99(2) states that the victim would not be denied access to the case record, relevant

documents and papers.

52. Maintaining confidentiality has a different purpose but in no case can it be said that to maintain confidentiality, the relevant material would not be provided to the child or his guardian or parents. It would be in complete contravention of the settled principles of criminal jurisprudence. Concept of confidentiality used in section 99 is to prevent the reports from coming in public domain or shared in public. Its availability will be confined to the parties to the proceedings and the parties should also refrain from sharing it with third parties. Section 99(2) begins with the non obstante clause and proceeds to direct that the victim should not be denied access to the case report, orders and relevant papers. Once the legislature's intention is to provide material to the victim there could never be an intention in the name of confidentiality to deny such access to the records to the child or his parents or guardians. The Board and the Children's Court committed an illegality in not providing the documents as demanded by misinterpreting section 99 of the Act, 2015.

53. In the present case, the SIR and the report of the expert psychologist was not provided to the respondent or his parents or guardians. An application was filed on behalf of the respondent for supplying such material which was denied by the Board by a detailed order dated 13.12.2017. The Board only extended the liberty to the counsel and the parent or the guardian to look into these reports for 30 minutes before the hearing commenced.

54. It has been argued on behalf of the respondent that firstly, these documents ought to have been provided to them; and secondly, half an hour was too little a time to go through the contents of the voluminous SIR (running into 35 pages) which contained several statements; and thirdly, they had no opportunity to lead evidence in rebuttal by way of cross□examination or submitting documents.

55. Another violation of principles of natural justice/opportunity addressed on behalf of the respondent was on the report of the psychologist, which only provided the IQ level of the child and nothing more. An application was also filed on behalf of the respondent to lead evidence in rebuttal to the report of the psychologist and to cross□examine the psychologist as the tests applied by the psychologist in his report were not the relevant tests for a child aged 16.5 years. The tests applied were applicable to children up to the age of 15 years. This request made on behalf of the respondent was also denied by the Board by a detailed order dated 13.12.2017.

56. Another aspect urged on behalf of the respondent was to the effect that the report of the psychologist suggested/recommended that the child may be got examined further by the Institute of Mental Health, University of Health Sciences, Rohtak. According to the learned counsel for the respondent, the Board committed an error by not getting further examination carried out by a superior institution. Once the psychologist carrying out the tests had given a report and he was himself not sure of his own report and had suggested for assessment by a superior institution, the Board ought to have obtained further report.

57. Yet another aspect which goes to violation of a fair opportunity was, rejection of the application filed on behalf of the respondent before the Board to defer the proceedings of preliminary assessment till such time the compliance of rule 10(5) of the Model Rules is not made. The material

collected by the Child Welfare Police Officer in the form of statement of witnesses and other documents during the course of investigation which was to be made within a period of one month, ought to have been awaited and a copy of the same should have been provided to the respondent or his parents or guardian as this would be relevant for preliminary assessment.

58. In view of the above, the argument of Mr. Vikramjit Banerjee, learned counsel for CBI, on two counts needs to be rejected. Firstly, rule 10(5) of the Model rules should be read down as being in conflict with section 99 of the Act, 2015 and secondly, that no material collected during investigation could be provided to the accused till such time the police report under section 173(2) Cr.P.C. is filed and the cognizance is taken by the Magistrate under section 190 and the stage of section 207/208 Cr.P.C. is reached. The Act, 2015, being a special Act, will have an overriding effect over general procedure prescribed under the Cr.P.C.. The provisions of the Cr.P.C. would be applicable so long and so far as they are not in conflict with the special provisions contained in the Act, 2015.

TIMELINE

59. There is a timeline provided for the inquiry, submission of the SIR, preliminary assessment and the investigation under the Act, 2015 and the Model Rules:

> i. The inquiry by the Board under section 14(1) is to be completed within a period of four months from the date of first production of the child before the Board, and it could be extended by a period of two more months by the Board for the reasons to be recorded as per section 14(2). ii. Section 14(3) provides that a preliminary assessment under section 15 should be disposed of by the Board within a period of three months from the date of first production of the child before the Board. iii. Under section 14(4) it is provided that if the inquiry by the Board under section 15 for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated. iv. Under the proviso to section 14(4) dealing with the serious or heinous offences, in case the Board requires further period of time for completion of inquiry, the same may be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded.
>
> v. Under section 8(3)(e), SIR is to be submitted by the Probation Officer or the Child Welfare Officer or a social worker within a period of fifteen days from the date of first production of the child before the Board. vi. In rule 10(5) of the Model Rules, in case of heinous offences committed by a child between the age of 16 to 18 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.

60. The timeline given under the various provisions as referred to above, has a rationale. The SIR to be submitted within fifteen days would facilitate the Board in taking a decision on the request for bail at the earliest. The period of one month given under rule 10(5) is to facilitate the Board to take a decision may be on a pending bail matter or for preliminary assessment for which three months'

time is provided. The completion of inquiry within four months or any extended period is to ensure that a child is not subjected to unnecessary long and lengthy processes of trials and inquiries and that the matter is taken to its logical conclusion at the earliest.

61. In the present case, despite request of the respondent to defer the preliminary assessment till such time as the material under rule 10(5) was provided, was rejected by the Board on 13.12.2017 and the Board proceeded to make an order of preliminary assessment within a week thereafter on 20.12.2017. The child had been taken into custody and was produced before the Board for the first time on 08.11.2017. The three months' period for preliminary assessment would have continued till 07.02.2018. The Board could have, rather ought to have, waited for the report and material under rule 10(5) of the Model Rules. Similarly, once the report of the psychologist suggested that if further examination is required then the respondent ought to have been referred to a specialised institute in Rohtak but this suggestion was also not accepted by the Board without cogent reason.
PRELIMINARY ASSESSMENT

62. The obligation of the Board in making the preliminary assessment on the four counts mentioned in section 15 of the Act is largely dependent upon the wisdom of the Board without there being any guidelines as to how the Board would conduct such preliminary assessment. In the absence of any such framework or guidelines, the Board has to use its discretion in taking into consideration whatever material it deems fit for assessing the four attributes.

(a)In the present case, the Board and the Children's Court, relying upon the statement given by the child at the time of first appearance before the Board, the second statement given by the child at a later stage, the SIR and the report of the psychologist indicating an IQ level of 95, have held that the respondent had the mental capacity to commit the offence.

(b) Insofar as the physical capacity is concerned, the Board and the Children's Court have taken into consideration the built of the child and his age to hold that he had the physical capacity to commit the nature of the alleged assault.

(c)The Board relied upon the fact that the respondent was studying in class 11th; he had stated that he is physically and mentally fit and not suffering from any disease; his IQ level shows that he is mentally fit and as such it cannot be said that he did not know the consequences of the alleged offence to be committed by him. From the statement of the respondent recorded during his personal assessment, it was indicated that he was mature enough. All these facts satisfied the Board that the respondent was having sufficient maturity and ability to understand the consequences of his action.

(d) The order of the Board does not anywhere refer to its assessment regarding the circumstances in which the respondent allegedly committed the offence. However, what appears is that the Board relied upon the SIR.

63. In the present case, the Board and the Children's Court relied heavily on the psychologist's report which only reflected the IQ of the respondent to be of average level bearing a score of 95 to hold that the respondent had the mental capacity to commit the offence and also ability to know the

consequences of the offence. The Board and the Children's Court both have also recorded that the recommendation of the psychologist to send the respondent for further assessment to the Institute of Mental Health, University of Health Sciences, Rohtak was not necessary as, according to them, the IQ findings were sufficient for them to arrive at the preliminary assessment.

64. Section 15 and rule 10A provide that the Board may take the assistance of psychologists, psycho□ social workers, or other experts who had experience of working with children in difficult circumstances. According to the learned counsel for the appellants, the word 'may' should be read as 'may' only i.e., the Board in its discretion may or may not take the assistance of such experts whereas on behalf of the respondent, it has been strenuously contended that the word 'may' should be read as 'shall' and it should be mandatory for the Board to take opinion or assistance from such experts before passing an order of preliminary assessment. This aspect is dealt with at a later stage.

65. While considering a child as an adult one needs to look at his/her physical maturity, cognitive abilities, social and emotional competencies. It must be mentioned here that from a neurobiological perspective, the development of cognitive, behavioural attributes like the ability to delay gratification, decision making, risk taking, impulsivity, judgement, etc. continues until the early 20s. It is, therefore, all the more important that such assessment is made to distinguish such attributes between a child and an adult.

66. Cognitive maturation is highly dependent on hereditary factors. Emotional development is less likely to affect cognitive maturation. However, if emotions are too intense and the child is unable to regulate emotions effectively, then intellectual insight/knowledge may take a back seat.

67. We are in agreement with the reasoning given by the High Court that further assessment ought to have been carried out once the psychologist had recommended so and had also suggested the name of the institute. The Board and the Children's Court apparently were of the view that the mental capacity and the ability to understand the consequences of the offence were one and the same, that is to say that if the child had the mental capacity to commit the offence, then he automatically had the capacity to understand the consequences of the offence. This, in our considered opinion, is a grave error committed by them.

68. The language used in section 15 is "the ability to understand the consequences of the offence". The expression used is in plurality i.e., "consequences" of the offence and, therefore, would not just be confined to the immediate consequence of the offence or that the occurrence of the offence would only have its consequence upon the victim but it would also take within its ambit the consequences which may fall upon not only the victim as a result of the assault, but also on the family of the victim, on the child, his family, and that too not only immediate consequences but also the far□ reaching consequences in future. Consequences could be in material/physical form but also affecting the mind and the psychology of the child for all times to come. The consequences of the offence could be numerous and manifold which cannot be just linked to a framework; and, for this purpose, the overall picture as also future consequences with reference to the facts of the case are required to be consciously analysed by the Board.

69. Consequences for the victim could be his death, or permanent physical disability, or an injury which could be repaired or recovered; the impact of the offence on the mind of the victim may be prolonged and continue for his lifetime; the impact on the family and friends of the victim, both mental and financial; consequence on the child going into incarceration; mental impact on the child, it could be repentance or remorse for life, the social stigma cast on the child and his family members; the consequences of litigating and so many other things which would be difficult to adumbrate.

70. A child with average intelligence/IQ will have the intellectual knowledge of the consequences of his actions. But whether or not he is able to control himself or his actions will depend on his level of emotional competence. For example, risky driving may result in an accident. But if emotional competence is not high, the urge for thrill seeking may get the better of his intellectual understanding.

71. Children may be geared towards more instant gratification and may not be able to deeply understand the long-term consequences of their actions. They are also more likely to be influenced by emotion rather than reason. Research shows that young people do know risks to themselves. Despite this knowledge, adolescents engage in riskier behaviour than adults (such as drug and alcohol use, unsafe sexual activity, dangerous driving and/or delinquent behaviour). While they do consider risks cognitively (by weighing up the potential risks and rewards of a particular act), their decisions / actions may be more heavily influenced by social (e.g. peer influences) and/or emotional (e.g. impulsive) tendencies. In addition, the lack of experience coupled with the child's limited ability to deeply understand the long-term consequences of their actions can lead to impulsive / reckless decision making.

72. Coming to the last count, i.e., the assessment regarding the circumstances in which the offence is alleged to be committed is again an attribute which could have many factors to be considered before such an assessment could be made. There could be a number of reasons for a person to commit a crime. It could be enmity, it could be poverty, it could be greed, it could be perversity in mind and many others. There could be coercion. There could be threat to one's life and property. There could be allurement in terms of the material and physical gains. Crime could be committed on account of stress or depression also. It could be on account of the company that one keeps. One could commit crime in order to help his family and friends. All these and many more could be termed as circumstances leading to the commission of crime.

73. The preliminary assessment has been a question of debates, analysis and research. The National Law University, Orissa, in collaboration with UNICEF, made a detailed study on the practice of preliminary assessment under the Act, 2015. To the said report is annexed as Annexure 4, the Guidance Notes on Preliminary Assessment Reports for Children in Conflict in Law developed by the Department of Child and Adolescent Psychiatry, NIMHANS9, Bengaluru. It would be worthwhile to mention here that NIMHANS, Bengaluru is one of the premier institutions involved in the 9 National Institute of Mental Health and Neurosciences. research and study of psychology, and is a world-renowned centre for mental health, neurosciences and allied fields. The contents of the Guidance Notes referred to above are reproduced below-"Guidance Notes on Preliminary

Assessment Report for Children in Conflict with Law Department of Child & Adolescent Psychiatry, NIMHANS, Bengaluru The preliminary assessment uses information from the detailed psychosocial and mental health assessment (that is done first) and presents that information as outlined below. A. Mental & Physical Capacity to Commit Alleged Offence The child's ability to make social decisions and judgments are compromised due to:

(i) Life skills deficits (emotional dysregulation/ difficulty coping with peer pressure/ assertiveness & negotiation skills /problem□solving/ conflict□resolution/ decision□ making).

(ii) Neglect / poor supervision by family/poor family role models

(iii) Experiences of abuse and trauma

(iv) Substance abuse problems

(v) Intellectual disability

(vi) Mental health disorder/ developmental disability

(vii) Treatment/ interventions provided so far Guidance Notes For this section, the professional filling out the preliminary assessment form is simply required to mark off against each item (a tick mark to indicate 'yes' and an X mark to indicate 'no') whether or not the child is compromised in this particular area. The information is drawn from relevant sections of the detailed psychosocial and mental health proforma, which contain information on: how a child's abilities to make appropriate social decisions and judgements (which translate into actions and behaviours) have been affected by the child's life circumstances and mental health or developmental problems.

For item (i) on life skills deficits, refer to Section 6, 'Life Skills Deficits and Other Observations of the Child' and sub□section 6.1. on 'Life Skills Deficits'. For item (ii), refer to Section 2, sub□section 2.1. on 'Family Issues Identified'. For item (iii) on experiences of abuse and trauma, refer to Section 3, 'Trauma Experiences:

Physical, Sexual and Emotional Abuse Experiences'. For items (iv) and (vi) on substance abuse problems and mental health disorders/ developmental disability, refer to Section 5, 'Mental Health Concerns'. For item (v) on intellectual disability, you may rely on your judgement based on your interaction with the child during the entire process of administering the psychosocial and mental health proforma—if the child was unable to respond to most questions or responded 2 in an age□appropriate manner (like a younger child would, demonstrating little understanding of many things asked or discussed), then you may suspect that he/she has intellectual disability. (Following this, it would be useful and necessary to confirm this through

relevant IQ testing conducted by psychologists located in mental health facilities).

For item (vii), you may have enquired from the child, during the assessment, about whether he/she has received any professional assistance or treatment for any mental health issues/ family problems or life skills deficits that he/she has. (Generally, children in the Observation Home have never received any treatment or interventions for their problems). In actual fact, everyone, except someone with serious physical disability (the type that severely impacts locomotor skills) or with intellectual disability, has the mental and physical capacity to commit offence. So, to ask whether a given child has the mental and physical capacity to commit offence, in simplistic terms, is likely to elicit the answer 'yes' in most cases. And just because someone has the physical and mental capacity to commit an offence, does not mean that they will or that they have. Therefore, a dichotomous response as elicited by this question posed by the JJ Act is of little use in making decisions regarding child who has come into conflict with the law. Thus, in response to the problems resulting from a simplistic dichotomous response to the physical□mental capacity question, we have adopted a more detailed, descriptive and nuanced interpretation. As per the preliminary assessment report we have developed, mental and physical capacity to commit offence is the ability of a child to make social decisions and judgments, based on certain limitations that the child may have. In other words, a child's abilities to make social decisions and judgments are compromised due to life skills deficits, neglect / poor supervision by family/poor family role models, experiences of abuse and trauma, substance abuse problems, intellectual disability, and/or mental health disorder/ developmental disability. Such issues (if untreated) adversely impact children's world view, and their interactions with their physical and social environment, thereby placing them at risk of engaging in antisocial activities.

B. Circumstances of Alleged Offence

(i) Family history and relationships (child's living arrangements, parental relationships, child's emotional relationship & attachment to parents, illness & alcoholism in the family, domestic violence and marital discord if any).

(ii) School and education (child's school attendance, Last grade attended, reasons for child not attending school□whether it is due to financial issues or lack of motivation, school refusal, corporal punishment).

(iii) Work experience/ Child labour (why the child had to work/ how child found the place of work, where he was working / hours of work and amount of remuneration received, was there any physical/emotional abuse by the employer and also regarding negative influence the child may have encountered in the workplace regarding substance abuse etc).

(iv) Peer relationships (adverse peer influence in the context of substance use/ rule□ breaking/inappropriate sexual behaviour/school attendance)

(iv) Experiences of trauma and abuse (physical, sexual & emotional Abuse experiences) 3 (vi) Mental health disorders and developmental disabilities: (Mental health disorders and developmental disabilities that the child may have).

Guidance Notes All of the above information for this section is to be documented as it is in the detailed psychosocial and mental health assessment, drawing on relevant sections from the detailed assessment, so as to present the factors and circumstances that made the child vulnerable to committing offence.

Information for the first four heads needs to be drawn from Section 2, Social History, of the psychosocial and mental health proforma—which contains details on family, school, institution and peer issues; Information for the fifth item on trauma, needs to be drawn from Section 3, Trauma Experiences: Physical, Sexual, and Emotional Abuse Experiences' of the psychosocial assessment form; For the sixth item on Mental Health Disorders, Section 5, 'Mental Health Concerns' (including substance abuse) from the psychosocial assessment form, would need to be used. It is important to recognize that 'Circumstances of the Offence' does NOT refer to proximal factors i.e. what happened right before the offence incident took place. This is because proximal factors have a history which is important to recognize—there is a whole set of factors and life events that led up to the decisions and actions to just before the offence as well as the offence itself. Therefore, 'circumstances' are interpreted as life circumstances and a longitudinal approach is taken to understanding vulnerabilities and pathways to offences. This entails events and circumstances starting from the child's birth (or starting with the mother's pregnancy experiences) to the current date. This is the universal approach to history□taking in child and adolescent mental health, to be able to understand children's emotions and behaviours based on their contexts and experiences, as they have played out over several years (and so it is not actually specific to children in conflict with the law).

C. Child's Knowledge of Consequences of Committing the Alleged Offence (A brief about the child's understanding of social/ interpersonal and legal consequences of committing offence along with the child's insights regarding committing such an offence).

Guidance Notes This is based on the 'Potential for Transformation' section in the detailed psychosocial and mental health assessment, as well as the first level interventions provided immediately after. How the child responded during the assessment i.e. extent of his/her insight and motivation, must be documented here.

Social and interpersonal consequences refer to the child's sense of empathy and understanding of how his/her actions would (negatively) impact his/her relationship with family, friends and others; legal consequences refer to the child's understanding of his/her actions as being a boundary violation/ breaking of rules with serious negative consequences for himself/herself, including punishment and coming into conflict with the law.

D. Other Observations & Issues Guidance Notes Any other observation made during the assessment regarding the child's social temperament/ child's behaviour in the observation home/ level of motivation for change/ if any positive behaviour noted is also provided. This may be drawn from Section 6 of the psychosocial and mental health proforma, on 'Life Skills Deficits and Other Observations of the Child', sub□section 6.2 'Other Observations of the Child'. These refer not just to negative observations but also to positive ones you might have made during the assessment. Observations may thus include the child's demeanour, or any views or ideologies that the child may have expressed regarding problem behaviours such as violence or abuse— which may better help understand who he/she is (and help the magistrate view the offence behaviour from varied perspectives). They may also include any odd behaviours that you observe which might help substantiate the evidence on mental health disorders and developmental disabilities— for instance, if the child's responses appear socially and cognitively inappropriate to his age, you may note possible intellectual disability; or if a child appears disoriented in terms of place and time or has marks of self□harm on his body, then you might note mental health issues. E. Recommendations Guidance Notes Finally, the report makes recommendations for treatment and rehabilitation interventions for the child, based on the interests and desires of the child. These could pertain to placement, living arrangements, education and schooling, counselling for parents, referral to a tertiary facility for further mental health and psychosocial care and treatment. This sub□section is critical as it provides the JJB magistrate with clear direction on what assistance the child requires, thus creating an imperative for the board to consider options and respond in ways that are supportive and proactive (versus making decisions of transfer to the adult justice system).

JJB magistrates may be requested to refer the child to a psychiatric facility for treatment, so that other issues pertaining to family and school can also be taken care of by the mental health system, which is then obligated to report to the JJB on the child's progress. In many instances, JJB magistrates have issued a conditional bail to ensure that the child and family follow through with mental health services as required i.e. bail is given to the child on condition that he/she presents at the mental health facility and complies with treatment (if the child refuses to do so, the magistrate can revoke the bail). Thus, there are adequate provisions under the JJ Act, which if effectively invoked, can be used to protect CICL from transfer to adult systems, and to facilitate their rehabilitation instead.

PROVISO TO SECTION 15(1) DIRECTORY OR MANDATORY:

> 74. The world acknowledges that children in conflict with law should be treated differently than adults in conflict with law.

The reason is that the mind of the child has not attained maturity and it is still developing. Therefore, the child should be tested on different parameters and should be given an opportunity of being brought into the main stream if, during his juvenility, has acted in conflict with law. To understand psychology of the child, huge rounds of studies have been made not only recently but from age old times and child psychology is a subject which is being studied world over and there are institutes specifically dealing with the developments and research on the said subject. The enactments dealing with children are enacted world over.

75. It is to be noted that child psychology is a specialised branch of development psychology, its genesis is based on the premise that children and adults have a different thought process. The individualised assessment of adolescent mental capacity and ability to understand the consequences of the offence is one of the most crucial determinants of the preliminary assessment mandated by section 15 of the Act, 2015. The report of the preliminary assessment decides the germane question of transferring the case of a child between 16 to 18 years of age to the Children's Court. This evaluation of 'mental capacity and ability to understand the consequences' of the child in conflict with law can, in no way, be relegated to the status of a perfunctory and a routine task. The process of taking a decision on which the fate of the child in conflict with law precariously rests, should not be taken without conducting a meticulous psychological evaluation.

76. As already noticed, the Board consists of three members, one is a Judicial Officer First Class and two social workers, one being a woman. The social worker appointed as a member could be having a degree in child psychology or psychiatry but it is not necessary. As such, the constitution of the Board may not necessarily be having an expert child psychologist. It is for all the above reasons that it has been provided not only in sections 15 and 101(2) but also under the Model Rules that assistance may be taken from an expert psychologist. Having regard to the framework of the Act, 2015 and the Model Rules and the purpose of preliminary assessment in terms of Section 15 as also looking to the varied composition of the Board, we are of the view that where the Board is not comprising of a practicing professional with a degree in child psychology or child psychiatry, the expression "may" in the proviso to section 15(1) would operate in mandatory form and the Board would be obliged to take assistance of experienced psychologists or psycho□social workers or other experts. However, in case the Board comprises of at least one such member, who has been a practicing professional with a degree in child psychology or child psychiatry, the Board may take such assistance as may be considered proper by it; and in case the Board chooses not to take such assistance, it would be required of the Board to state specific reasons therefor.

77. It is a well settled principle of interpretation that the word 'may' when used in a legislation by itself does not connote a directory meaning. If in a particular case, in the interests of equity and justice it appears to the court that the intent of the legislature is to convey a statutory duty, then the use of the word "may" will not prevent the Court from giving it a mandatory colour. This Court in Bachahan Devi v. Nagar Nigam, Gorakhpur10, held as under:

> "18. It is well settled that the use of the word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word "may", the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word "may" involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act,

> the word "may" should be interpreted to convey a mandatory force. As a general rule, the word "may" is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word "shall", which ordinarily is imperative as it imposes a duty. Cases, however, are not wanting where the words "may", "shall" and "must" are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances."

78. Similarly, this Court in Dhampur Sugar Mills Ltd. v. State of U.P.11, held:

> 10 (2008) 12 SCC 372 11 (2007) 8 SCC 338 "36. ....In our judgment, mere use of word "may" or "shall" is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."

79. Therefore, looking to the purpose of the Act, 2015 and its legislative intent, particularly to ensure the protection of best interest of the child, the expression "may" in the proviso to Section 15(1) thereof and the requirement of taking assistance of experienced psychologists or psycho□social workers or other experts would operate as mandatory unless the Board itself comprises of at least one member who is a practicing professional with a degree in child psychology or child psychiatry. Moreover, in case the Board, in view of its own composition with at least one member, who is a practicing professional with a degree in child psychology or child psychiatry, chooses not to take such assistance, it would record specific reasons therefor.

80. Before we close, it would be pertinent to mention that the case laws relied upon by the learned counsel for the parties do not require deliberation in view of the findings recorded by us on various issues.

CONCLUSION

81. We are conscious of the fact that the power to make the preliminary assessment is vested in the Board and also the Children's Court under sections 15 and 19 respectively. The Children's Court, on its own, upon a matter being referred to under section 18(3), would still examine whether the child is to be tried as an adult or not, and if it would come to the conclusion that the child was not to be tried as an adult then it would itself conduct an inquiry as a Board and pass appropriate orders under section 18. Thus, the power to carry out the preliminary assessment rests with the Board and the Children's Court. This Court cannot delve upon the exercise of preliminary assessment. This Court will only examine as to whether the preliminary assessment has been carried out as required under law or not. Even the High Court, exercising revisionary power under section 102, would test

the decision of the Board or the Children's Court with respect to its legality or propriety only. In the present case, the High Court has, after considering limited material on record, arrived at a conclusion that the matter required reconsideration and for which, it has remanded the matter to the Board with further directions to take additional evidence and also to afford adequate opportunity to the child before taking a fresh decision.

82. In arriving at the conclusion, the High Court firstly held that there was denial of adequate opportunity to the respondent. The list of documents, copies of the documents, copies of the statement, the SIR not being provided to the respondent, was in clear violation of rule 10(5) of the Model Rules.

83. Despite specific request for cross-examining the experts who had given the report, the same was not provided to the respondent. The tests conducted by the expert psychologists were not applicable or could not have been applied to a child above the age of 15 years. It could have been applied only for children below the age of up to 15 years in one test and up to 11.5 years in the other test. The psychologist had suggested for further assessment by a superior facility, which was not accepted by the Board without cogent reason.

84. The mental age as per the applicable formula based on the IQ of the child would be less than 16 years. The Board, provided only 30 minutes time to the child, his lawyer, his father and also to the counsel for CBI to peruse the 35 pages of the report, which was too little to peruse and comprehend and give any evidence in rebuttal. The CBI counsel had admitted that it did not have officers or the required infrastructure to conduct the investigation under the Act, 2015. For all the above reasons, the High Court remitted the matter to the Board after setting aside both the orders of the Board and the Children's Court to consider afresh and assess the intelligence, maturity, physical fitness and as to how the child in conflict with law was in a position to know the consequences of the offence. The exercise was to be undertaken within a period of six weeks. The High Court further directed that while conducting the preliminary assessment afresh, opinion of the psychologist of the Government Hospital (Institute of Mental Health, University of Health Sciences, Rohtak) be obtained. This Court may not agree with the reasoning given by the High Court on all counts and also the direction given for conducting further tests. However, we have no hesitation in agreeing with the ultimate result of the High Court in remanding the matter for a fresh consideration after rectifying the errors on lack of adequate opportunity.

85. The High court taking into consideration all these aspects set aside the order of the Board, and remanded the matter and also directed for getting further examination of the child, and this exercise was to be undertaken within 6 weeks. Today, after 3½ years, we are not in a position to give an opinion as to whether any further test can be carried out at this stage as the age of the child is now more than 21 years. However, we leave it to the discretion of the Board or the psychologist who may be consulted as to whether any fresh examination would be of any relevance/assistance or not. We have already referred to in detail the kind of analysis or assessment required to be made under section 15. The Act, 2015 or the Model Rules do not lay down any guidelines or framework to facilitate the Board in making a proper preliminary assessment on the relevant aspects. The only liberty given to the Board is to obtain assistance of an experienced psychologist or a psycho-social

worker or other expert. In the present case, the only assistance taken is to get the mental IQ of the child. Beyond that, regarding the ability to understand the consequences and also the circumstances in which the alleged offence was committed, no report was called for from any psychologist.

86. In view of the above, both the appeals are dismissed.

87. Before concluding, we may indicate that the task of preliminary assessment under section 15 of the Act, 2015 is a delicate task with requirement of expertise and has its own implications as regards trial of the case. In this view of the matter, it appears expedient that appropriate and specific guidelines in this regard are put in place. Without much elaboration, we leave it open for the Central Government and the National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights to consider issuing guidelines or directions in this regard which may assist and facilitate the Board in making the preliminary assessment under section 15 of the Act, 2015.

88. We also make it clear that any observations made in our order which may be touching the merits of the case was only for the purpose of deciding these appeals and the same would in no way influence the Board or the Children's Court or the High Court. They may proceed to decide the matters objectively on merits in accordance with law.

.....J. [DINESH MAHESHWARI] .....J. [VIKRAM NATH]
NEW DELHI JULY 13, 2022.