Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors on 8 March, 2006

Equivalent citations: AIR 2006 SUPREME COURT 1367, 2006 (3) SCC 374, 2006 AIR SCW 1340, 2006 (1) GCD 615 SC, 2006 (2) CHANDCRIC 137, 2006 (3) SCALE 104, 2006 (1) CALCRILR 524, 2006 (2) ALL CJ 966, (2006) 1 ANDHLD 559, (2006) 1 BOMCR(CRI) 544, (2006) 132 DLT 661, (2006) 2 GUJ LR 1493, (2006) 2 KER LT 350, (2006) 3 PAT LJR 83, (2006) 2 RAJ CRI C 257, (2006) 2 RECCRIR 448, (2006) 5 SCJ 536, (2006) 1 CURCRIR 193, (2006) 2 SUPREME 598, (2006) 2 ALLCRIR 1185, (2006) 3 SCALE 104, (2006) 3 JLJR 96, (2006) 2 KCCR 857, (2006) 1 CAL LJ 328, (2006) 2 CRIMES 36, (2006) 2 MAD LJ(CRI) 517, (2006) 1 ORISSA LR 721, (2006) 2 EASTCRIC 176, (2006) 34 OCR 43, 2006 (2) ANDHLT(CRI) 287 SC, 2006 (3) AIR JHAR R 99, 2006 CRI. L. J. 1694, (2006) 41 ALLINDCAS 914 (SC), 2006 CRILR(SC MAH GUJ) 346, (2006) 2 ALLCRILR 368, 2006 CALCRILR 1 524, 2006 (2) SCC (CRI) 8, 2006 CRILR(SC&MP) 346, 2006 ALL CJ 2 966, (2006) 45 ALLINDCAS 695 (PAT), (2006) 1 GCD 615 (SC), (2006) 2 CHANDCRIC 137, (2006) 2 ANDHLT(CRI) 287

Author: Arijit Pasayat

Bench: Arijit Pasayat, H.K. Sema

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           CASE NO.:
Appeal (crl.)  446-449 of 2004

PETITIONER:
Zahira Habibullah Sheikh & Anr

RESPONDENT:
State of Gujarat & Ors

DATE OF JUDGMENT: 08/03/2006

BENCH:
ARIJIT PASAYAT & H.K. SEMA

JUDGMENT:
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J U D G M E N T CRIMINAL MIS. PETITION NOS.6658-6661 OF 2004 IN CRIMINAL APPEAL NOS. 446-449 OF 2004 ARIJIT PASAYAT, J.

The case at hand immediately brings into mind two stanzas (14 and 18) of Eighth Chapter of Manu Samhita dealing with role of witnesses. They read as follows:

"Stanza 14 "Jatro dharmo hyadharmena Satyam Jatranrutenacha Hanyate prekshyamananam Hatastrata Sabhasadah"

(Where in the presence of Judges "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin) Stanza 18 "Padodharmasya Kartaram Padah sakshinomruchhati Padah sabhasadah sarban pado rajanmruchhati"

(In the adharma flowing from wrong decision in a Court of law, one fourth each is attributed to the person committing the adharma, witness, the judges and the ruler".) This case has its matrix in an appeal filed by Zahira Habibullah hereinafter referred to as 'Zahira and Another namely, Teesta Setelwad' and another appeal filed by the State of Gujarat. In the appeals filed before this Court, the basic focus was on the absence of an atmosphere conducive to fair trial. Zahira who was projected as the star witness made a grievance that she was intimidated, threatened and coerced to depart from the truth and to make statement in Court which did not reflect the reality. The trial Court on the basis of the statements made by the witnesses in Court directed acquittal of the accused persons. Before the Gujarat High Court an application under Section 391 of the Code of Criminal Procedure, 1973 (in short the 'Code') highlighting the necessity for accepting additional evidence was filed. The foundation was the statement made by Zahira. The High Court did not accept the prayer and that is why the appeals came to be filed in this Court. By judgment dated 12th April, 2004 in Zahira Habibullah Sheikh & Anr. v. State of Gujarat and Ors. [(2004) 4 SCC 158], the following directions were given:

"75. Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system no congeal and conducive atmosphere still prevailing, we direct that the re-trial shall be done by a Court under the jurisdiction of Bombay High Court. The Chief Justice of the said High Court is requested to fix up a Court of Competent jurisdiction.

78. Since we have directed re-trial it would be desirable to the investigating agency or those supervising the investigation, to act in terms of Section 173(8) of the Code, as the circumstances seem to or may so warrant. The Director General of Police, Gujarat is directed to monitor re-investigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant.

79. Sub-section (8) of Section 173 of the Code permits further investigation, and even de hors any direction from the Court as such, it is open to the police to conduct proper investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted."

A review petition (Zahira' Habibulla H. Sheikh and Anr. V. State of Gujarat and Ors. (2004 (5) SCC 353) was filed by the State of Gujarat which was disposed of by order dated 7th May, 2004.

While the trial was on before a Court in Maharashtra pursuant to this Court's direction, it appears Zahira gave a press statement in the presence of some government officials that what she had stated before the trial Court in Gujarat earlier was correct. A petition was filed before this Court alleging that Zahira's statement was nothing but contempt of this Court. At a press conference held on 3.11.2004 few days before the scheduled appearance of the witnesses in the trial, she had changed her version, disowned the statements made in this Court, and before various bodies like National Human Rights Commission. Considering the petition filed orders were passed on 10.1.2005 and subsequently on 21.2.2005, giving directions which read as follows:

> Order dated 10.1.2005 Having heard learned counsel for the parties, we are of the considered view that a detailed examination is necessary as to which version of Zahira Habibullah Sheikh is a truthful version. It is necessary to do so because various documents have been placed to show that she had made departure from her statements/stands at different points of time. Allegations are made by Mr. P.N.Lekhi, learned senior counsel appearing for Zahira Habibullah Sheikh that she was being threatened, coerced, induced and/or lured by Teesta Setalvad. On the contrary, learned counsel appearing for Teesta Setalvad submits that she was being threatened, coerced, lured or induced by others to make statements or adopt stands contrary to what she had stated/adopted earlier. In this delicate situation, the appropriate course would be to direct an inquiry to be conducted to arrive at the truth. We direct the Registrar General of this Court to conduct the inquiry and submit a report to this Court within three months. The Registrar General shall indicate in the report
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> (a) if Zahira Habibullah Sheikh was in any manner threatened, coerced, induced and/or in any manner pressurised to depose/make statement(s) in any particular way, by any person or persons, and (b) if the answer to (a) is in the affirmation, who the person/persons is (or) are.

For the purpose of inquiry, he may take assistance of a police officer of the rank of Inspector General of Police. Though a suggestion was given by Mr. For the purpose of inquiry, he may take assistance of a police officer of the rank of Inspector General of Police. Though a suggestion was given by Mr. Anil Diwan, learned senior counsel appearing on behalf of Ms.Teesta Setalvad that it should be an officer from the CBI, Mr.P.N.Lekhi, Mr.K.T.S.Tulsi and Mr.Mukul Rohtagi, learned senior counsel, opposed the same. In our view, an efficient, impartial and fair officer should be selected. Therefore, we leave the choice to the Registrar General to nominate an officer of the Delhi Police, as noted above, of the rank of Inspector General of Police. The inquiry shall be conducted on the basis of affidavits to be placed before the Registrar General and if he deems fit, he may examine any witness or witnesses to substantiate the contents of the affidavits. We do not think it necessary to lay down any broad guidelines as to the modalities which the Registrar General will adopt. He is free to adopt such modalities as he thinks necessary to arrive at the truth, and to submit the report for further consideration.

The affidavits and documents if any in support of the respective stands shall be filed before the Registrar General within a period of four weeks from today.

We make it clear that the pendency of the inquiry will not be a ground for seeking adjournment in the pending trial.

We have perused the letter of the trial court seeking extension of time. The time is extended till 31st of May, 2005 for completion of trial.

The matter shall be placed for consideration of the Report to be submitted, after three months.

Order dated 21.2.2005 Heard.

The parties are granted four weeks' time to file the affidavits in terms of the earlier order dated 10.01.2005. We make it clear that we have not taken note of paragraph-8 of the application filed in Crl.M.P. Nos.1908-1911 of 2005.

Criminal Miscellaneous Petition Nos.1908- 1911 of 2005 are accordingly disposed of.

Crl.M.P. Nos.6658-6661 of 2004 By order dated 10.01.2005, the question as to whether Ms. Zahira Habibullah Sheikh was in any manner induced to depose in a particular way, has been directed to be enquired into, we think it appropriate to direct her to file an affidavit indicating details of her bank accounts, advances, other deposits, amounts invested in movable or immovable properties and advances or security deposits, if any for the aforesaid purpose, along with the affidavit to be filed before the Registrar General of this Court. She will also indicate the sources of the aforesaid deposits, advances and investments, as the case may be. She shall also indicate the details of such deposits, advances and investments, if any, in respect of her family members and the source thereof. The Registrar General and police officer nominated to be associated with enquiry are free to record statements of such family members and to make such further enquiries in the manner as deemed necessary and to ask the family members to file affidavits containing the details as noted above. They shall indicate in the affidavits and the statements the sources of such deposits, advances and investments. If the Registrar General and the police officer feel that any further enquiry as regards the sources is necessary, they shall be free to do it.

Since, we have extended the time for filing of affidavits by the parties, the enquiry report shall be submitted by the Registrar General within three months from today.

Put up thereafter."

Considering the materials placed before the Inquiry Officer, he has submitted his report. Parties were permitted to file statements indicating their views so far as the report is concerned. The findings recorded by the Inquiry Officer with reference to various documents are essentially as follows:

> (1) The FIR dated 2.3.2002 (2) Memorandum dated 21.3.2002 before the Chairman, NHRC (3) Statements made on 11.5.2002 and 20.7.2002 before the concerned Citizen Tribunal and Nanavati Commission respectively (4) Statements dated

7.7.2003 of the Press Conference in Mumbai (5) Statement dated 11.7.2003 before NHRC (6) Plain copy of the affidavit dated 8.9.2003 attested by Notary submitted before this Court as additional document in SLP(Crl.) 3770/2003 (7) Statement recorded on 16.12.2003 at the Santa Cruz Police Station, Mumbai (8) Affidavit dated 3.11.2004 submitted before Collector, Vadodara (9) Affidavit dated 31.12.2004 submitted before this Court (10) Affidavits dated 20.3.2005, 12.4.2005 and 24.4.2005 before the Inquiry Officer.

The Inquiry Officer has categorically recorded that Zahira had changed her stands at different stages and has departed from statements made before this Court. So far as the question whether she was threatened, coerced, lured, induced and/or in any manner pressurized to make statements in a particular way by any person or persons, it has been found that Zahira has not been able to explain the assets in her possession in spite of several opportunities having been granted. The Inquiry Officer had referred to transcript of conversations purported to have been made between a representative of "Tehlaka" and Shri Tushar Vyas, Shri Nisar Bapu and Shri Chandrakant Ramcharan Srivastava @ Bhattoo Srivastava, Shri Madhu Srivastava, and Shri Shailesh Patel. These persons were also given opportunity to explain their stands as the transcript of the Video Compact Disc produced by Tehlaka.com clearly indicated that money was paid to Zahira to change her stand. The Inquiry Officer has referred to the explanations offered by Zahira and her family members and found that she could not explain various receipts of money received by her and deposits made in their bank accounts. The amount involved was nearly rupees five lakhs. The explanation offered by Zahira and her family members was found unacceptable. The details indicated in the affidavit dated 24.4.2005 filed by Zahira explained the following details:

"1. 'Rs.65,000/- Sale consideration of one house sold in the month of November, 2001

2. Rs.40,000/(Approx.)- Sale consideration of two-three wheelers sold to Scrap dealer (Kabadi)

3. Rs.30,000/- Received from Insurance Company by mother on account of damages to motor cycle.

4. Rs.32,000/- Sale consideration of scrap of machinery of Bakery

5. Rs.1,50,000/-(Approx.) Sale consideration of scrap of Bakery

6. Rs.50,000/- Compensation for damages of house received from Government through cheque in favour of her mother

7. Rs.50,000/- Received by mother as & Rs.40,000/- compensation of her sister's death from the Government through cheque

8. Rs.493/-P.M. Deposited on monthly basis directly in Savings Bank Account No.16669 with Syndicate Bank stands in the name of mother, as interest on Bond amount of Rs.50,000/- received as compensation of her sister's death from Government.

9. Rs.55,000/- Investment in a house in Ekta Nagar in the name of Ms. Zahira Sheikh

10. Rs.20,000 & Rs.25,000/- Investment in two small plots of 15x30ft. each by her brother Nasibullah

11. Rs.45,000/- Deposited by her in the Bank Account No.11348 with Bank of Baroda, Nawapura Branch at Vadodara

12. Rs.52,045/- Deposits in a joint account No.16754 with her brother, Nasibullah with Syndicate Bank, Goddev Branch, Bhayander

13. Rs.1,37,384/- Deposits in her brother's account No.16667 with Syndicate Bank, Goddev Branch, Bhayander

14. Rs.1,42,256/- Deposits in her mother's account No.16669 with Syndicate Bank, Goddev Branch, Bhayander.

The Inquiry Officer repeatedly asked Zahira and her brother H. Nafitullah about the names and addresses of purchasers of scrap and further details which were not supplied.

Two charts have been prepared by the Inquiry Officer showing the discrepancies. They read as follows:

Receipts S. No. Amount Remarks

1.

Rs. 50,000/- & Rs. 40,000/-

Received as compensation of her sister's death

2. Rs. 25,000/-

Received as damages of the house.

3. Rs. 30,000/-

Received from insurance company against damages of motorcycle.

4. Rs. 18,800/-

Received as sale price of one three-wheeler

5.

Rs. 6,296/-

Receipts from clearing zone-

Received as interest against bond of which has been alleged to be purchased out of the balance amount of Damages of sister's death.

TOTAL Rs. 2,02,096/-

Note: Rs.1,82,000/- have been claimed to be treated as receipts against the sale price of the scrap which has not been acceded to on the ground noted on page No. 106-107 despite if this amount is deemed to be accepted, then the total of the receipts will be Rs. 3,84,096 (Rs. 2,02,096 + Rs. 1,82,000).

Investments:

S. No. Amount Remarks

1.

Rs. 45,000/-

Deposited by her in the Bank Account No. 11348 with Bank of Baroda, Nawapura Branch at Vadodara.

2. Rs. 52,045/-

Deposits in a joint account No. 16754 with her brother, Nasibullah with Syndicate Bank, Goddev Branch, Bhayander.

3. Rs.1,37,384/-

Deposits in her brother's account No. 16667 with Syndicate Bank, Goddev Branch, Bhayander.

4. Rs. 1,42,256/-

Deposits in her mother's account No. 16669 with Syndicate Bank, Goddev Branch, Bhayander.

5.

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Rs.    73,000/-
Purchase of two plots and
construction to the tune of Rs.
66,000/- and spent Rs. 7,000/-
on renovation of best bakery
building.
6.
Rs.    60,000/-
Invested against a flat of Bombay
7.
Rs.    48,000/-
Deposited on 14.5.2003 with
Bank account (A/c. No. 2037) of
Sh. Nafitullah.
8.
Rs.    30,727/-
Mother's account (A/c. No. 8881)
Total
Rs. 5,88,412/-
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- Difference: Investments Receipts Rs. 5,88,412 Rs. 2,02,096 = Rs. 3,86,316/-

- If Rs. 1,82,000/- is also included as receipts then the difference is = Rs. 2,04,316/-.

The Inquiry Officer recorded the following findings:

> "In view of the all, as discussed above, the fact which can be accepted as highly probable, that money has exchanged hands and that was the main inducement responsible which made Ms. Zahira to state in a particular way in Trial Court, Vadodara although threat could have also played a role in reaching at an agreement. However, the element of threat cannot be altogether ruled out. One cannot loose sight of the fact that first contact over cell phone was made by Sh. Madhu Srivastava and Sh. Bharat Thakkar and not by Sh. Nafitullah. The evidence of Sh. Abhishek Kapoor about presence of Sh. Madhu Srivastava, MLA, in the Court at the time of testimony of Ms. Zahira can also be treated as an indication of this factor."

In addition to the aforesaid conclusions the Inquiry Officer has also recorded that after a particular point of time contemporaneous to when she started changing her stand, a society called Jan Adhikar Samiti came to the picture. It appears from the statements of functionaries of Jan Adhikar Samiti that substantial amount has been spent for meeting the expenses of Zahira and her family members. But the Inquiry Officer has found that even though materials do exist to show that money played a vital role in the change of stand yet it could not be directly linked to Madhu Srivastava and Bhattoo Srivastava.

Zahira has objected to acceptance of the Inquiry Officer's report. The grounds on which the objections have been raised essentially as follows:

> (1) The Inquiry Officer has tailored facts to fit into his pre-conceived conclusions. There has been deliberate omissions and distortion of facts. (2) No cross examination of the witnesses whom the Inquiry Officer has examined was permitted. (3) There was no transparent procedure adopted and the agreed procedure was never followed. (4) There was lack of fair objective and reasonable approach. The pre-requisites of an objective enquiry were missing. There was no intelligent appreciation of facts.
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> (5) The Inquiry Officer appeared to be guided by Teesta Setalwad. The conclusion that Zahira had approached this Court for a fresh trial is wrong. (6) The request for examining the Chairman, NHRC was not accepted without indicating any reason. (7) Zahira was not only the person who had made departure from her stand purportedly recorded during investigation, there were others but no effort was made to take any action against them. Though many persons had died or injured, Citizen for Justice and Peace and its functionaries never bothered to take up their cases. It is surprising why they only chose Zahira.
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> (8) The petition filed before this Court was not in fact signed by Zahira but was signed by Teesta and the mere fact that she had filed a Vakalatnama would not make her responsible for the statements made in the affidavit.
>
> (9) Upto the point of time of the Press Conference Zahira was under the control of Teesta and she was a mere puppet in her hands and whatever statement was purportedly made by Zahira was in fact made by Teesta. Teesta's role in the whole episode is very suspicious. She had spent lot of money taking advantage of the helplessness of Zahira and has used her for her machination.

Zahira was tutored to make statements on different occasions. Teesta has given different versions as to when she has come in contact with Zahira and decided to take up her issues.

On the other hand, the State of Gujarat has adopted a peculiar stand stating that in view of conclusions of the Inquiry Officer it is not in a position to simpliciter accept or deny the report. So far as the criticism levelled by the Inquiry Officer against the conduct of some of the officers it was pointed out that the State has shown its anxiety to see that justice is done and nothing is wrong in deputing officers and merely because Shri S.N. Sinha who had been transferred appeared in the proceedings before the Inquiry Officer, that cannot show that the State of Gujarat was adopting any particular stand.

On behalf of Mrs. Teesta it has been submitted that report deserves to be accepted. Further enquiry as to the role of Madhu Srivastava and the sources of money which has come to the possession of Zahira may be further proved. The Inquiry Officer has clearly indicated the roles played by Madhu Srivastava and his cousin Chandrakant in intimidating/coercing witnesses like Zahira and family

members. Assistance was given by Sudhir Sinha, Commissioner of Police, Surat to Zahira to hold the press conference on 3.11.2004 just a day before her testimony was to be recorded in Mumbai. Similar assistance was given by Shri Bhagyesh Jha, Collector, Vadodara to Zahira. The directions by the Home Secretary Shri S.C. Murmu, to Shri Sudhir Sinha, Commissioner of Police, to attend the proceedings before the Inquiry Committee clearly show the partisan approach. The role of the State of Gujarat in lodging Zahira and her family members at Silver Oak Club, Gandhi Nagar for a period of 10 days raises big question mark as to who met the expenses. These clearly show that sinister roles were played by State of Gujarat's functionaries. It has been submitted that Teesta is being targeted for exposing the evil deeds of the aforesaid persons.

At the outset, it has to be noted that we have not gone into the question as to whether Teesta has done anything wrong in the process. It was for Zahira to explain whether she was either telling the truth or making false statement. Merely stating that she was acting as a puppet in the hands of Teesta is not sufficient. Much has been made by learned counsel for Zahira about some observations made by Inquiry Officer in his report. A bare reading of the observations makes it clear that what is being submitted by learned counsel for Zahira is by reading observations out of context.

The procedure adopted during enquiry has been characterized to be unfair and not fair and transparent procedure. On a bare perusal of the proceedings of the enquiry, it is clear that the procedure adopted was quite transparent. The proceedings were conducted in the presence of learned counsel for the parties and/or the parties themselves. After the questions were asked by the Inquiry Officer, learned counsel and the parties were asked if any further questions were to be asked and as the records revealed whenever any question was suggested that was asked. Grievance is made that scope for "cross examination" was not given. That according to us is really of no consequence. What questions in "cross examination" by learned counsel could have been put, were asked by the Inquiry Officer whenever any suggestion was made in that regard. If a party did not suggest any question to be put to a witness by the Inquiry Officer, it is not open for him or her to say that opportunity for "cross examination" was not given. A further grievance is made that a request to call the Chairman, NHRC was turned down without reasons. This according to us is a plea which needs to be noticed and rejected. The statement of Zahira was recorded by NHRC in the presence of the Chairman (a retired Chief Justice of this Court) and several members which included a retired Judge of this Court). The allegation that it was not properly recorded or that somebody else's statement was recorded and Zahira was asked to put the signatures, as she has tried to make out is clearly untenable. If we may say so, such a plea should not have been raised as it reflects on the credibility of functionaries of a body like NHRC.

The other pleas which have been enumerated above do not in any way affect credibility or acceptability of the report. The allegation that the Inquiry Officer acted with some pre- conceived ideas and/or report was based on presumptions is not correct. The conclusions drawn by the Inquiry Officer have their foundation on materials which have been elaborately discussed by the Inquiry Officer. Much has been made of the fact that original affidavit was not filed. The reason for this has been explained, the Inquiry Officer has dealt with the question in detail and undisputedly original affidavit has been brought on record. The stand that mere filing of a vakalatnama without an affidavit by the concerned person cannot constitute a statement by the person who has filed the

vakalatnama is clearly unacceptable. The appeal undisputedly has been filed by Zahira and it has been candidly admitted that she has filed the vakalatnama for filing the appeal. She cannot now turn around and say that she was not a party in the appeal.

Above being the position, there is no reason to discard the report given by the Inquiry Officer which is accordingly accepted. Further, what remains to be done is what is the consequence of Zahira having made such conflicting statements and the effect for changing her stand from the statements made at different stages, particularly in this Court.

Whatever be the fate of the trial before the Court at Mumbai where the trial is stated to be going on and the effect of her statement made during trial shall be considered in the trial itself. Acceptance of the report in the present proceedings cannot have any determinative role in the trial. Serious questions arise as to the role played by witnesses who changed their versions more frequently than chameleons. Zahira's role in the whole case is an eye-opener for all concerned with the administration of criminal justice. As highlighted at the threshold the criminal justice system is likely to be affected if persons like Zahira are to be left unpunished. Not only the role of Zahira but also of others whose conduct and approach before the Inquiry Officer has been highlighted needs to be noted. The Inquiry Officer has found that Zahira could not explain her assets and the explanations given by her in respect of the sources of bank deposits etc. have been found to be unacceptable. We find no reason to take a different view.

During the course of hearing, we had asked learned counsel appearing for Zahira as to whether they would like to be heard on the question of the consequential order, if any, if the report is accepted and Zahira is found to have committed contempt or to have deflected the course of justice by unacceptable methods. Learned counsel for Zahira stated that they would not like to make statements in that regard and would only stress on the report being not accepted.

Zahira has committed contempt of this Court.

Parliament by virtue of Entry 77 List I is competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself and such a law may prescribe the nature of punishment which may be imposed on a contemner by virtue of the provisions of Article 129 read with Article 142(2) of the Constitution of India, 1950. Since, no such law has been enacted by Parliament, the nature of punishment prescribed under the Contempt of Courts Act, 1971 may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act ipso facto does not deal with the contempt jurisdiction of the Supreme Court, except that Section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the Supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. The judgment in Sukhdev Singh Sodhi v. Chief Justice and Judges of the PEPSU High Court (AIR 1954 SC 186) as regards the extent of "maximum punishment"

> which can be imposed upon a contemner must, therefore, be construed as dealing with the powers of the High Courts only and not of this Court in that behalf. In

> Supreme Court Bar Association v. Union of India and Anr. (AIR 1998 SC 1895), this Court expressed no final opinion on that question since that issue, strictly speaking, did not arise for decision in that case. The question regarding the restriction or limitation on the extent of punishment, which this Court may award while exercising its contempt jurisdiction, it was observed, may be decided in a proper case, when so raised. We may note that a three Judge Bench in Suo Motu Contempt Petition 301 of 2003 by judgment dated 19.12.2003 in re: Sri Pravakar Behera (2003 (10) SCALE 1726) imposed cost of Rs.50,000/-.
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> The complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions, ideas and ideals. If the Court acts contrary to the role it is expected to play, it will be destruction of the fundamental edifice on which justice delivery system stands. People for whose benefit the Courts exists shall start doubting the efficacy of the system. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking that "the Judge was biased". (Per Lord Denning MR in Metropolitan Properties Ltd. v. Lannon (1968) 3 All ER 304 (CA). The perception may be wrong about the judge's bias, but the Judge concerned must be careful to see that no such impression gains ground. Judges like Ceaser's wife should be above suspicion (Per Bowen L.J. in Lesson v. General Council of Medical Education (1890) 43 Ch.D. 366).

By not acting in the expected manner a judge exposes himself to unnecessary criticism. At the same time the Judge is not to innovative at pleasure. He is not a Knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness, as observed by Cardozo in "The Nature of Judicial Process".

It was significantly said that law, to be just and fair has to be seen devoid of flaw. It has to keep promise to justice and it cannot stay petrified and sit non-challantly. The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection loose hope (See Jennison v. Backer (1972 (1) All ER 1006). Increasingly, people are believing as observed by SALMON quoted by Diogenes Laertius in "Lives of the Philosophers" laws are like spiders' webs: if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away". Jonathan Swift, in his "Essay on the Faculties of the Mind" said in similar lines: "Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through".

As has been noticed earlier in the earlier case (reported in 2004 (4) SCC 158), the role to be played by Courts, witnesses, investigating officers, public prosecutors has to be focused, more particularly when eyebrows are raised about their roles.

In this context, reference may be made to Section 311 of the Code which reads as follows:

> "311. Power to summon material witness, or examine person present.

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

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the

evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jagat Rai v. State of Maharashtra, (AIR 1968 SC

178).

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court," Vice-Chancellor Knight Bruce said :

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely
>
> - may be pursued too keenly - may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price .... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process :

> "It is the merit of the common law that it decides the case first and determines the principles afterwards ..... It is only after a series of determination on the same subject- matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it any every step."

The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

> "It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to

proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

> "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primary of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and

hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in Dhanraj Singh @ Shera and Ors. v. State of Punjab (JT 2004(3) SC 380). It was observed as follows:

"5. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. (1995 (5) SCC 518).

6. In Paras Yadav and Ors. v. State of Bihar (1999 (2) SCC 126) it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in Ram Bihari Yadav v. State of Bihar and Ors. (1998 (4) SCC 517) if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice. The view was again re-iterated in Amar Singh v. Balwinder Singh and Ors. (2003 (2) SCC 518)".

The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement

for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation. We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interest of the Individual accused. In this courts have a vital role to play.

In the aforesaid background, we direct as follows:

> (1) Zahira is sentenced to undergo simple imprisonment for one year and to pay cost of Rs.50,000/- and in case of default of payment within two months, she shall suffer further imprisonment of one year;
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> (2) Her assets including bank deposits shall remain attached for a period of three months. The Income Tax Authorities are directed to initiate proceedings requiring her to explain the sources of acquisition of various assets and the expenses met by her during the period from 1.1.2002 till today. It is made clear that any observation made about her having not satisfactorily explained the aforesaid aspects would not be treated as conclusive. The proceedings shall be conducted in accordance with law.

The Chief Commissioner, Vadodara is directed to take immediate steps for initiation of appropriate proceedings. It shall be open to Income tax authorities to direct continuance of the attachment in accordance with law. If so advised, the Income Tax Authorities shall also require Madhu Srivastava and Bhattoo Srivastava to explain as to why the claim as made in the VCD of paying money shall not be further enquired into and if any tangible material comes to surface, appropriate action under the Income Tax Law shall be taken notwithstanding the findings recorded by the Inquiry Officer that there is no acceptable material to show that they had paid money, as claimed, to Zahira. We make it clear that we are not directing initiation of proceedings as such, but leaving the matter to the Income Tax Authorities to take a decision. The Trial Court shall decide the matter before it without being influenced by any finding/observation made by the Inquiry Officer or by the fact that we have accepted the report and directed consequential action.

The applications are accordingly disposed of.