P.N. Krishna Lal And Ors. Etc. Etc vs Govt. Of Kerala And Anr. Etc. Etc on 17 November, 1994

Author: K. Ramaswamy

Bench: K. Ramaswamy, N. Venkatachala

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           CASE NO.:
Appeal (civil)  565 of 1994

PETITIONER:
P.N. KRISHNA LAL AND ORS. ETC. ETC.

RESPONDENT:
GOVT. OF KERALA AND ANR. ETC. ETC.

DATE OF JUDGMENT: 17/11/1994

BENCH:
K. RAMASWAMY & N. VENKATACHALA

JUDGMENT:
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JUDGMENT 1994 SUPPL. (5) SCR 526 The Judgment of the Court was delivered by K. RAMASWAMY, J. Leave granted in S.L. Ps. No. 10248, 9079, 13769/94 and S.L.P. No..... (CC No. 25558/94).

A Division Bench of the Kerala High Court, by its common judgment dated December 10, 1993 in O.P. No. 4637/89 and batch since upheld the constitutionality of ss. 57A and 57B inserted by the Abkari (Amendment) Act 21 of 1984 in the Amendment Act into the Abkari Act 1 of 1077 (for short 'the Act'), the correctness of that judgment is questioned in this appeal.

The facts lie in a short compass:-

> The appellants are licencees of arrack or Indian made foreign liquor retail shops or their employees. They have been charged for offences punishable under one or other sub-ss. (1) to (3) of s. 57A for having mixed or permitted mixing of noxious substance with liquor or for having failed to take reasonable precautions to prevent such mixing or for being in possession of liquor in which such a noxious substance has been mixed with the knowledge that arrack or Indian made foreign liquors were mixed with methanol (methyl alcohol), a substance which, on consumption, is likely to endanger human lite or causes grievous hurt to human beings or causes death. Therefore, when the appellants were charged for all or any of the offences in one or the other case, before competent criminal courts, the constitutionality of the said two provisions of the Amendment Act was assailed.

It is the case of the appellants that though they are dealers in arrack or Indian made foreign liquors either selling in retail shops or under their management, such arrack or Indian made foreign liquor was being supplied by the appropriate agencies controlled by the State or regulated under the Act They secured the supply only from those recognised sources in sealed bottles or containers. They did not mix noxious substance nor permitted mixing of any noxious substance with arrack or Indian made foreign liquor. As such, there was no occasion for them to take any reasonable precaution to prevent such mixing or for being in possession of such arrack or liquor mixed with noxious substance with such knowledge and that, therefore, they had not committed all or any of the offences. However, before being proceeded with the trial of the offences they filed writ petitions under Art. 226 challenging the constitutionality of the aforesaid two provisions, which as said earlier, were upheld by the High Court.

Section 3 (10) of the Act defines 'liquor' as including spirits of wine, methylated spirits, spirits, wine, toddy, beer, and all liquids consisting of or containing alcohol. Section 3 (14) defines 'intoxicating drugs' means

(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (Conhabis Sativa L), including all forms known as bhang, siddhi or ganja; (ii) Chants, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport; (iii) any mixture, with or without natural materials, of any of the above forms of intoxicating drug, or any drink prepared therefrom; and (iv) and other narcotic substance which the (Government) may, by notification, declare to be an intoxicating drug, such substance not being opium, coca leaf, or a manufactured drug, as defined in s. 2 of the Dangerous Drugs Act, 1930. Sections 6 to 11 in Part III regulate import, export and transport of liquor or intoxicating drug by a permit issued in that behalf. Part IV deals with manufacture, possession and sale of liquor or intoxicating drug in accordance with the provisions of the Act. (Vide Sections 12A and 12B). Sub-s (2) of s. 12B expressly postulates that "no person shall possess any preparation containing liquor or intoxicating drug, other man a medicinal preparation for the bona fide treatment, mitigation or prevention of disease in human beings or animals, in excess of the quantity specified by the Commissioner." Section 13 prohibits possession of liquor or intoxicating drug in excess of the prescribed quantity. Section 13 A is a facet thereof. Section 15 prohibits sale without licence of liquor or intoxicating drug. Section 18A gives power to the Government to grant exclusive privilege or other privileges to manufacture or supply by wholesale or of selling by retail or of manufacturing or supplying by wholesale and selling by retail any liquor or intoxicating drugs within the specified local area, the amount of rental in that behalf fixed from time to time and the collection thereof, in addition to the duty or tax leviable under ss. 17 and 18. Chapter VI and VII prescribe the forms and conditions of licenses, etc. Chapter VIII deals with the powers and duties of officers including searches and seizures of the offending contra-band and the follow-up actions in

furtherance thereof.

It is thus clear that manufacture, possession, trade and business of liquor and intoxicated drug is the privilege of the State and no one has a right de hors the Act, for manufacture, possession or sale of them except on a licence granted in that behalf by the competent officer in accordance with the provisions of the Act and the rules made thereunder and according to the conditions of licence. In other words, it is a regulated trade or business.

Chapter IX deals with penalties. Sections 55 to 57 deal with offences committed under the Act. Section 57, in particular, prohibits adulteration, etc., by licensed vendor or manufacturer of the liquor or intoxicating drug. Clause (a) excludes from its operation of the offence, namely, mixing or permitting mixing of any liquor or intoxicating drug, sold or manufactured by the licensed vendor or manufacturer with any other noxious drug or any foreign ingredients likely to add to its actual or apparent intoxicating quality or strength, or any article prohibited under the Act from its purview, Abkari Ordinance 37 of 1983 was issued by the Governor on November 1, 1982 bringing on statute ss. 57A and 57B and the Ordinance was replaced by the Amendment Act with retrospective effect from the said date. Sections 57A and 57B read thus:

> "5 7-A. For adulteration of liquor or intoxicating drug with noxious substances, etc. (i) whoever mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable.
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> (i) If, as a result of such act, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;
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> (ii) if, as a result of such act, death is caused to any person, with death or imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;
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> (iii) in any other case, with imprisonment for a term which shall not be less than one year, but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees;

Explanation- For the purposes of this Section and Section 578, the expression "grievous hurt" shall have the same meaning as in Section 320 of the Indian Penal Code, 1869 (Central Act 45 of 1960).

(2) Whoever omits to take reasonable precautions to prevent the mixing of any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable.

(i) If as a result of such omission, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(ii) if as a result of such omission, death is caused to any person, with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty five thousand rupees;

(3) Whoever possesses, any liquor or intoxicating drug in which any substance referred to in sub-section (i) is mixed, knowing that such substance is mixed with such liquor or intoxicating drug shall, on conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees;

(4) notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), no person accused or convicted of an offence under sub-section (1) or sub-section (3) shall, if in custody be released on bail or on his own bond, unless-

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) - (a) where a person is prosecuted for an offence under sub-section (i) or sub-section (2), the burden of proving that he has not mixed or permitted to be mixed or, as the case may be, omitted to take reasonable precautions to prevent the mixing of, any substance referred to in that sub-section with any liquor or intoxicating drug shall be on him;

(b) where a person is prosecuted for an offence under subsection (3) for being in possession of any liquor or intoxicating drug in which any substance referred to in subsection (I) is mixed, the burden of proving that he did not know that such substance was mixed with such liquor or intoxicating drug shall be on him. (emphasis supplied).

57-B. Order to pay compensation.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the Court when passing judgment in a case calling under section 57-A may, if it is satisfied that death or grievous hurt has been caused to any person or persons by consumption of liquor or intoxicating drug sold in any place licensed under this Act, order the licensee of that place, whether or not he is convicted of an offence under the said section, to pay, by way of compensation, such

amount as it appears to be just, to the legal representatives of the deceased or to the person or persons to whom grievous hurt has been caused.

(2) Any person aggrieved by an order under sub-section (1) may, within ninety days from the date of the order, prefer an appeal to the High Court;

Provided that no such appeal shall lie unless the amount ordered to be paid under sub-section (1) is deposited in the Court which passed such order;

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time."

In the Statement of Objects and Reasons annexed to the Amendment Act, it was stated that the gruesome liquor tragedy in Vaipeenkara Island in Ernakulam District of the State during the Onam Festival of 1982 took a heavy toll of life and left many with loss of eye-sight and physical incapacity. A Committee was constituted to suggest ways and means. It, therefore, became imperative to enact the Amendment Act to provide severe penalty for adulteration of liquor or intoxicating drug so as to prevent recurrence of such tragic incidents.

The first question is whether the State Legislature was competent to enact the Amendment Act. Entry 8 of List II - State List of the Seventh Schedule to the Constitution read with Article 246(3) of the Constitution, empowers the State Legislature to enact law relating to intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase or sale of intoxicating liquor. Entry 64 deal with offences against law with respect to any of the matter in List II. Entry 65 deals with jurisdiction and powers of all Courts except the Supreme Court with respect to any of the matters in List II. It is true that Sections 272 to 276 of the Indian Penal Code deal with punishment for adulteration of articles of food, while the Prevention of Food Adulteration Act, 1954 also deals with the same topic. As a procedural facet, Chapter 18 of the Code of Criminal Procedure, 1973 (for short 'the Code') and the relevant provisions in the Evidence Act 1872 deal with adduction of evidence and consideration thereof by the Court, in proof of the guilt or its non proof. It is not necessary to burden the judgment with copious citation of diverse decisions on the scope of the consideration of an entry in the 7th Schedule. In Shri Jilubhai Nan Bhai Khachar Etc, Etc. v. State of Gujarat and Anr. Etc. Etc,, JT (1994) 4 SC 473, this Court extensively considered the scope of an entry in the 7th Schedule and held that such entry is not a power given to the Legislature but is a field of its legislation. The Legislature derives its power under Article 246 and other related Articles in the Constitution, The language of an entry should be given the widest meaning fairly capable to meet the need of the government, envisaged by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended within it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality. If there exists any difficulty in ascertaining the limits of the legislative power, it must be resolved, as far as possible, in favour of the legislature, putting the most liberal construction on the legislative entry so that it is infra vires. Narrow interpretation should be avoided and construction to be adopted, must be beneficial and cover the amplitude of the power. The broad liberal spirit should

inspire those whose duty it is to interpret the Constitution to find out whether the impugned Act is relatable to one or the other entry in the relevant List. The allocation of the subjects of the entries in the respective lists is not done by way of a scientific or logical definitions but it is a mere enumeration of broad and comprehensive categqries. The power to legislate on a particular topic includes the power to legislate on subjects which are ancillary to or incidental thereto or for purposes necessary to give full effect of the power conferred by the Entry.

In determining whether the impugned Act is a law with respect to a given power, the court has to consider whether the Act, in its pith and substance, is a law on the subject in question. If the statute relates in pith and substance to a topic assigned to a particular legislature, the Act will not be invalidated even if it incidentally trenches on topics coming within another legislative list The fact of incidental encroachment does not effect the vires of the law even as regards the area of encroachment. The court has to ascertain the true nature and character of the subject of the Act or its pith and substance to find whether impugned Act falls within the competence of the particular legislature. Blind adherence to strict interpretation which would lead to invalidation of statutes as being legislated in the forbidden sphere should be avoided, lest all beneficial legislations would be stifled at birth and many a subject entrusted to the State legislature rendered ineffectual divesting the State legislature of its power to deal with particular subject of entry or topic.

In A.S. Krishna v. State of Madras, [1957] SCR 399, a Constitutional Bench of this Court held mat "when the law is impugned on the ground that it is ultra vires the power of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found mat the legislation in substance is one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but a mere collection of sections, then disintegrate in into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not" In that case like the facts of this case, it was argued that sections 4 (2) and 28 and 32 of Madras Prohibition Act, 1937, were void under section 107 (1) of the Government of India Act, 1935 on the contention that they were repugnant to the provisions of the Indian Evidence Act and the Code of Criminal Procedure, 1898 and to Article 14 of the Constitution. This Court rejected the argument and held that the Madras Prohibition Act would fall under Entry 31 of List II of 7th, Schedule of the Government of India Act, 1935 and the Provincial Legislature had exclusive competence to make the Act and it was not repugnant to section 107 (1), of 1935 Act.

A more serious contention raised on behalf of the appellants was that the High Court found, as a fact, that the State Government, in spite of giving repeated opportunities, had not produced the file before the Court to show that the assent of the President was expressly obtained with reference to any of the provisions of the Evidence Act, the IPC and the Code and, therefore, the Act is void. In that regard they placed strong reliance on Gram Panchayat of Village, Jamalpur v, Malwinder Singh, [1985] 2 Supp. SCR 28, Minoo Framroze Balsara v. Union of India, AIR (1992) Bombay 375 and S. Kanagaraj v. Government of Tamil Nadu, AIR (1991) Madras 182. We find no force in the

contention.

The scheme of the Act and the Amendment Act is a consistent whole regulating production, manufacture, possession, transport, purchase or sale of intoxicating liquors. The Amendment Act was enacted to prohibit mixing or permitting to mix methynol in arrack or intoxicated drug or failure to take reasonable precautions to prevent acts or omissions, of mixing methynol in arrack or intoxicated drug or to be in possession thereof with knowledge of its adulteration or to prevent deleterious effect on the health of the consumers to prevenc grievous hurt to human beings or their death. As a part of it, the burden of proof of the ingredients of the offence being within the special knowledge of the accused has also been laid on the accused person. Therefore, though incidentally it trenches into some of the provisions of the Evidence Act. the Indian Penal Code and the Code, in its pith and substance, it is an integral scheme of the Act, which falls within Entry 8 read with Entry 64 and 65 of Schedule II of the 7th Schedule of the Constitution. Under Article 246(3), the State Legislature was competent to enact the Amendment Act. Therefore, the assent of the President is not necessary. Even assuming that some of the provisions incidentally trespass into the field of operation of the central provisions falling in the Concurrent List, which empower both the Parliament and the State Legislature to enact the law, the assent given by the President made Sections 57A and 57B valid. The gazette notification of the Amendment Act has been placed before us which shows that the President has given his assent to the Amendment Act on December 1, 1984. Therefore, by operation of proviso to clause (2) of Article 254, the Amendment Act prevails over the relevant provisions in the Indian Evidence Act, IPC and the Code in relation to the State of Kerala.

It is not the requirement of law under Article 254 that the State Government should seek assent of the President in respect of each and every specified provisions of the Central Act or Acts in respect of which there would be inconsistency or repugnancy in the operation of the Central provisions and the State enactment. It is enough that once the assent of the President is sought and given to the State amendment, though to some extent inconsistency or repugnancy exists between any provision, part or parts of any Act or Acts of any Central Statutes, the repugnancy or inconsistency ceases to operate in relation to the State in which the assented State Government operates.

In Jamalpur Gram Panchayat case, the facts were that specific assent of the President was sought, namely, Article 31 and Article 31-A of the Constitution vis-a-vis Entry 18 of List II of the 7th Schedule of the Constitution. The President had given specific assent. The Shamlat-deh lands in Punjab were owned by the proprietors of the village, in proportion to their share in the property of the lands held by them. After the partition, the proprietary interests in the lands of the migrants and proportionate to share of their lands vest in the Union of India. The question arose whether the Punjab Village Common Lands (Regulation) Act, 1953 prevails over Evacuee Property Act 1950. It was contended that in view of the assent given by the President, the State Act prevails over the Central Act. This. Court in that context considered the scope of the limited assent. Chandrachud, CJ, speaking for majority, held that the Central Act, 1950 prevails over the Punjab Act, 1953 and the assent of the President which was obtained for a specific purpose cannot be utilised for according precedence to the Punjab Act, At page 42, placitum 'B' to 'E', this Court held that "the assent of the President under Article 254 (2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for

doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise." Thus it is clear that this Court did not intend to hold that it is necessary that in every case the assent of the President in specific terms had to be sought and given for special reasons in respect of each enactment or provision or provisions. On the other hand, the observation clearly indicates that if the assent is sought and given in general terms it would be effective for all purposes. In other words, this Court observed that the assent sought for and given by the President in general terms could be effective for all purposes unless specific assent is sought and given in which event it would be operative only to that limited extent.

In Minoo Framroze Balsara v. Union of India, AIR (1992) Bombay 375, it was contended that the Public Premises Unauthorised Occupants (Eviction) Act, 1971 prevails over the Bombay Rent Act following the ratio in Jamalpur Gram Panchayat's case but the division bench held that since special assent of the President was sought and given in relation to the Transfer of Property Act, and Small Causes Court Act over the Bombay Rent Act, the omission to obtain assent in relation to Eviction Act, 1971 was eloquent and that, therefore, the Public Premises Unauthorised Occupants (Eviction) Act, 1971 will not prevail over the Bombay Act. The ratio therein is not a general proposition of law as contended but is confined to the factual background.

In S. Kanagaraj's case, a learned Single Judge of Madras High Court held that the scheme in Part IV-A of the Motor Vehicles Act, 1939, was amended by Tamil Nadu Bill and sought the assent of the President Before the assent was given, the Motor Vehicles Act, 59 of 1988 had come into force repealing 1939 Act. The subsequent assent given by the President would not prevail over the Motor Vehicles Act, 1988. In that context, the learned Judge held that the general assent does not save the State enactment unless specific assent is sought for and given. The broad proposition of law therein is not good law. Accordingly, we hold that the assent of the President in general terms is sufficient compliance with the proviso to clause (2) of Article 254 of the Constitution.

The crucial questions canvassed with vehemence in chorus by alt the counsel for the appellants are the validity of section 57-A and 57-B on the anvil of Articles 20 (3), 14 and 21 of the Constitution, Before adverting to their contentions, it is necessary to keep in forefront the need for the amendments, the ingredients of the offences and the scope of their operation. It is common knowledge that due to consumption of adulterated arrack or toddy with mythenol resulted in large scale loss of valuable lives and permanent incapacity of many a place in Andhra Pradesh, Orissa, Delhi and Rajasthan etc. The quest for deterence is to quench the greed for unjust profits and to save precious lives of innocent consumers of arrack etc. The Amendment Act was enacted to meet the menace, as section 57 was not effectual. Section 57-A with the marginal note, "For adulteration of liquor or intoxicating drug with noxious substances etc. etc.' says :

> (1) Whoever mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug, shall, on conviction be punishable....." The ingredients of the offence are: of mixing or permitting to mix noxious substance or any other substance with liquor or intoxicating drug, which is likely to endanger human life or cause grievous hurt to

human life or cause grievous hurt to human beings or death when the adulterated liquor or intoxicating drug is consumed by an individual, (i) If as a result of such act, grievous hurt is caused to any person, then the accused on conviction, be punishable with imprisonment for a term which shall not be less then two years bat which may extend to imprisonment for life and with fine which may extend to Rs. 50,000. (ii) If as a result of such act, death is caused to any person, in other words, on account of consumption of adulterated liquor or intoxicating drug mixed with noxious substance or any other substance, the accused, on conviction, be punishable with death or imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and with fine which may extend to Rs, 50,000. (iih In any other case, on conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and with fine which may extend to Rs. 25,000. The expression 'grievous hurt' by operation of the Explanation to Sub-section (1) of section 57-A for the purpose of sections 57-A and 57-B, shall have the same meaning as envisaged in section 320 of IPC. Sub-section (2) prescribes 'omission' also as an offence postulating that whoever omits to take reasonable precaution to prevent the mixing of any noxious substance or any other substance which is likely to endanger human life or to cause grievous hurt to the human beings with any liquor or intoxicating drug, shall be liable for conviction. In other words, there should be proof of the liquor or intoxicating drug mixed with noxious substance and the person responsible for omission to take reasonable precaution to prevent mixing of noxious substance or any substance, the consequence of which act of mixing or omission to take reasonable precaution in that behalf to prevent the mixing of noxious substance or any other substance which is likely to endanger human life or to cause grievous hurt to human beings or death. On proof thereof, the accused, on conviction, shall be, (a) as a result of such omission, grievous hurt is caused to any person, in other words, to the consumer, punishable for a term which shall not be less than two years but which may extend to imprisonment for life and with fine which may extend to Rs.

50,000; (b) if as a result of such omission, death is caused to any person, in other words, to the consumer, shall be punishable for not less than three years but which may extend to imprisonment for life and with fine which may extend to Rs. 50,000; (c) in any other case, with imprisonment for a term which shall not be less than one year but which may extend to ten years and with fine which may extend to Rs. 25,000, Sub-section (3) makes a person in possession of any liquor or intoxicating drug with the knowledge that liquor or intoxicated drug was mixed with any noxious or any oilier substance. On proof thereof, the accused found in possession of the adulterated liquor or intoxicating drug mixed with noxious substance or any other substance, shall be liable to conviction. On recording conviction, he would be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and with fine which may extend to Rs. 25,000. In all these cases the prosecution has to prove that the arrack or intoxicated drug contained noxious substance or any other substance. Due to consumption of adulterated liquor, it endangered human life or caused grievous hurt or death or other disability to the consumer. On proof thereof the operation of sub-section (5) comes into play.

Sub-section (4) deals with grant of bail. In view of the constitution bench decision of this Court upholding the constitutional validity of similar provision of TADA in Kartar Singh v. Union of India, [1994] 3 SCC 569, the validity of sub-section (4) is no longer res Integra and that, therefore, its validity no longer remains assailable. The need to elaborately discuss its validity is obviated. Therefore, it is accordingly held valid and so upheld.

Sub-section (5), because of non-obstanate clause, makes inapplicable the relevant provisions in the Indian Evidence Act as to fact proved, disproved or not proved under section 3; may presume, shall presume and conclusive proof in section 4 and burden of proof in Chapter 7 in Part III of the Evidence Act. The special rules of evidence envisaged under sub-section (5) of section 57-A get attracted. Clause (a) provides that where a person is prosecuted for an offence under sub-section (1) or (2), the burden of proof that he has not mixed or permitted to mix noxious substance or any other substance with the liquor or the intoxicated drug or as the case may be, omitted to take reasonable precaution to prevent the mixing of any noxious substance or any other substance falling sub-sections (1) and (2) of section 57-A with any liquor or intoxicating drug, shall be on him. In other words, notwithstanding the burden of proof of a fact or disproof or non-proof of the fact envisaged in the Evidence Act, the onus of proof thereof though normally is on the prosecution, by operation of sub-section (5) special rule of proof and its burden has been placed on the person prosecuted for the offences mentioned in sub-sections (1) and (2) as the facts are within his knowledge. So he has to prove that he has not mixed or has not permitted to mix or as the case may be, had not omitted to take reasonable precaution to prevent the mixing of any noxious substance or any other substance, referred to in sub-sections (1) and (2) of section 57-A with any liquor or intoxicating drug. We would advert to the mode of proof and the extent of the burden of proof which lie on the accused at a later stage.

(2) When a person is prosecuted for an offence under sub-section (3), in other words, the person found in possession of liquor or intoxicating drug mixed with noxious substance or any other substance, it places the burden on him to prove that he did not have knowledge that such noxious substance or any other substance was mixed with such liquor and intoxicating drug found in his possession. The burden of such want of knowledge shall be on him. The primary facts that the accused was in possession of adulterated arrack or intoxicated drug and that it was an adulterated one with noxious or other substance is on the prosecution.

Section 57-B is a concomitant culmination to the act of mixing or permitting to be mixed or failure to take reasonable precaution in mixing or being in possession of adulterated liquor or intoxicating drug with knowledge mat liquor or intoxicating drug was adulterated with noxious or any other substance envisaged in section 57-A. On the Court finding that the prosecution has proved its case, the Judge having satisfied that death or grievous hurt has been caused to the consumer or endangered human life and finding that the death or grievous hurt has been caused or endangered human life, by sale of the adulterated liquor or intoxicating drug in any licence placed under the Act, the licensee becomes liable for payment of compensation. Power has been conferred upon the court to order the licensee of that place whether or riot he is convicted of an offence under section 57-A, to pay by way of compensation as liquidated damages such amount, as appears to be just, to be paid to the legal representatives of the deceased or to the person or persons to whom grievous hurt has been

caused. By operation of sub-section (2), the person aggrieved by an order made under sub-section (I), has been given right of appeal to the High Court within prescribed period of limitation. The proviso imposes as a condition precedent that the appeal shall not lie unless the amount ordered under sub-section (1) was deposited in the court of first instance. In other words, exercise of the right of appeal under sub-section (2) is conditional one for pre-compliance with the order of the court made in sub-section (1) and gives to the High Court the jurisdiction to entertain the appeal only on proof of the deposit of the amount ordered to be made by the trial court. Since it is made a condition precedent, the second proviso gives power and discretion to the High Court to entertain the appeal, after the expiry of the prescribed period of limitation on the appellants' satisfying the court that he was prevented by sufficient cause to file the appeal within time.

The contentions of the counsel for the appellants are that the universal declaration of human rights, the civil and political rights, Convention to which India is a Member, guarantee fundamental freedom and liberty to an accused. The procedure prescribed for trial must also stand the test of the rights guaranteed by those fundamental human rights. In criminal jurisprudence, the settled law is that the prosecution must prove all the ingredients of the offences for which the accused has been charged with. The proof of guilt of the accused should be on the prosecution and be beyond reasonable doubt. At no stage of trial, the accused is under an obligation to disprove his innocence. Unlike in a trial of civil action, the burden of proof of a case always rests on the prosecution and it never gets shifted. Sub-section (5) relieves the prosecution of its duty to prove its case beyond reasonable doubt which is incumbent under the Code and the Evidence Act and makes the accused to disprove the prosecution case. Thereby, the substantive provisions and the burden of proof not only violate the fundamental human rights as well as fundamental right under Articles 20(3) and 14. To place the entire burden on the accused by section 57-A (5) to prove his innocence, therefore, is arbitrary, unjust and unfair infringing upon his right to life and unfair and unjust procedure violating the guarantee under Article 21.

Mere possession of the arrack or intoxicated drug without proof by the prosecution that it was mixed with noxious substance is per se arbitrary, unfair and an unconscionable procedure violating Articles 14 and 21. A mere appearance of rash on human body due to consumption of arrack or intoxicated drug mixed with noxious or other innocuous substance entails the offender with minimum sentence. Intention to commit crime is sine quo non for the prosecution of an offender. Conviction for offences under section 57-A without proof of the intention of the offender is contrary to the settled principles of criminal jurisprudence. Sections 299 and 300 of IPC make a distinction between culpable homicide and murder but the Amendment Act has done away with this salutary distinction and mere death of a person by consumption of adulterated arrack, makes the offender liable for conviction and imprisonment for life or penalty of death. Mere negligence in taking reasonable precaution to prevent mixing noxious substance or any other substance with arrack or Indian made foreign liquor or intoxicated drugs is made punishable with minimum sentence is harsh, unjust and excessive punishment offending Articles 14 and 21. Exclusion of proof of any mitigating circumstances, want of intention or non-serious or trivial consequences ensued by consumption of adulterated arrack etc. are totally excluded from consideration by me court in awarding sentence which would violate Fundamental Rules of fair procedure guaranteed under Articles 21 and 14. Even the culpability of the negligence proved under section 304- A while giving

discretion to criminal court to impose lesser sentence, is taken away in the garb of mandatory deterrent sentence prescribed in section 57-A, compensatory justice envisaged in section 57-B is obnoxious to fair trial. The consequential omission or failure to deposit the compensation awarded as a condition to exercise right of appeal is also Unfair, unjust and illusory offending Articles 14 and 21, The presumptions envisaged in sub-section (5) of section 57-A per se violate the fundamental rights and universal declaration. Mere possession of adulterated liquor without any intent to sell, to become a presumptive evidence to impose punishment without the prosecution proving that the person in possession was not a bona fide consumer or had its possession without animus to sell for consumption and place the burden on the accused to prove his innocence is procedure, which is unjust and oppressive violating the cardinal principles of proof of crime beyond reasonable doubt.

Absence of proportionality in imposition of the sentences consistent with the proved guilt under section 57-A is also arbitrary and unfair. The extreme penalty of death by section 57-A (I) (ii) without proof of intention or knowledge to cause the death which is an essential pre- requisite ingredient both for culpable homicide or murder defined in sections 299 and 300 of IPC, violates the rights guaranteed under Articles 14 and 21 of the Constitution and is grossly disproportionate to the proved guilt of the accused. Any provision which imposes penalty by resorting to statutory presumption is per-se unconstitutional. There should always be proof of culpable mandatory state of mind on the part of the accused to impose maximum punishment of death which is rarest of the rare cases for extremely cruel crime but the innocent man charged under section 57-A and B is made to prove his innocence or else he would be liable to be sentenced to death or other minimal sentence. Therefore, it would be a savage punishment anathema to civilised jurisprudence. The violation of the constitutional mandate that no person shall be deprived of the life or personal liberty without complying with the mandatory provisions of Articles 21 and 14, is writ large.

Compelling the accused to prove the facts constituting offence under section 57-A by operation of its sub-section (5) is opposed to the mandate of Article 20(3), amounts to and compels him to be a witness to prove his innocence, A reading of the provisions in section 57-A and 57-B do establish that there is no rational relation or nexus with the object sought to be achieved by the Amendment Act. The provisions of Prevention of Adulteration Act provide an elaborate procedure to take samples of the articles of food for getting tested its adulteration and the absence of such procedure either in the Amendment Act or in the Act and no rules having been made in that behalf, the procedure is arbitrary, unjust and unfair offending Articles 14 and 21 of the Constitution. Mere mixing or permitted to mix noxious or other substance with liquor or intoxicated drug itself was made an offence without the same being exposed for sale or intended for sale or consumed and consumption by the person is contrary to the notions of fair criminal jurisprudence. Absence of burden on prosecution to prove these essential ingredients, makes the Amendment Act totally arbitrary and per se unjust violating Articles 14, 19 and 21. The presumption by section 57-A(5) read with section 57-A(3) that a person in possession of adulterated liquor is presumed to know mat the same is mixed with noxious substance is harsh and cruel since as a bona fide purchaser of liquor for consumption would also be a person in possession of the liquor or intoxicated drug without any knowledge that it was mixed with or permitted to be mixed with noxious or any other substance and it does not satisfy the test of rational connection. We have given our anxious and deep consideration to the diverse aspects projected forcefully by all the learned counsel and we find that they are

unacceptable and if given credence, they would frustrate the very object of the Amendment Act.

Article 20 (3) of the Constitution protects that "no person accused of any offence shall be compelled to be a witness against himself." Article 21 envisages that "no person shall be deprived of his life or personal liberty except according to the procedure established by law." Article 14 provides equality and equal protection of the laws to a person. R.C. Cooper v. Union of India, [1970] 3 SCR 530, accentuated the efficacy of meaningful right to life guaranteed by Article 21 to full blossom and the fairness of the procedure for its deprivation have been woven with civilised jurisprudence treating all the relevant Articles in Part III as an integral stream of rights to make the dignity of the person meaningful with unimpeaded flow of fair justice to every person and to make each right in its conjoint operation an effective tool in that process. Equally the founding fathers of the Constitution structured the scheme in the Constitution in such a way that not only the liberty, equality and fraternity, i.e. trinity would always blossom and enliven the flower of human dignity in harmony with social good. In Kartar Singh v. State of Punjab, [1994] 3 SCC 569 at 715, it was held that freedom cannot last long unless it is coupled with order, freedom can never exist without order, freedom and order may coexist. It is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive. Liberty of individual should be subject to social control otherwise it would become anti-social and would undermine the security of the State. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delienate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute licence but must arm itself within the confines of law, In other words, there can be no liberty without social restraint Liberty, therefore, as a social conception is a right to be assured to all members of a society, the liberty of some must not involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising restraint which society has over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number, in other words, common happiness is an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to undermine social welfare and order. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution. The concept of individual liberty in harmony with social order is in consonance with universal declaration of human rights and international covenant to civil and political rights and other allied covenants.

The reisen di-etre of the State being the welfare of the members of the society, the whole purpose of the creation of the State would be to maintain order, health and morality by suitable legislation and proper administration. The State has the power to prohibit trade or business which are illegal,

immoral or injurious to the health and welfare of the people. No one has the right to carry on any trade or occupation or business which is inherently vicious and pernicious and is condemned by all civilised societies. Equally no one could claim entitlement to carry on any trade or business or any activities which are criminal and immoral or in any articles of goods which are obnoxious and injurious to the safety and health of general public. There is no inherent right in crime. Prohibition of trade or business of noxious or dangerous substance or goods, by law is in the interest of social welfare.

Article 11 (1) of the universal declaration of Human Rights provides that everyone charged with penal offences has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Article 14(2) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 6(1) of Convention on Civil and Political Rights states that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Article 9(1) says that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as is established by law. Article 14(2) envisages that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law and shall be entitled to minimum guarantees detailed therein. Clause (e) thereof posits thus - "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" and (g) "provides not to be compelled to testify against himself or to confess guilt." This Court in Bachhan Singh v. Slate of Punjab, [1980] 2 SCC 684, while upholding the constitutionality of death sentence under section 302, IPC, when contended that it violates Article 6 (1) of the Convention and the Universal Declaration of Human Right held that both rights are substantially the same as the guarantees or prohibition contained under Articles 20 and 21 of our Constitution.

> "India's commitment, therefore, does not go beyond what is prohibited in the Constitution and the Indian Penal Code and the Criminal Procedure Code." However, the spirit of the international convention has to be kept in view in considering the validity of the impugned provisions and their applications.
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> It is true and indisputable, as contended by Sri A. Raghuvir, the learned senior counsel that the golden rule that runs through the web of all the civilised criminal jurisprudence is that the accused is presumed to be innocent unless he is found guilty of the charged offence. The burden to prove all the facts constituting the ingredients of the offence against the accused beyond reasonable doubt rests on the prosecution. If there is any reasonable doubt the accused gets the benefit of acquittal. But the rule gets modulated with the march of time. Whether the legislature could step in and provide exceptions, create offences and also place part of the burden of proof on the accused, where the facts are within his special knowledge or intention is locked up in the mind of the accused to prove the said facts is unconstitutional and violates fundamental human rights.

Under the Act, the State has absolute right to regulate production, transport, storage, possession and sale of liquor or intoxicant drug. No person has any absolute right to sell liquor or intoxicated drug except in accordance with law which aimed at preservation of public health as well as to raise revenue. Dealing in liquor or intoxicant drug is, therefore, not an absolute right to business or trade but is a regulated right in accordance with law. The Act prohibits mixing of noxious substance with liquor or possession thereof. The State, therefore, possesses the right of complete control on all kinds of intoxicants, namely, manufacture, collection, sale and consumption thereof. Regulation of sale of potable liquor prevents reckless propensity for adulterating liquor to make easy gain at the cost of health and precious life of consumer. Equally none has freedom or fundamental right to do business in adulterated articles of food. Cognizant to the contemporaneous large scale deaths or grievous hurt to the consumers of adulterated liquor mixed with noxious substance, the Amendment Act aims to prevent their recurrence and accordingly it came to be made.

No civilised society, therefore, would countenance that a citizen has a fundamental right to trade or business in activities which are criminal in its propensity, immoral, obnoxious and injurious to health, safety and welfare of the general public. It is, therefore; a question of public expedience and public morality that the State is fully competent to regulate the business in liquor or intoxicated drug to mitigate its evil or to suppress it in its entirety. There is no inherent right in a citizen to conduct business or trade in adulterated intoxicated liquor by retail or wholesale. It is, therefore, obvious that dealing in liquor inherently pernicious or dangerous goods which endangers the community or subversive of morale, is within the legislative competence under the Act. The State has thereby the power to prohibit trade or business which is injurious to the health and welfare of the public and the elimination and exclusion from the business is inherent in the nature of liquor business. The power of the legislature to evolve the policy and its competence to raise presumptive evidence should be considered from this scenario.

In Salabiaku v. Grance, [1988] 13 EHRR 379 at 388, the European Court of Human Rights while dealing with the scope of Article 11 of Universal Declaration of Human Rights, the scope of the burden of proof on the prosecution and also its placement on the accused, held that presumption of fact or of law operate in every legal system. Clearly, the Convention of civil and political rights does not prohibit such presumption in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph I, Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference to domestic law. Such a

situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of that is at stake and maintain the rights of the defence. It was therefore held that providing exceptions or to place partial burden on the accused was not violative of universal declaration of human rights or even convention on civil or political rights.

Let us trench into the contours of comparable jurisdiction in U.K., Hong Kong, Malaysia, U.S.A., Australia and Canada to find the permissive limits of the burden of proof on the accused. The celebrated judgment of the House of Lords is of Lord Sankey L.C. is Woolmington v. Director of Public Prosecutions, (1935) A.C. 432. It was laid down at pp. 481-482 that throughout the web of the English criminal law the golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. This ratio was further explained in the speech of Viscount Simon L.C. in Mancini v. Director of Public Prosecutions, (1942) A.C. 1 at 11, Woolmington's case was explained and reinforced that the prosecution must prove the charge beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner Should have the benefit of it. The rule is of general application in all charges under the criminal law. The only exception which arises, as explained in Woolmington's, case, is in the defence of insanity and in offences where onus of proof is specially dealt with by statute. In Jayesena v. The Queen, (1970) A.C. 618, Lord Devlin speaking for the Privy Council, commenting upon Woolmington's case at p.

623 stated that the House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on die prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt In Reg. v. Edwards [1975] Q.B. 27, considering the Licence Act of 1964 and section 160 (1) (a), the Court of Appeal held that when the accused was convicted of selling intoxicating liquor without the licence contrary to law and the prosecution had not adduced any evidence to show that he did not have the licence, the Court of Appeal held that the burden was on the defendant (accused) to prove that he held a licence and that as he had not done so he was rightly convicted. This case followed number of precedents on the statutory exceptions and ultimately upheld that it is no part of the duty of die prosecution to prove a negative fact that the accused had a licence.

In Ong Ah Chuan v. Public Prosecutor, (1981) A.C. 648, a case arising from Singapore Court of Appeal, Lord Diplock speaking for the Board considered trafficking in prohibited drug (heroin) and

the statutory presumption of trafficking under the Drugs Act, 1973 vis-a-vis, the Bill of Rights. The accused had in his possession 15 grams of heroin in violation of section 3 of the Misuse of Drugs Act, 1973. Under section 29, the death sentence was mandatory for such an offence. Respondent was convicted and sentenced to death which was affirmed by the Court of Appeal. Lord Diplock speaking for the Board held that proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus in the case of an accused caught in the act of conveying from one place to another the controlled drugs in a quantity much larger than is likely to be needed for the purpose of trafficking in them, would, in the absence of any plausible alternative explanation by him, be irresistible - even if there was no statutory presumption such as is contained in section 15 of the Drugs Act. As a matter of common sense die larger the quantity of drugs involved, the greater the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing evidence needed to rebut it. Whether the quantities involved be large or small, however, the inference is always rebuttable. The presumption, therefore, works that when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another, the mere act of moving them does not of itself amount to trafficking under the Act. But if the purpose of which they were being moved was to transfer possession from the mover to some other person at their intended destination, the mover is guilty of the offence of trafficking under section 3. If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in section 15, that section creates a returnable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not Intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption, (emphasis supplied). The constitutional validity of presumption under section 15 was upheld holding that a generous interpretation avoiding what has been called 'the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental liberties is necessary and most liberal approach to the construction of the written constitution which is sui generis, is necessary. It was held that one of the fundamental rules of natural justice, in the field of criminal law, is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it.....What fundamental rules of natural justice do require, is that there should be material before the court, that is, logically probative of facts sufficient to constitute the offence with which the accused is charged. Upon the prosecution's proving that certain ads consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Presumption of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition. Section 15, therefore, was not inconsistent with the Constitution, at any rate so far as it relates to proved possession, with which alone the instant cases are concerned, (emphasis supplied). Accordingly, the sentence of death imposed by the trial and was confirmed on appeal, was affirmed. In Regina v. Hunt (Richard),

(1987) A.C. 352, when the Police Officer found in the appellant's house a paper fold containing 154 milligrams of a white powder which, when analysed, was found to be morphine mixed with caffeine and atropin, the appellant was charged under section 5(2) of the Misuse of Drugs Act, 1971 and section 4 of the Misuse of Drugs Act, 1973, Lord Griffiths, speaking for the House per majority, interpreting the presumption, during the course of the speech, the learned Law Lord, held at p. 376 that whenever burden of proof is placed upon a defendant by statute the burden should, be an evidential burden and not a persuasive burden. In order to establish the guilt the prosecution must, therefore, prove that the prohibited substance is in the possession of the defendant. At p. 380 construing the dictum of Lord Sankey and Lord Viscount Simon L.C., it was stated that "I take the word 'specially' to mean no more than that the onus of proof is made the subject of a statutory provision, be this express or implied, Lord Simon was not purporting to narrow the exception identified by Lord Sankey, but merely to repeat it. If he had intended to narrow it to express statutory exceptions, this would have been so stated but the resultant anomaly would then have required justification. Since, ex hypothesis, Parliament had, by necessary implication from the words used in the statute, made known its intention, by what authority could that intention be ignored? It is a constitutional platitude to state that where Parliament makes its intention known, either expressly or by necessary implication, the courts must give effect to what Parliament has provided.....Whenever it is the intention of Parliament to place a burden of proof upon the accused, so to provide in express terms, the proposition advanced by the appellant cannot be sustained. In Mok Wei Tak and Am. v. The Queen, (1990) 2 A.C. 333, a case arising from Hong Kong Prevention of Bribery Ordinance (Laws of Hong Kong, 1980 rev., c.201). Sections 10 (I)

(a), the accused husband and his wife were maintaining a standard of living above that commensurate with his official emoluments during the relevant period and on the charge of abatement of the crime by the wife; they were convicted of the offences and the Court of Appeal dismissed the appeal. On further appeal, the judicial committee speaking through Lord Roskill held per majority that section 10(1) creates an offence different from the other offences enacted by Part II of the Ordinance, It concerns with maintaining an excessive standard of living following an earlier event, namely, corrupt acquisition of assets which has enabled those later events to take place. Therefore, the proof of abeting or aiding the abatement was to be inferred unless proper explanation was given. It was held that the wife failed to give that explanation, The conviction was upheld. In Attorney General of Hong Kong v. Lee Kwong-Kut, [1993] W.L.R. 329, a case arising from Hong Kong Court of Appeal and the High Court, the Privy Council considered Drug Trafficking (Recovery of Proceeds) Ordinance, section 25 and Hong Kong Bill of Rights Ordinance 1991, sections 3, 8 and 11. The accused were charged under section 30 of the Summary Offences Ordinance for being in possession of cash reasonably suspected of having been stolen or unlawfully obtained. The second was charged for assisting another to retain the benefit of drug trafficking, contrary to section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance. Both the accused were convicted and their convictions were upheld. In both the cases the High Court quashed the indictment on the ground that they were violative of Article 11 of the Bill of Rights. On appeal by the Attorney General, the Privy Council upheld the judgment in the first case but set aside the conviction in the second case and held that section 2 (j) is not in violation of Article 11 of Bill of Rights. The Board held that Article 11 of Bill of Rights was intended that the accused will have fair trial and that justice will be done. Article 11(1) is always subject to implied limitation. It is not the letter of the language of the statute

-which is important but its substance and effect is material. If the prosecution retains responsibility to prove the essential ingredient the less likely it is that an exception will be regarded as unacceptable. In deciding- what are the essential ingredients, the language of the relevant statutory provision will be important. (Emphasis supplied).

Analysing the ratio in the judgment of Canadian Supreme Court and Australian Reports and Article 11(1), section 30 and section 25 of the Act, it was held that the substantive effect of the statutory provision in respect of the first accused was to place onus on him to establish that he can give an explanation as to his innocent possession of the property which is a most significant element of the offence. It reduces the burden on the prosecution to prove possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. Therefore, it was held that it contravened Article II (1) of the Hong Kong Bill of Rights. But with regard to section 25 it was held that under sub-section (1) of section 25, the onus is on the prosecution. Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person's proceeds of drug trafficking within the wide terms of section 25(2) as set out in section 25(1) and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts the defendant is entitled to be acquitted. However, once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has .carried out drug trafficking or has benefited from drug trafficking, then the defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy section 25(3) or (4). If the defendant chooses not to take the precautionary action under section 25(3) then he knows he can only safely proceed by relying on section 25(4). To be able to achieve this the defendant will have to take all steps necessary to ensure that he does not have the knowledge or suspicion referred to. If the defendant has done this then he will be aware of the relevant facts and it is reasonable that he should be required to establish them. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfill the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a defendant to bear that onus under section 25(4) is manifestly reasonable and clearly does not offend Article If (I), Indeed section 30 and section 25 can be regarded as examples of situations close to the opposite ends of the spectrum of what does and does not contravene Article 11(1). (Emphasis supplied). Accordingly it was held that the burden of proof could not conceivably contravene Article 11(1).

In Queen v. Oakes, 26 D.L.R, (4th) 200, the Supreme Court of Canada considered the constitutionality of the presumption engrafted in section 8 of the Narcotic Control Act, 1970 on the anvil of section 11(d) of the Canadian Charter of Rights and Freedoms and held that the 'reverse onus' laid down in section 8 of the Act violated the presumption of innocence guaranteed by section ll(d) of the Charter. Since section 8 established a mandatory presumption of law and, in using the word 'establish' imposed a legal burden of proof on the accused, and not merely an evidentiary burden, by requiring the accused to prove on the balance of probabilities that he was not in possession of the narcotic drug for the purpose of trafficking, it compelled him to prove that he was not guilty of the offence of trafficking. The presumption of innocence is hallowed principle lying at the very heart of criminal law which protects the fundamental liberty and human dignity of any and

every person accused by the State of criminal conduct. This is essential in a society committed to fairness and social justice. It was held that the Section failed to rationalise the connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking of persons guilty of possession only of narcotic drugs. In Louis Beaver v. The Queen, [1957] SCR 531, the same court held that for an offence of being in possession of Narcotic substance, the element of knowledge formed part of the ingredient of possession when mere possession of the substance amounted to an offence and it would be within the province of the Parliament to create an offence. As seen, the Privy Council had-explained the rationale to strike a balance between individual liberty and social order and court is to see whether strict construction would subserve the legislative purpose and the Court was not inclined to adopt that strict construction. The decision of the Hong Kong High Court in the Queen v. Sin Yau-ming, [1992] 1 Hong Kong Criminal Law Reports p. 127, must be understood in the light of the latter decision of the Privy Council referred to hereinbefore.

In Ed Tumedy v. State of Ohio, (71) L.Ed. 510, the question arose whether certain statutes of Ohio in providing for the trial by the Mayor for Violation of the Prohibition Act of the State, deprive the accused of due process of law violating the 14th Amendment to the Federal Constitution. Tapt, C.J. speaking for the unanimous Supreme Court of the United States of America held that a statute seeking to stimulate small municipalities to organise and maintain courts to try persons accused of violation of the prohibition law without a jury to try offenders with no review of decisions except on matters of law and flagrant disregard of the evidence was held constitutional. There is nothing in the Federal Constitution to prevent a State from providing such a system of courts as it chooses. There is nothing in the 14th Amendment to the Federal Constitution that requires jury trial for every offender. In Morrison v. California, 78 Law. Ed. (1933), the question arose whether placing the burden of proof on a co- accused of a charge of conspiracy so as to violate the Alien Land Law of California was violative of due process under 14th Amendment. Cardozo, J, speaking for the unanimous court held that within the limits of reason and fairness, the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the State shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Special reasons are at hand to make the change permissible. The legislature may go a good way in raising a presumption or in changing the burden of proof, but there are limits. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. Presumption that are not evidence in a proper sense but simply regulations of the burden of proof. Accordingly it was held that placing the burden on the accused to prove lack of guilty knowledge was held to be not violative of due process of 14th Amendment In United States v. Gainey, 13, Law. Ed. 2nd. p. 659 (1965), in a prosecution to carry on an illegal distilling businesses, the court instructed the jury that the unexplained presence of the accused at the sight of illegal distilling business is sufficient evidence to authorise conviction of the offences unless the accused explains his presence to the satisfaction of the jury, whether unconstitutional and section 26 USC 5601 (b) (2), violates due process of 14th Amendment Steward, J. expressing the opinion for majority by seven Members of the Court held that the statutory inference is

constitutional. The purpose of section 26 USC 5601 (b) (1) and (2) is to provide that the unexplained presence of an accused at the sight where an unregistered distilling apparatus is set up or an illegal distilling business is carried out shall be sufficient evidence to authorise conviction, is to meet the practical impossibility of proving actual participation in such an illegal activity except by inference drawn from the accused's presence when the illegal acts were committed. The constitutionality of legislation authorising an inference from the certain facts depends on the rationality of the connection between facts proved and the ultimate fact presumed. Significant weight should be accorded to the capacity of Congress to amass the stuff of actual experience and cull conclusions from it in matters not within specialised judicial competence or completely common place. An unexplained presence of an accused at a place where an illegal distilling business is carried on shall be deemed to be sufficient evidence to authorise conviction for illegal carrying on the business of distilling permits. A judge is to submit a case to the jury on the basis of the accused's presence alone but where presence is the only evidence it does not require a judge to submit the case to the jury nor preclude the grant of a judgment, notwithstanding the verdict. And the Appellate Court may review the trial judge's denial of motions for a directed verdict or for a judgment. The presumption was held to be not unconstitutional violating due process of law. James Turner v, United States, 396 US 398 (1970) 24 L.Ed. 2nd, 610, the defendant was tried before a jury on a charge with (1) knowingly receiving, concealing, and transporting heroin and cocaine which he knew that it had been illegally imported, and (2) knowingly purchasing, disposing, and distributing heroin and cocaine which were not in or from the original stamped package. The evidence indicated that the defendant had been in possession of a 14.68 gram package containing a cocaine with sugar mixture and a 48.25 gram package containing 275 bags of heroin, and that no federal tax stamps were affixed to the packages. No evidence was presented as to the origin of the cocaine or heroin, and the defendant did not testify. Relying upon the presumption the trial judge instructed the jury that the defendant's unexplained possession of the heroin and cocaine would support an inference that he knew that they had been illegally imported and the defendant's possession of heroin and cocaine which were not in a stamped package constituted prima facie evidence that he knowingly purchased, dispensed or distributed such heroin and cocaine. On finding guilty on all the counts by the jury on conviction and affirmation by the Court of Appeal, on eertiorari, White J. speaking for the majority affirmed the conviction involving heroin and held that all heroin consumed in the United States is illegally imported and the jury would properly infer, as authorised by statute, that the heroin in the defendant's possession had been illegally imported and the defendant had knowledge of its illegal importation. The evidence of the defendant's possession of 275 bags of heroin was sufficient to support his conviction for distributing such heroin because it was extremely unlikely that a package containing heroin would be legally stamped and because most persons in possession of heroin could be presumed to have obtained it by purchase, the defendant was properly convicted for purchasing heroin which was not in or from the original stamped package. But since cocaine was being also cultivated in the United States, it was held that from mere possession the statutory presumption of unlawfully procured or to infer that cocaine in the defendant's possession had been illegally imported and that he had knowledge of its illegal importation cannot be sustained unless there is some evidence adduced by the prosecution. The ratio in Lawry's case was followed. In Barnes v. United States, 412 US 837 (1973), 37 Law. Ed. 2nd, 381, in a prosecution on a charge of being in possession of US Treasury checks from the mails knowing them to be stolen, the trial court instructed the Jury that ordinarily it would be justified in inferring, from the defendant's

unexplained possession of the recently stolen property, that he possesses the mails with knowledge that it was stolen. On finding guilty by the jury and on conviction and affirmation by the Dist. Court and the US Court of Appeal on the federal side, on certiorari, Powell, J. speaking for the majority, held that a statutory inference submitted to the jury has sufficient to support Conviction accords with due process if it satisfies the reasonable doubt standard that the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt as well as the more-likely-than-not standard that is, it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Although the introduction of any evidence, direct or circumstantial tending to implicate the accused in the alleged crime increases the pressure on him to testify, the mere massing of evidence against an accused cannot be regarded as a violation of his privilege against self- incrimination. The inference from the accused's unexplained possession of recently stolen property, though he knew that it was stolen, does not infringe his privilege against self-incrimination and it may not be fairly understood as a comment on his failure to testify. Where there is rational connection between the facts proved and the facts presumed or inferred, it is permissible to shift the burden of going forward to the defendant where an inference satisfies the reasonable doubt standard. In County Court of Ulster, New York v. Samuel Allen, 442 US 140 (1979), 60 Law. Ed. 2nd, 777, three adult males and a 16 year old girl were jointly tried on charges that they illegally possessed two loaded hand-guns which had been found in a car in which they were riding by a police officer who had stopped the auto for speeding, the handguns having been positioned crosswise in the girl's open handbag on either the front seat or floor of the car where the girl had been sitting, the trial judge instructed the jury that subject to certain exceptions, that the presence of a firearm in an auto is presumptive of its illegal possession by all persons then occupying the vehicle and that it was entitled to infer the defendants' possession of the handguns from their presence in the car, tending to support or contradict such inference, and that it was to decide the matter for itself without regard to how much evidence the defendants introduced. On finding guilty by the jury and conviction followed and affirmed by Court of Appeal, in a certiorari Stevens, J., joined by Burger Ch. J., and White Blackmun, and Rehnquist, JJ., it was held that defendants' claim that it was unconstitutional for fee State to rely on the presumption because the evidence was otherwise insufficient for conviction had not been rejected by the State courts on the basis of an independent and adequate State procedural safeguards. It was held that the most common evidentiary device is the entirely permissible inference or presumption which allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. The basic fact may constitute prima facie evidence of the elemental fact, A state statutory presumption, providing that the presence of a firearm in an automobile is generally presumptive evidence of its illegal possession by all persons occupying the vehicle, is not violative of the due process under the United States Constitution.

For the purposes of the constitutionality, in terms of due process, a statutory presumption regarding a criminal matter, a presumption need not be accurate in every imaginable case. For the purpose of due process, the validity of inferences and presumptions varies from case to case, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the feet finder's freedom to assess the evidence independently. In criminal cases, the ultimate test of any device's constitutional validity in a given case is that the

device must not undermine the defendant's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt. An inference or presumption involved in a case is permissive or mandatory for the purpose of analysing its validity in terms of due process was held not violative of due process. Same view was reiterated in Herman Solem v. Jerry Buckley Helm, 463 US 277 (1983) 77 Law. Ed. 2nd. 637. In Timothy F. Leary v, U.S., 395 US 6, 23 Law. Ed. 2nd. 57, the petitioner and his daughter were found in their automobile when stopped at the American customs inspection area upon driving back across the International Bridge between the United States and Mexico. He was found to be in possession of marijuana. When he was charged for having knowingly transported and facilitated the transportation and concealment of marijuana which had been illegally imported or brought into the United States, ail in violation of 21 USC I76a and sub-section (2) upon conviction finding by the jury to be knowingly transported, concealed etc. and confirmation by the Court of Appeal, on certiorari, Harlan, J. per majority of 7 Judges, held that but there was no connection between the fact proved is to infer that the defendant's possession of marijuana that he knew of the illegal importation or bringing into United States. However, it was well settled in the United States that to import a narcotic drug contrary to law or to receive or conceal or to facilitate any of the acts with knowledge that drug has been imported unlawfully and also provided that the production of a narcotic drug should be deemed to authorise conviction under the statute unless the defendant explained such satisfaction of the jury under 21 USC 174 and it was held that it does not violate the 5th Amendment by compelling him to a witness against him. It has to be remembered that in the Federal Constitution of USA, except the writ of certiorari, there is no power like our Article 136 to review the legality, conviction or trial of an offender on merits. So the Supreme Court of USA adopted due process technique and reasonable doubt standard to synthesise the procedure and principles suitable to its judicial review.

Section 5 of the Evidence Act envisages that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and such other facts as are hereinafter declared to be relevant and no others. Illustration (a) provides that 'A' is tried for the murder of 'B' by beating him with a club with the intention of causing his death. At A's dial, the following facts are in issue :-

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

Section 6 provides that facts which though not in issue, are so connected with a feet in issue to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Section 101 places general burden of proof postulating that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist Section 102 says that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 105 says that if a person is accused of any offence,

the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. Section 6 makes another exception, providing that any fact if to be established within the knowledge of any person, the burden of proof is upon him. The definition of the word 'proved' says that a fact is said to be proved when, after considering matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be not proved when it is neither proved nor disproved. A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist It is the cardinal rule of our criminal jurisprudence that the burden in the web of proof of an offence would always lie upon the prosecution to prove all the facts constituting the ingredients beyond reasonable doubt. If there is any reasonable doubt, the accused is entitled to the benefit of the reasonable doubt. At no stage of the prosecution case, the burden to disprove the fact would rest on the defence. However, exceptions have been provided in sections 105 and 106 of the Evidence Act, as stated hereinbefore. Section 113-A of the Evidence Act raises a presumption as to abatement of suicide by a married woman by her husband or his relatives. Similarly section 114-A raises presumption of absence of consent in a rape case. Several statutes also provided evidential burden on the accused. On the general question of the burden of proof of facts within special knowledge of the accused, this Court, in Shambu Nath Mehra v. State of Ajmer, [1956] SCR 199, laid the rule thus :-

"Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and section 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible, or a proportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience."

In C.S.D. Swamy v. The State, [1960] 1 SCR 461, on a charge for offence under section 5(1) (a) and 5(1) (b) read with section 5(3) of the Prevention of Corruption Act, 1947, on the question of burden of proof, this Court noticing the language in section 5(3) which reads as under :-

"In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is

> guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption."

It was held that it does not create a new offence but only lays down a rule of evidence enabling the court to raise a presumption of guilt in certain circumstances - a rule which is a complete departure from the established principles of criminal jurisprudence that the burden is always on the prosecution to prove all the ingredients of the charge and the burden never shifts to the accused to disprove the charge framed against him. The Legislature using the expression "satisfactorily account" in section 5(3) cast the burden on the accused not only to offer a plausible explanation as to how he came by the large wealth disproportionate to his known sources of income, but also to satisfy the court that his explanation was worthy of credence. The general law where it has been held that the accused could be exculpated if he offered a plausible explanation, could have no application.

In Sajjan Singh v. State of Punjab, [1964] 4 SCR 630, the Constitution Bench considering section 5(3) held that this sub-section provides an additional mode of proving an offence punishable under sub-section (2) for which an accused is being tried. This additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that this is hot disproportionate to his known sources of income, if the accused person cannot satisfactorily account for such possession. Sub-section (3) made a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution. It merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct defined in section 5(1) for which an accused person is already under trial. Sub-section (3) places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.

In Harbhajan Singh v. State of Punjab, [1965] 3 SCR 235, in a prosecution under section 499 read with exception of section 9 of IPC when the accused pleads an exception, its scope was considered and held that under section 105 of the Evidence Act, if an accused person claims the benefit of Exceptions, the burden of proving his plea that his case falls under the Exceptions is on the accused but the nature and extent of the onus of proof on the accused is not the same as the nature and extent of the onus placed on the prosecution in a criminal case. He is not required to discharge that burden by leading evidence to prove his case beyond reasonable doubt. The test of proof beyond reasonable doubt does not apply to the accused and if he proves by preponderance of probabilities, the burden shifts to the prosecution which has still to discharge its original burden. Considering the Woolmington's ratio this Court held that the principle of common law criminal law jurisprudence would be a part of the criminal law in our country.

In Dhanvantrai Balwantrai Desai v. State of Maharasthtra, AIR (1964) SC 575, it was held that in order to raise the presumption under sub-section (1) of section 4 of Prevention of Corruption Act, 1947, what the prosecution has to prove is that the accused has received "gratification other than legal remuneration" and when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by this Section is satisfied and the

presumption there under must be raised. In C.I. Emden v. State of Uttar Pradesh, AIR (1960) SC 548, this court further held that it cannot be suggested that the relevant clause in section 4 (1) which deals with the acceptance of any valuable thing should be interpreted to impose upon the prosecution an obligation to prove not only that the valuable thing has been received by the accused but that it has been received by him without consideration or for a consideration which he knows to be inadequate. The plain meaning of this clause undoubtedly requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more. In V.D. Jhangcn v. State of Uttar Pradesh, [1966] 3 SCR 736, this court held that as soon as the prosecution proves acceptance of illegal gratification, it must be held that the requirement of section 4(1) has been fulfilled and the presumption thereunder must be raised. On the nature of the burden of proof on the accused, this Court reiterated the test of proof on a preponderance of probability in favour of the case of the accused and he need not prove his case beyond reasonable doubt. The onus of proof lying on the accused person is to prove his case by preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts.

In S.L Goswami, v. State of Madhya Pradesh, [1972] 2 SCR 948, on the general principles of burden of proof, a bench of four Judges held at page 954 that even in cases where the defence of the accused does not appear to be credible or is palpably false that burden does not become any the less. It is only when the burden is discharged that it will be for the accused to explain or controvert the essential elements in the prosecution case which would negative it. It is not however for the accused even at the initial stage to prove something which has to be eliminated by the prosecution to establish the ingredients of the offence with which he is charged, and even if the onus shifts upon the accused and the accused has to establish his plea, the standard of proof is not the same as that which rests upon the prosecution. Where the onus shifts to the accused, and the evidence on his behalf probabilities the plea he will be entitled to the benefit of reasonable doubt. The same view was reiterated in Kali Ram v. State of Himachal Pradesh, [1974] 1 SCR 722, by a bench of three Judges.

In State of Mahrasthra v. Wasudeo Ramachandra Kaidalwar, [1981] 3 SCR 675, considering the question as to the nature and extent of burden of proof under section 5 (1) (e), this court held that the expression "burden of proof has two distinct meanings; (1) the legal burden, that is, the burden of establishing the guilt and (2) the evidential burden, that is, the burden of leading evidence. Notwithstanding the general rule that the burden of proof lies exclusively upon the prosecution, in the case certain offence, the burden of proving a particular fact in issue may be laid by law upon the accused. This burden is not so onerous as that which lies on the prosecution and is discharged by proof of a balance of probabilities. As soon as the ingredients of offence under sections 5(1) and 5 (2) to the extent of the pecuniary resources or property in his possession or his known sources of income known to the prosecution are established and its proof that the property was disproportionate to his known source of income, the offence of criminal misconduct would be complete. The burden that shifts to the accused to satisfactorily account for possession by him of assets disproportionate to his income. The extended nature of the burden resting on the public servant cannot be higher than establishing case on preponderance of probability.

It is thus settled law even under general criminal jurisprudence that sections 105 and 106 of the Evidence Act place a part of the burden of proof on the accused to prove facts which are within his knowledge when the prosecution establishes the ingredients of the offence charged, the burden shifts on to the accused to prove certain facts within his knowledge or exceptions to which he is entitled to. Based upon the language in the statute the burden of proof varies. However, the test of proof of preponderance of probabilities is the extended criminal jurisprudence and the burden of proof is not as heavy as on the prosecution. Once the accused succeeds in showing, by preponderance of probabilities that there is reasonable doubt in his favour, the burden shifts again on to the prosecution to prove the case against the accused beyond reasonable doubt, if the accused has to be convicted. From this conceptual criminal jurisprudence, question emerges whether sub-section (5) placing the burden on the accused of the facts stated therein would offend Articles 20(3), 21 and 14 of the Constitution.

Section 315 of Code of Criminal Procedure, 1973 corresponding to section 342-A of 1898 Code, makes an accused person to be a competent witness. He would be a competent witness and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial, provided that (a) he shall not be called as a witness except on his own request in writing; (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial. He, therefore, could waive his right under Article 20(3) and tender himself as a witness, if he so chooses.

In A.S. Krishna's case, the Constitution Bench considering constitutional validity of the presumption under section 4 (2) of the Madras Prohibition Act, 1947, held that the presumptions do not offend the requirement as the equality before law or the equal protection of law under Article 14 as they have to be raised against all persons against when the facts mentioned therein are established. After Bank Nationalisation's case and Menaka Gandhi v. Union of India, [1978] 1 SCR 568, the procedure prescribed must also stand the test of Article 21. It is settled law that the procedural as well as substantive law must satisfy the requirements of Articles 14, 20 and 21.

In K. Veeraswamy v. Union of India, [1991] 3 SCC 655, when the constitutionality of section 5 (1) (e) and section 5 (3) of the Prevention of Corruption Act was challenged, the Constitution Bench held that a statute placing the burden on the accused cannot be regarded as unreasonable, unjust or unfair nor can it be regarded as contrary to Article 21 of the Constitution as contended for the appellant In Sanjay Dutt v. The State through C.B.I [1994] 5 SCC 410, a Constitution Bench held that on proof of possession of firearm or ammunition and of conscious possession by the prosecution, the unauthorised possession in notified area raises statutory presumption that it was meant for terrorist or disruption act. Burden is on the accused to rebut the presumption. The accused has a duty to prove non-existence of a fact essential to constitute an ingredient of an offence under section 5 of TADA. Section 5 of TADA was held to be constitutional.

In Jagmohan Singh v. State of U.P., [1973] 2 SCR 541, Constitution Bench was to consider the validity of section 302 of IPC imposing death sentence. This court held that the decision of the court as regards punishment is dependent upon consideration of all the facts and circumstances and that,

therefore, the crime widely differ from facts and facts and it hardly be challenged on any ground under Article 14. In Bachan Singh's case considering the validity of the same question under Article 19(1), 14 and 21, this court held that the provisions of death penalty as an alternative punishment for the murder under section 302 IPC is not unreasonable and it is in the public interest. It was also held that whether an act of that penalty serves any penological purpose is a difficult, complex and intractable issue. For the purpose of testing the constitutionality of the impugned provision on the ground of reasonableness in the light of the Articles 19 and 21 of the Constitution, it is not necessary to express any categorical opinion one way or the other as to which of the two antithetical views held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision is totally devoid of reason and purpose. The provision of imposition of the death penalty as an alternative punishment for murder, therefore, cannot be said unreasonable and it is in the public interest. It, therefore, neither violates Article 21 or ethos of Article 19. It is also not in violation of Article 6 of the International Covenant on Civil and Political Rights.

In Mithu, Etc. v. State of Punjab Etc. Etc., [1983] 2 SCR 690, this court held that equity and good conscience are the hall-mark of justice. A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death. It was, therefore, held that section 303 IPC imposing compulsory death sentence on a person undergoing life imprisonment was held to be unconstitutional. This ratio also reiterates that savage sentence is anathema to civilised jurisprudence of Article 21 and that, therefore, court has wide discretion in imposing punishment in accordance with the magnitude of the crime. It is for the court to decide whether the procedure prescribed by law for depriving a person of his liberty or life is fair, just and reasonable. In Polavarapu Satyanarayana alias Narayana v. Polavarapu Soundaryavalli and Ors., 1987 (I) Andhra Law Times 762, the Andhra Pradesh High Court was to consider whether section 113-A of the Evidence Act was constitutionally valid under Articles 14, 21 and 20(3) of the Constitution. The High Court held that the presumptive evidence under section 113-A of the Evidence Act has been drawn keeping in view the paramount social interest. They are against the interest of the specified class of offenders, husband or his relatives. Section 113-A does not offend Article 20(3) or 21 or 14 of the Constitution. It was held that when offences are committed within the confines of a society of marital home of woman, it becomes intractable for the prosecution to place the entire material in that regard. It is for the Court from the totality of the circumstances to find and hold whether the prosecution has proved its case beyond reasonable doubt. Section 113-A does not create an offence but it is an evidential part placed on the accused to adduce evidence in proof of a crime occurred within their confines to meet peculiar circumstances in intractable areas. So it is neither unfair nor unjust nor unreasonable attracting either Article 14 or Article 21 of the Constitution nor offend right to life. Article 20(3) though accords immunity from testimonial compulsion or self-incrimination, the immunity has its own

limitation. It is open to the accused to waive the privilege. There is no prohibition to make a voluntary confession or admission. Equally, if he volunteers to give evidence, he waives his privilege and gives testimony on the point concerned and he has to speak the whole truth. If he enters into the box and gives evidence, he will be subject to cross-examination upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness. Though the element of compulsion is implicit in section 113-A, it is for the accused to exercise his privilege engrafted under Article 20(3). It is optional. Production of evidence does not necessarily require the accused to examine himself. It is enough to raise reasonable doubt on preponderance of probabilities. The presumptive evidence under section 113-A has been drawn keeping in view of the paramount social interest than the interest of offenders. Accordingly, its validity was upheld.

The doctrine of reading down sub-section (5) of section 57-A is not applicable to the situation arising under the Amendment Act. Therefore, it is not necessary to deal with the decisions on Menaka Gandhi, Kehar Singh v. Union of India, [1988] Supp 2 SCR 24, D.T.C, v. Union of India, [1990] Supp 1 SCR 142 and Sunil Batra v. Delhi Administration, [1979] 1 SCR 392 etc. The question of intention and the distinction between murder and culpable homicide under section 300 and 299 IPC and the doctrine of negligence and culpability under section 304-A IPC and the decisions arising thereunder are not relevant. The question of intention bears no relevance to an offence under section 57-A and equally of culpability or negligence. It is seen that mixing or permitting to mix noxious substance or any other substance with liquor or intoxicated drug or omission to take reasonable precaution or being in possession without knowledge of its adulteration for the purpose of unjust enrichment would be without any regard for loss of precious human lives or grievous hurt. The legislature has noted the inadequacy and deficiency in the existing law to meet the menace of adulteration of liquor etc. and provided for new offences and directed with mandatory language protection of the health and precious lives of innocent consumers. While interpreting the law, the court must be cognizant to the purpose of the law and respect the legislative animation and effectuate the law for social welfare. The legislature enacted deterrent social provisions to combat the degradation of human conduct. These special provisions are to some extent harsh and are a departure from normal criminal jurisprudence. But it is not uncommon in criminal statutes. It is a special mode to tackle new situations created by human proclivity to amass wealth at the alter of human lives. So it is not right to read down the law.

It is seen that the trial judge has been given wide discretion to impose the sentence based on fact situation and circumstances in each case subject to minimum sentence prescribed under the Act. The object of the Amendment Act is to put down the menace of adulteration of arrack etc. by prescribing deterrent sentences. Individual cases like the victim suffering from rashes by consumption of adulterated arrack etc. may be an individual hypothetical case. The statute cannot be struck down on hypothesised individual case. Under the Code, the accused has the opportunity before imposing sentence to adduce evidence even on sentence and has an opportunity to plead any mitigating circumstance in his favour and it would be for the trial judge to consider on the facts situation in each case the sentence to be imposed. All the accused are treated as a class and there is reasonable nexus between the offence created and the case to be dealt with the procedure, presumption and burden of proof placed on the accused, are not unjust, unfair or unreasonable offending Articles 21 and 14. It also does hot violate Article 20(3). Section 57-A and 57-B are,

therefore, valid. The possession itself being an offence under sub-section (3) of section 57-A, in a given case whether the accused was in possession for self, consumption for exterminating his life would be an hypothetical case and the offence created cannot be declared to be ultra vires on its basis. The non obstanate clause takes out the rigour, as stated earlier, from the applicability of the provisions of the Evidence Act and that of the Code. Compensation under section 57-B is in the nature of liquidated damages under tort to mitigate and relieve from the hardship of the victim or next of kin. The legislature thought it expedient to provide the minimum, of course, subject to law of damages by the aggrieved person or next of kin at the civil action. Therefore, prescription of the damages does not violate either Article 14 or 19. It is a reasonable classification to subserve the social good. The accused charged for the offence stand as a class and that, therefore, there is no invidious discrimination on the proof of the charge for the punishment envisaged under the relevant provisions of section 57-A or 57-B. Therefore, these provisions are not violative of Articles 14, 20(3) and 21 of the Constitution. The appeals are accordingly dismissed with costs quantified as Rs. 20,000 in each appeal.