(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

622. Judgment in Masalti v. State of U.P. MANU/SC/0074/1964: [1964] 8 SCR 133 was delivered before the new Code, i.e., Criminal Procedure Code, 1973 (Act 2 of 1974) came into operation. 40 persons were put on trial before the Additional Sessions Judge under Section 302 read with Section 149 of the Indian Penal Code and other sections for committing murder of five persons with guns. Of them 35 were found guilty and the Additional Sessions Judge sentenced ten of them, who carried fire arms, to death and the rest to imprisonment for life. On a reference to the High Court under Section 374 of the old Code and also on appeals filed by the convicted persons High Court acquitted seven of the appellants, concurring with the findings of the Additional Sessions Judge and dismissed the appeal of the rest. It confirmed the death sentences passed on the ten accused. This Court said that both the trial court and the High Court were agreed that these sentences of death imposed on ten persons were justified by the circumstances of the case and by the requirements of justice. It said that as a mere proposition of law it should be difficult to accept the argument that the sentence of death could be ultimately imposed only where an accused person was found to have committed the murder himself. This Court then held as under:

Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which had to be decided on the facts and circumstances of each case. In the present case, it is clear that the whole group of persons belonged to Laxmi Prasad's faction, joined together armed with deadly weapons and they were inspired by the common object of exterminating the male members in the family of Gayadin, 10 of these persons were armed with fire-arms and the others with several other deadly weapons, and evidence shows that five murders by shooting were committed by the members of this unlawful assembly. The conduct of the members of the unlawful assembly both before and after the commission of the offence has been considered by the courts below and it has been held that in order to suppress such fantastic criminal conduct on the part of villagers it is necessary to impose the sentences of death on 10 members of the unlawful assembly who Were armed with fire-arms. It cannot be said that discretion in the matter has been improperly exercised either by the trial Court or by the High Court. Therefore we see no reason to accept the argument urged by Mr. Sawhney that the test adopted by the High Court in dealing with the question of sentence is mechanical and unreasonable.

There are, however, three cases in which we think we ought to interfere. These are the cases of accused No. 9 Ram Saran who is aged 18; accused No. 11 Asha Ram who is aged 23 and accused No. 16 Deo Prasad who is aged 24, Ram Saran and Asha Ram are the sons of Bhagwati who is accused No. 2. Both of them have been sentenced to death. Similarly, Deo Prasad has also been sentenced to death. Having regard to the circumstances under which the unlawful assembly came to be formed, we are satisfied that these young men must have joined the unlawful assembly under pressure and influence of the elders of their respective families. The list of accused persons shows that the unlawful assembly was constituted by members of different families and having regard to the manner in which these factions ordinarily conduct themselves in villages, it would not be unreasonable to hold that these three young men must have been compelled to join the unlawful assembly that morning by their elders, and so, we think that the ends of justice would be met if the sentences of death imposed on them are modified into sentences of life imprisonment. Accordingly, we confirm the orders of conviction and sentence passed against all the appellants except accused Nos. 9, 11 and 16 in whose cases the sentences are altered to those of imprisonment for life. In the result, the appeals are dismissed, subject to the said modification.

623. In Dhananjoy Chatterjee Alias Dhana v. State of West Bangal MANU/SC/0626/1994: [1994] 1 SCR 37 this Court said:

In recent years, the rising crime rate -particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different

sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state Of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

624. In Bheru Singh s/o Kalyan Singh v. State of Rajasthan MANU/SC/0647/1994: [1994] 1 SCR 559 this Court relied on its observations on the question of sentence made in Dhananjoy Chatterjee Alias Dhana's case and then in the case of a writ said as under:

The barbaric, gruesome and heinous type of crime which the appellant committed is a revolt against the society and an affront to human dignity. There are no extenuating or mitigating circumstances whatsoever in this case nor have any been pointed out and in our opinion it is a fit case which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant. The plea of his learned Counsel for mercy is unjustified and the prayer for sympathy, in the facts and circumstances of the case, is wholly misplaced. We, therefore, uphold the conviction and sentence of death imposed upon the appellant by the courts below for the offence under Section 302 IPC.

625. In Natwarlal Sakarlal Mody v. The State of Bombay (1963) 65 BLR 660 (SC) this Court said as under:

While Section 239 of the CrPC allows a joint trial of persons and offences within defined limits, it is within the discretion of the Court to permit such a joint trial or not, having regard to the circumstances of each case. It would certainly be an irregular exercise of discretion if a Court allows an innumerable number of offences spread over a long period of time and committed by a large number of persons under the protecting wing of all-embracing conspiracy, if each or some of the offences can legitimately and properly form the subject-matter of a separate trial; such a joint trial would undoubtedly prolong the

trial and would be a cause of unnecessary waste of judicial time. It would complicate matters which might otherwise be(simple; it would confuse accused and cause prejudice to them, for more often than not accused who have taken part in one of the minor offences might have not only to undergo the long strain of protracted trial, but there might also be the likelihood of the impact of the evidence adduced in respect of other accused on the evidence adduced against him working to his detriment. Nor can it be said that such an omnibus charge or charges would always be in favour of the prosecution for the confusion introduced in the charges and consequently in the evidence may ultimately benefit some of the accused, as a.clear case against one or other of the accused may be complicated or confused by the attempt to put it in a proper place in a larger setting. A Court should not be overzealous to provide a cover of conspiracy for a number of offences unless it is clearly satisfied on the material placed before it that there is evidence to prove prima facie that the persons who committed separate offences were parties to the conspiracy and they committed the separate acts attributed to them pursuant to the object of the said conspiracy.

626. In Payne v. Tennessee 111 S.Ct. 2597 (91) the Supreme Court of United States overruled by majority of 6:3 its earlier two decisions in Booth v. Maryland 482 U.S. 496 and South Carolina v. Gathers 490 U.S. 805 and upheld the admission during capital sentencing of evidence relating to the victim's personal characteristics and the emotional impact of crime on the victim of his family or friends. Charisse Christopher, her two years old daughter Lacie and her three years old son, Nicholas, were brutally attacked with a butcher knife in their apartment in Tennessee. Only the son Nicholas surviced. The police arrested Payne and a jury found him guilty of two counts of first degree murder and one count of assault with intent to commit murder in the first degree. At the sentencing phase of trial, the state presented the testimony of the mother of Charisse Christopher, who explained how Nicholas continued to be affected by the murders: "He cries for his mom....And he cries for his sister Lacie." In addition, during his closing argument the prosecutor depicted the continuing impact on Nicholas's life: "His mother will never kiss him good night or pat him as he goes off to bed....He doesn't have anybody to watch cartoons with him...." The jury then sentenced Payne to death. The Supreme Court of Tennessee affirmed the conviction. Despite Booth and Gathers, the court found the admission of victim impact evidence "technically irrelevant" but "harmless beyond reasonable doubt." The court even applauded the admission of such evidence and claimed that "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise.,., the Defendant.... but nothing may be said that bears upon the character of, or the harm imposed upon, the victims. Although the Tennessee Supreme Court's holding rested on a finding of harmless error, the Supreme Court, upon granting certiorari, specifically asked the parties to address whether Booth and Gathers should be overruled, even though the issue had not been raised in the petition for certiorari or. in its response. In a 6:3 opinion, the Supreme Court affirmed the Tennessee Supreme Court's judgment and explicitly overruled Booth and Gathers. Writing for the majority, Chief Justice Rehnquist noted that Booth and Gathers were premised on the notion that a capital defendant should be

treated as a "uniquely individual human being". This "individualized consideration," he argued, should not occur "wholly apart from the crime" the defendant committed. According to Chief Justice Rehnquist, Booth and Gathers created an unfairly imbalanced process in which the defendant may introduce all mitigating personal evidence, although "the State is barred from...offering 'a glimpse of the life' which the defendant 'chose to extinguish'." (Harvard Law Review)

627. In R v. Howells and Ors. (1999) 1 AII.ER 50 Court of Appeal, Criminal Division said that "Court should always bear in mind that sentences were in almost every case intended to protect the public, whether by punishing the offender or reforming him, or deterring him and others, or all of those things."

628. Mr. Natarajan said that Nalini (A-1) got involved in the conspiracy only to please Murugan (A-3) and to be close to him, who was her lover. It was Murugan (A-3), who first indoctrinated her and then used her as a cover. It was not that any idea to assassinate Rajiv Gandhi had originated with her and she became party to the conspiracy only on the day of the incident itself though she might have suspicion or even knowledge about the same. Mr. Natarajan further said that Nalini (A-1) did not contribute to the conspiracy but merely acted as a cover as she was only obeying the role assigned to her by Sivarasan whom Murugan (A-3) introduced to her as his boss. It was also submitted that in India no woman had been hanged since India attained independence. He said if we look at the criminal, Nalini (A-1) did not belong to any criminal tribe and that though there is no evidence about her character but nothing has been said about her bad antecedents by the Executive Officer from her office, who appeared as a witness. He said in his confession Nalini (A-1) had already expressed regret and repentance and now she is a chastened woman. She is not any threat or menace to the society. Lastly, he said considering the future of the girl child, who is adolescent and born in unfortunate circumstances Nalini (A-1) may be spared the extreme penalty of death. Santhan (A-2), Mr. Natarajan said, came to India in the group of nine with Sivarasan on 1.5.1991 but he had come to India to go abroad. Since arrangements for his passport and visa could not be made till then he continued to stay in India. Otherwise, he would not have been here to be a member of the conspiracy. About Murugan (A-3) Mr. Natarajan said that he was summoned to go to Sri Lanka and was on his way there. But since boat did not arrive from there he had to return to Madras. Had the boat arrived on time from Sri Lanka Murugan (A-3) would not have been here 'during the crucial period culminating in achieving the object of conspiracy. It was submitted that both Santhan (A-2) and Murugan (A-3) were not involved in any policy making for LTTE and were not the perpetrators of the crime. They acted under the domination of others and do not deserve the extreme penalty. About Murugan (A-3) Mr. Natarajan said that he is also father of the girl child. Arivu (A-18), he said, was under the complete domination of Sivarasan and did not understand the implications of the various jobs entrusted to him by Sivarasan. He is a youth of 20 years having born on 30.7.1971 and does not deserve extreme penalty for the crime of abetment to murder, being also a paid employee of LTTE.

629. It is not that Nalini (A-1) did not under stand the nature of the crime and her participation. She was a willing party to the crime. We have to see both the crime and the criminal. Nalini (A-1) in her association with Murugan (A-3) and others developed great hatred towards Rajiv Gandhi and wanted to have a revenge. Merely because Nalini (A-1) is a woman and a mother of the child who was born while she was in custody cannot be the ground not to award the extreme penalty to her. She is an educated woman and was working as a stenographer in a private firm. She was living alone away from her mother, sister and brother since April, 1990 and started living in a rented apartment in Villivakkam from October, 1990. She became friendly to Murugan (A-3) when she was introduced to him in her office by her sister Kalyani and Bharathi (PW-233). Before this date also she was close to some of the LTTE activists. She developed fondness towards Murugan (A-3) and in fact wanted to marry him. He, however, declined as he said he was a committed LTTE activist and as per code of LTTE he could not marry. They were, however, having sexual relations and when they returned from trip to Tirupathi after the assassination of Rajiv Gandhi it was found that Nalini (A-1) was pregnant. Subsequently while both of them were in custody they were married from earlier date. It was in July 1991 that she gave birth to the girl child. When you think of the crime we find that along with Rajiv Gandhi 15 others also lost their lives. Many of them were Police men on duty. Fifteen persons who lost their lives in the bomb blast were: (1) P. K. Gupta, Personal Security officer to Rajiv Gandhi, (2) Latha Kanna, (3) Kokilavani, (4) Iqbal, Superintendent of police, (5) Rajaguru, Inspector of Police, (6) Edward Joseph, Inspector of police, (&) Ethiraj, Sub Inspector of Police, (8) Sudararaju Pillai, Police constanble, (9) Ravi, Commando Police constable, (10) Dharman, Police constable, (11) Chandra, woman police constable, (12) Santhani Begum, (13) Darryl Peter, (14) Kumari Saroja Devi and (15) Munuswamy. It is not disputed that these persons died on account of the bomb blast and others suffered grievous and simple injuries on that account. What about their families, one may ask. In the beginning of the judgment we noted that one small girl Kokila wanted to recite a poem to Rajiv Gandhi. In one of the photographs she is shown standing with her mother Latha Kannan next to Dhanu. Both died in the blast. What about the children, wives and husbands of those who died? Cruelty of the crime committed has known no bounds. The crime sent shock waves in the country. General elections had to be postponed. It was submitted more than once that principal perpetrators in the present case are already dead but then for the support which Nalini(A-1),Santhan (A-2), Murugan (A-3) and Arivu (A-18) afforded for commission of the crime it could not have been committed. Each one of these four accused had a role to play. Crime was committed after previous planning and executed with extreme brutality. There were as many as two dry runs as to how to reach Rajiv Gandhi after penetrating the security cordon. A former Prime Minister of the country was targeted because this country had entered an agreement with a foreign country in exercise of its sovereign powers. Rajiv Gandhi being head of the Government at that time was signatory to the accord which was also signed by the head of the Government of Sri Lanka. The accord had the approval of the Parliament. It was not that Rajiv Gandhi had entered into the accord in his personal

capacity or for his own benefit. Though we have held that object of the conspiracy was not to commit any terrorist act or any disruptive activity nevertheless murder of a former Prime Minister for what he did in the interest of the country was an act of exceptional depravity on the part of the accused, an unparallel act in the annals of crimes committed in this country. In a mindless fashion not only that Rajiv Gandhi was killed along with him others died and many suffered grievous and simple injuries. It is not that intensity of the belt bomb strapped on the waist of Dhanu was not known to the conspirators as after switching on the first switch on her belt bomb Dhanu asked Sivarasan to move away. Haribabu was so keen to have close-up picture of the crime that he met his fate in the blast itself. We are unable to find any mitigating circumstance not to upset the award of sentence of death on the accused.

630. This is a case where all these Nalini (A-1), Santhan (A-2), Murugan (A-3) and Arivu (A-18) deserve extreme penalty. We confirm the award of sentence of death on them.

631. We record our appreciation of the assistance given to us by counsel for the parties. Mr. Natarajan, senior advocate, led the team for all the accused except one. He was ably assisted by Mr. Sunder Mohan, Mr. B. Gopikrishnan, Mr. S. Duraisamy, Mr. V. Elangovan, Mr. N. Chandrasekharan, Mr. T. Ramdass and Mr. R. Jayseelan. A heavy burden lay on the shoulders of Mr. Natarajan. He carried it with aplomb. His presentation of the case showed his complete mastery on facts and law. It was a pleasure to hear him, not losing his poise even for once. He was fair in his submissions conceding where it was unnecessary to contest. Mr. Siva Subramanium, senior advocate assisted by Mr. Thanan, who represented the remaining one accused, rendered his bit to support Mr. Natarajan. Mr. Altaf Ahmad, Additional Solicitor General, was not far behind in any way. He had to face an uphill task defending the sentence of death imposed on all the 26 accused. He in his task was ably assisted by Mr. Jacob Baniel, Mr. Ranganathan, Mr. P. Parmeshwaran, Mr. A.D.N. Rao, Mr. Romy Chacko, Mr. T.G.N. Nair, Ms. Meenakshi Arora, Mr. S.A. Matoo and Mr. Mariaputam, advocates. Mr. Altaf Ahmad was forthright in his submissions. He presented his case with learning and assiduity. We express our sense of gratitude to all the counsel and admire their profound learning and experience. They did their job remarkably well.

632. We would also like to record our appreciation for the Special Investigation Team (SIT) constituted by the Central Bureau of Investigation to investigate the case. Under the stewardship of Mr. D.R. Karthikeyan, SIT did assiduous work and was able to solve the crime within a short time. Investigation was meticulous. Loose ends tied to bring out a clear picture of conspiracy and the part played by each of the conspirators. Members of SIT performed their job with dedication and determination. We have also a word of praise for Mr. R.K. Raghavan, who was at the relevant time Inspector General of Police, Forest Cell (CID), Madras and was entrusted with the election arrangements in Chinglepet range. He was on duty at the time the crime was committed at Sriperumbudur. He immediately realised the gravity of situation. He stayed on at the

scene of crime, organised relief and ensured that material evidence was not tempered with. It was he who found the camera (MO-1) on the body of Haribabu which provided a breakthrough in the case.

633. Appeals filed by the accused and the proceeding submitted by the Designated Court to this Court under Section 366 of the Code read with Sub-section (6) of Section 20 of TADA are disposed of in the terms mentioned above.

S.S.M. Quadri, J.

634. I have had the advantage of going through the draft judgments prepared by my noble and learned brethern, Hon'ble Mr. Justice K.T. Thomas and Hon'ble Mr. Justice D.P. Wadhwa. In view of different notes struck by them on some aspects, I am expressing my views separately.

635. The facts are stated somewhat exhaustively in their judgments. To recapitulate briefly, it may be noted that May 21, 1991 witnessed a terrible happening - explosion of human bomb, an unprecedented event in Sriperambudur (Tamil Nadu) at 10.20 p.m. - which resulted in extirpation of a National leader, a former Prime Minister of India, Shri Rajiv Gandhi, killing of 18 others and leaving 43 persons seriously injured. This incident was a result of wickedly hatched conspiracy which was skillfully planned and horridly executed. While in office as Prime Minister of India, Shri Rajiv Gandhi, to bring about a settlement of disputes between Tamil-speaking ethnic minority and Government of Sri Lanka, signed Indo-Sri Lankan Accord on July 22, 1987 under which the Government of India took upon itself certain role. A prominent organisation of Tamils - Liberation Tiger of Tamil Elam(LTTE) -was among the signatories to that Accord. In discharge of its obligation under the Accord, Government of India sent Indian Peace Keeping Force (IPKF) to Sri Lanka to disarm LTTE. This fact together with the alleged atrocities of IPKF against Tamilians in Sri Lanka and non-cooperation of Government of India with the LTTE, at what is termed as the hour of their need, gave rise to grouse which culminated in plotting of a conspiracy to assassinate Shri Rajiv Gandhi, which was put through on the fateful day, May 21, 1991. It caused severe blow to the democratic process, sent shock waves throughout the world and the nation had to pass through excruciating time.

636. The investigation of that horrible incident was entrusted to the Central Bureau of Investigation (CBI)/Special Investigating Team (SIT). On June 26, 1992, after a lengthy investigation, the SIT filed charge sheet in respect of offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), Indian Penal Code, 1890 (IPC), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933, against 41 persons, 12 of them died (2 in the blast and 10 having committed suicide) and three were declared absconding. The case was thus tried against the following 26 accused persons: A-1 (S. Nalini), A-2 (T. Suthendraraja alias Santhan), A-3 (Sriharan alias Murugan alias Thas alias Indu Master),

A-4 (Shankar alias Koneswaran), A-5 (D. Vijayanandan alias Hari Ayya), A-6 (Sivaruban alias Suresh alias Suresh Kumar alias Ruban), A-7 (S. Kanagasabapathy alias Radhayya), A-8 (A. Chandralekha alias Athirari alias Sonia alias Gowri), A-9 (B. Robert Payas alias Kumaralingam), A-10 (S. Jayakumar alias Jayakumaran alias Jayam), A-11 (J. Shanthi), A-12 (S. Vijayan alias Perumal Vijayan), A-13 (V. Selvaluxmi), A-14 (S. Bhaskaran alias Velayudam), A-15 (S. Shanmugavadivelu alias Thambi Anna), A-16 (P. Ravichandran alias Ravi alias Pragasam), A-17 (M. Suseemdram alias Mahesh), A-18 (G. Perarivelan alias Arivu), A-19 (S. lrumborai alias Duraisingam), A-20 (S. Bhagyanathan), A-21 (S. Padma), A-22 (A. Sundaram), A-23 (K. Dhanasekaran alias Raju), A-24 (N. Rajasuriya alias Rangan), A-25 (T. Vigneswaran alias Vicky), A-26 (J. Ranganath). Thirteen of these accused are Sri Lankan and an equal number comprises of Indians.

637. The Designated Court framed as many as 251 charges of which Charge No. 1 is common to all the accused for the other 250 charges, accused are charged separately under different heads. For the sake of brevity, all charges can be conveniently classified under three categories -

A. Under Section 120-B read with Section 302 IPC;

B. Under Sections 3, 4 and 5 of the TADA Act; and

C. (i) Under various provisions of IPC

(ii) Under Sections 3, 4 and 5 of the Explosive Substances Act, 1908;

(iii) Section 25 of the Arms Act, 1959;

(iv) Section 12 of the Passport Act, 1967;

(v) Section 14 of the Foreigners Act, 1946;

(vi) Section 6(1A) of the Wireless Telegraphy Act, 1933.

638. To bring home the guilt of the accused in respect of the charges framed against each of them, the prosecution placed on record confessions of seventeen accused and also plethora of evidence. It examined 288 witnesses exhibited 1448 documents, marked Exs.P-1 to P-1448.

639. The Designated Court, on consideration of the material placed before it, found all the twenty six accused guilty of all the charges framed against them and awarded punishment of fine of varying amounts, rigorous imprisonment of different period and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts, numbered as Death Reference No. 1 of

1998. The convicts filed appeals, Criminal Appeals 321 to 324 of 1998, against their conviction for various offences and the sentence awarded to them. These cases were heard together.

640. Mr. Natarajan, learned senior counsel for the appellants (except Appellant No. 15), assisted by the team of able and thoroughly prepared instructing counsel, Mr. Subramaniam for the appellant No. 15 and Mr. Altaf Ahmed, learned Additional Solicitor General for the Prosecution, assisted by competent and proficient advocates and departmental officers, very ably and exhaustively argued the cases for over three months.

641. Regarding conviction of the appellants for offences mentioned in Category 'C' noted above, the learned Counsel for appellants submitted that they were not pressing the appeals on that aspect as all the appellants had served out the sentence thereunder.

642. The conviction of appellants under the provisions of TADA Act, noted in category 'B' above, had been found to be unsustainable by my learned brethern in their separate opinions and I am in respectful agreement with the same.

643. The provisions of Sub-sections (2), (3) and (4) of Section 3 of TADA Act would be attracted only when a person accused of the offences under the said provisions, has committed 'a terrorist act' within the meaning of Section 3(1) of the TADA Act. Section 3(1) reads as under:

3(1). Punishment for terrorist acts - Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act."

A perusal of the provision, extracted above, shows that it embodies the principle expressed in the maxim 'actus non facit reum nisi menssit rea'; both 'mens rea' and a criminal act are the ingredients of the definition of Terrorist Act'. The mens rea required is the intention (i) to overawe the Government as by law established; or (ii) to strike terror in the people or any section of the people; or (iii) to alienate any section of the people; or (iv) to adversely affect the harmony amongst different sections of the people. The actus reus should comprise of doing any act or thing by using bombs, dynamite or other

explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manners to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detaining any person and threatening to kill or injure such persons in order to compel the Government or any other persons to do or abstain from doing any act.

644. Mr. Altaf Ahmed, learned Additional Solicitor General, has developed an ingenious argument that as the acts which are committed by the accused persons have the potentiality to overawe the Government and to strike terror in the people or any section of the people, the required mens rea has to be inferred. A perusal of the charges discloses that the intention to overawe the Government is not mentioned therein. However, Mr. Altaf Ahmed relying upon the provisions of Sections 211, 212, 215, 464 and 465 of the Criminal Procedure Code has submitted that omission to mention the ingredient of the charge did not result in misleading the accused persons and though the words 'to overawe the Government' were not mentioned in the charge, the charge is not bad in law. He relied on Tulsi Ram v. State of U.P. (1963) Suppl. 1 SCR 382; Willie (William) Slaney v. The State of Madhya Pradesh (1956) 2 SCR 1140; R.S. Pandit v. State of Bihar (1963) Suppl. 2 SCR 652 Chittaranjan Das v. State of West Bengal MANU/SC/0068/1963: [1964] 3 SCR 237 ; and Jaswantri Manilal Akhaney v. The State of Bombay MANU/SC/0030/1956: 1956 Cri LJ 1116 in support Of his contentions. In my view, the question here does not relate to defect in the charge but to the content of the charge and without the said germane words in the charge, it cannot be said that the charge includes the intention to overawe the Government. The charge framed is confined only to those acts which are referred to therein. This is also the view expressed by my learned brethern. Therefore, the conviction recorded by the Designated Court in the judgment under appeal for offences noted in Category 'B' under the TADA Act cannot be maintained. The appellants are accordingly acquitted of the charges under TADA Act.

645. Now remains the charge under Section 120B read with Section 302 IPC noted in Category 'A' above, which is substantial and important. Brother Thomas, J. in his precise and well considered opinion found A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) guilty of offence under Section 120B read with Section 302 IPC and sentenced A-1, A-9, A-10 and A-16 to life imprisonment and A-2, A-3 and A-18 to death, while brother Wadhwa, J., on very exhaustive consideration, held A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) guilty of the said offence and sentenced them to death.

646. There is no controversy about the horrible occurrence of human bomb blast in Sriperumbudur in the night of May 21, 1991 causing death of Shri Rajiv Gandhi and eighteen others and grievous injuries to 43 persons. The controversy is about who are

responsible for this horrendous crime? The question is whether the conviction of the appellants or any of them under Section 120B r/w 302 IPC is sustainable in law and in respect of whom the punishment of death sentence can be confirmed.

647. To record conviction under Section 120B, it is necessary to find the accused guilty of criminal conspiracy as defined in Section 120A of IPC which reads as under:

120A. Definition of criminal conspiracy - When two or more persons agree to do, or cause to be done -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

648. The ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. The proviso and the explanation are not relevant for the present discussion.

649. Though the meeting of minds of two or more persons for doing/or causing to be done an illegal act or an act by illegal means is a sine qua non of the criminal conspiracy, yet in the very nature of the offence which is shrouded with secrecy no direct evidence of the common intention of the conspirators can normally be produced before the Court. Having regard to the nature of the offence, such a meeting of minds of the conspirators has to be inferred from the circumstances proved by the prosecution, if such an inference is possible.

650. In Sardar Sardul Singh Caveeshar v. State of Maharashtra MANU/SC/0063/1963: 1965 Cri LJ 608a, Subba Rao.J. speaking for himself and his learned colleagues, observed: "The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties."

651. In Shivnarayan Laxminarayan Joshi and Ors. v. State of Maharashtra MANU/SC/0241/1979: 1980 Cri LJ 388, S. Murtaza Fazal Ali, J., speaking for a two-Judge Bench, observed:

It is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design which has been amply proved by the prosecution as found as a fact by the High Court.

652. In Mohammad Usman Mohammed Hussain Maniyar and Ors. v. State of Maharashtra MANU/SC/0180/1981: 1981 Cri LJ 588, another two-Judge Bench of this Court pointed out:

For an offence under Section 120B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do and/or caused to be done the illegal act; the agreement may be proved by necessary implication. In this case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and/or caused to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time.

653. In State of Himachal Pradesh v. Krishan Lal Pardhan and Ors. MANU/SC/0290/1987: 1987 Cri LJ 709 Natarajan, J. observed:

In the opinion of Special Judge every one of the conspirators must have taken active part in the commission of each and every one of the conspiratorial acts and only then the offence of conspiracy will be made out. Such a view is clearly wrong. The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences.

654. In State of Maharashtra and Ors. v. Somnath Thapa and Ors. MANU/SC/0451/1996: 1996 Cri LJ 2448, Hansaria, J., speaking for a three-Judge Bench of this Court after elaborate discussions of the various judgments of this Court, concluded thus:

To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the

conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

655. From a survey of cases, referred to above, the following position emerges:

In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may performance intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences.

656. The agreement, sine qua non of conspiracy, may be proved either by direct evidence which is rarely available in such cases or it may be inferred from utterances, writings, acts, omissions and conduct of the parties to the conspiracy which is usually done. In view of Section 10 of the Evidence Act anything said, done or written by those who enlist their support to the object of conspiracy and those who join later or make their exit before completion of the object in furtherance of their common intention will be relevant facts to prove that each one of them can justifiably be treated as a conspirator.

657. Section 10 of the Evidence Act recognises the principle of agency and it reads as follows:

10. Things said or done by conspirator in reference to common design.-Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

658. To apply this provision, it has to be shown that (1) there is reasonable ground to believe that two or more persons have conspired together; and (2) the conspiracy is to commit an offence or an actionable wrong. If these two requirements are satisfied then anything said, done or written by any one of such persons after the time when such intention was entertained by any one of them in furtherance of their common intention, is a relevant fact against each of the persons believed to be so conspiring as well as for

the purpose of proving the existence of conspiracy and also for the purpose of showing that any such person is a party to it.

659. To establish the charge of conspiracy to commit the murder of Shri Rajiv Gandhi, reliance is placed mainly on seventeen confessional statements made by the accused persons. The confessions of the accused persons have been recorded under Section 15(1) of the TADA Act. Before adverting to the confessional statements, it is necessary to consider the incidental questions as to whether they can be used against the appellants for the charge under Section 120B read with Section 302, IPC when the accused are found to be not guilty of various' offences under the TADA Act.

660. Mr. Natarajan has referred to the judgment of this Court in Bilal Ahmed Kaloo v. State of Andhra Pradesh MANU/SC/0861/1997: 1997 Cri LJ 4091, in support of his contention that the confession recorded under Section 15(1) of the TADA Act cannot be made use of to record the conviction of appellants under Section 120B read with Section 302 IPC.

661. Mr. Altaf Ahmed, however, submitted that that case could not be treated as authority for the proposition canvassed by the learned Counsel for appellants as Section 12 of the TADA Act has not been considered in that case by this Court.

662. Here, it would be necessary to refer to Section 12 of the TADA Act, which is reproduced herein:

12. Power of Designated Courts with respect to other offences - (1) When trying any offence, a Designated Court may also try and other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass and sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

Section 12(1) authorises the Designated Court to try offences under the TADA Act along with another offence with which the accused may be charged, under the Cr.P.C., at the same trial. The only limitation on the exercise of the power is that the offence under the TADA Act is connected with the offence being tried together. Sub-section (2) provides that the Designated Court may convict the accused person of offence under that Act or any rule made thereunder or under any other law and pass any sentence authorised under that Act or the rules or under any other law, as the case may be, for the punishment

thereof if in the course of any trial under the TADA Act the accused persons are found to have committed any offence either under that Act or any rule or under any other law.

663. A perusal of the judgment in Kaloo's case (supra) shows that Section 12 of the TADA Act was not brought to the notice of this Court and moreover the point was conceded by the learned Counsel for the State. I concur with my learned brethern that Kaloo's case does not lay down the correct law. It follows that confessions recorded under Section 15 of the TADA Act and admitted in the trial of offences under the TADA Act and under Section 120B read with Section 302 IPC can be relied upon to record conviction of the appellants for the said offences under IPC even though they are acquitted of offences under the TADA Act.

664. The next question that arises for consideration is the ambit of Section 15 of the TADA Act, which is in the following terms:

15. Certain confessions made to police officers to be taken into consideration - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder.

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2). The police officer shall, before recording any confession under Sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

665. Sub-section (1) of Section 15 opens with a non obstante clause -'notwithstanding anything in the CrPC or in the Indian Evidence Act' - and says that 'subject to the provisions of this section', a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under that Act or the Rules made thereunder. The admissibility of the confession of an accused in the trial of a co-accused, abettor or conspirator is subject to the condition that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

666. Sub-section (2) incorporates safeguards for the person whose confession is to be recorded under Sub-section (1) and it is not necessary to refer to it for the present discussion.

667. Having regard to the provisions of Section 12 of the TADA Act, the confession recorded under Section 15 will be admissible in the trial of a person, co-accused, abettor or conspirator for an offence under the TADA Act or the rules made thereunder and such other offence with which such a person may be charged at the same trial under the provisions of the Criminal Procedure Code provided the offence under the TADA Act or the Rules made thereunder is connected with such other offence.

668. An analysis of Sub-section (1) of Section 15 shows that it has two limbs. The first limb bars application of provisions of the CrPC and the Indian Evidence Act to a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by him in any of the modes noted in the section. The second limb makes such a confession admissible, de hors the provisions of the Evidence Act in the trial of such person or co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder provided the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. The import of Section 15(1) is that insofar as the provisions of the Cr.P.C. and the Evidence Act come in conflict with either recording of a confession of a person by a police officer of the rank mentioned therein, in any of the modes specified in the section, or its admissibility at the trial, they will have to yield to the provision of Section 15(1) of the TADA Act as it is given overriding effect.

669. Thus, Sections 162, 164, 281 and 463 of the CrPC which have a bearing on the question of recording of statement/confession of a person and Sections 24 to 30 of the Evidence Act which deal with various aspects of confession of an accused stand excluded vis-a-vis Section 15(1) of the TADA Act and cannot be called in aid to invalidate recording of confession of an accused by a police officer of the specified rank and/or its admissibility in the trial of the, co-accused, abettor or conspirator charged and tried in the same case together with the accused for an offence under the TADA Act or rules made thereunder. It must be made clear that the non obstante clause in Section 15(1) of the TADA Act does not exclude the application of all the provisions of the Cr.P.C. and the Indian Evidence Act in the trial of offences under TADA Act.

670. What remains to be examined is what is the evidential value of a confession recorded under Section 15 of the TADA Act against the maker thereof and as against a co-accused, abettor or conspirator?

671. Thomas, J. took the view that the confession of an accused is a substantive evidence as against the maker thereof but it is not so as against the co-accused, abettor or conspirator against whom it can be used only as corroborative evidence. Wadhwa, J. took

the contrary view; according to him, confession of an accused is a substantive evidence against himself as well as against co-accused, abettor or conspirator.

672. Section 3 of the Indian Evidence Act defines, inter alia, the term 'evidence' to mean and include all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under the inquiry (which is called 'oral evidence') and all documents produced for the inspection of the court (which is called 'documentary evidence'). The plea of 'guilty' by the accused at the trial cannot, therefore, be treated as falling within the meaning of evidence as it is not a statement made by a witness before the Court, The extra judicial confession made to any person which is allowed to be proved by the Court will be a part of the statement of a witness made before the Court, so it will be evidence within the meaning of that term. A confession recorded by a Magistrate under Section 164 Cr.P.C. also satisfies the requirements of the definition of the term 'evidence'. A confession recorded under Section 15(1) of the TADA Act is also within the ambit of evidence under Section 3(1) of the Evidence Act and there is no dissension on this.

673. The expression "substantive evidence" is not employed in the Evidence Act. It connotes evidence of a fact in issue or a relevant fact. In Black's Law Dictionary (at P. 1597), the following meaning is noted:

SUBSTANTIVE EVIDENCE. That adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness, (i.e. showing that he is unworthy of belief,) or of corroborating his testimony. Best, Ev. 246,773,803.
In Words and Phrases (Vol.40), "substantive evidence" is defined as follows:

'SUBSTANTIVE EVIDENCE Although subordinate feature of case, certain types of evidence, such as character evidence or prior criminal acts, can be considered as 'substantive evidence' on question of guilt or innocence. State v. Wallace, N.C.A. pp.283 S.E.2d. 404, 407. '

'Substantive evidence' is that offered for purpose of persuading trier of fact as to truth of proposition on which determination of tribunal is to be asked, whereas 'impeachment evidence' is that evidence designed to discredit the witness, i.e. to reduce effectiveness of his testimony by bringing forth evidence explaining why jury should not put faith in his testimony. Zimmerman v. Superior Court In and For Maricopa County 402, P.2d. 212,215,98, Ariz 85, 18A.L.R. 3d. 900.

Thus, plea of guilty by an accused at the.commencement of the trial or in his statement under Section 313 Cr.P.C. will not be substantive evidence but extra judicial confession and confession recorded by a Magistrate under Section 164 Cr.P.C. of an accused will be substantive evidence. So also a confession of a person recorded under Section 15 of the TADA Act; I shall elaborate this point presently.

674. In regard to evidential value of confessions both academicians and Judges have expressed conflicting opinions.

675. Blackston described confession as the weakest and most suspicious of all evidence.

676. In Wigmore on Evidence, para 866, third edition, it is noted:

Now, assuming the making of a confession to be a completely proved fact - its authenticity beyond question and conceded, - -then it is certainly true that we have before us the highest sort of evidence. The confession of crime is usually as much against a man's permanent interests as anything well can be; and, in Mr. Starkie's phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.

(Emphasis supplied)

Similar view is expressed in Treatise on the Law of Evidence, Volume 1, Twelfth Edition, by Taylor in para 865:

Indeed, all reflecting men are now generally agreed that, deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.
In Principles and Digest of the Law of Evidence, Volume 1, New Edition, by Chief Justice M. Monir, after noticing conflicting views and discussing various authorities, the learned author stated the rule as follows:

The rule may, therefore, be stated to be that whereas the evidence in proof of a confession having been made is always to be suspected the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the law.
There is a plethora of case law holding that confession of an accused recorded in the manner provided under Cr.P.C. and admissible under the provisions of the Evidence Act, even if retracted later, is substantive evidence as against the maker thereof.

677. Section 30 of the Evidence Act which deals with consideration of proved confession affecting person making it and others jointly under trial for same offence, is quoted below:

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence - When more persons than one are being tried jointly for the same Offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation - 'Offence' as used in this section, includes the abetment of, or attempt to commit, the offence.

This Section says that when more persons than one are being tried jointly for the same offence and a confession, made by one of such persons affecting himself and some other of such persons, the Court may take into consideration such confession against the maker of the confession as well as against such other person when such a confession is proved in Court.

678. Speaking for a two-Judge Bench of this Court in Kalpnath Rai v. State (Through CBI) MANU/SC/1364/1997: 1998 Cri LJ 369, Thomas, J. observed:

confession made admissible under Section 15 of TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act.
679. A plain reading of Section 30 of the Evidence Act discloses that when the following conditions exist, namely, (i) more persons than one are being tried jointly; (ii) the joint trial of the persons is for the same offence; (iii) a confession is made by one of such persons (who are being tried jointly for the same offence); (iv) such a confession affects the maker as well as such persons {who are being tried jointly for the same offence); and (v) such a confession is proved in Court, the Court may take into consideration such confession against the maker thereof as well as against such persons (who are being jointly tried for the same offence).

680. It has been noticed above that Section 15(1) of the TADA Act enacts that a confession recorded thereunder shall be admissible in the trial of the maker of the confession, or co-accused, abettor or conspirator provided the co-accused, abettor or conspirator is charged and tried In the same case together with the accused.

681. The difference between Section 30 of the Indian Evidence Act and Section 15(1) of the TADA Act may also be noticed here. Whereas the former provision requires that the maker of the confession and others should be tried jointly for the same offence, the latter provision does not require that joint trial should be for the same offence. Another point of distinction is that under Section 30 of the Evidence Act, the Court is given discretion to take into consideration the confession against the maker as well as against those who are being tried jointly for the same offence, but Section 15(1) of TADA Act mandates that confession of an accused recorded thereunder shall be admissible In the trial of the maker

of confession or co-accused, abettor or conspirator, provided the co-accused, abettor or conspirator is charged and tried in with the accused the same case. Both Section 30 of the Evidence Act as well as Section 15 of the TADA Act require joint trial of the accused making confession and co-accused, abettor or conspirator.

682. Having excluded the application of Sections 24 to 30 of the Evidence Act to a confession recorded under Section 15(1) of the TADA Act, a self-contained scheme is incorporated therein for recording confession of an accused and its admissibility in his trial with co-accused, abettor or conspirator for offences under the TADA Act or the rules made thereunder or any other offence under any other law which can jointly be tried with the offence with which he is charged at the same trial. There is thus no room to import the requirements of Section 30 of the Evidence Act in Section 15 of the TADA Act.

683. Under Section 15(1) of the TADA Act the position, in my view, is much stronger, for it says, "a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder, Provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused". On the language of Sub-section (1) of Section 15, a confession of an accused is made admissible evidence as against all those tried jointly with him, so it is implicit that the same can be considered against all those tried together. In this view of the matter also, Section 30 of the Evidence Act need not be invoked for consideration of confession of an accused against a co-accused, abettor or conspirator charged and tried in the same case along with the accused.

684. Therefore, with great respect to the learned Judges, I am unable to agree with the above-quoted observations made in Kalpnath Rai's case (supra) and the view of brother Thomas, J. in his judgment in this case.

685. In support of the said view, Thomas, J. pointed out, in his judgment, that (i) a confession can be used as relevant evidence against its maker under and subject to conditions mentioned in Section 21 of the Evidence Act; (ii) there is no provision in the Evidence Act except Section 30 which authorises consideration of confession against co-accused and posed a question that if Section 30 is to be excluded by virtue of non-obstante clause in Section 15(1) of the TADA Act, under what provision could a confession of one accused be used against another co-accused at all? With great respect to my learned brother, I am not persuaded to adopt that view. On analysis of Section 15(1) of the TADA Act and Section 30 of the Evidence Act, I have reached a different conclusion, noted above,

686. It is true that Section 21 of the Evidence Act declares that admission is-relevant and permits its proof against the person who makes it. Even when confessions which are species of admissions are not hit by Sections 24, 25 or 26 and are relevant or when they became relevant under Sections 27, 28 and 29, they can only be proved against the maker thereof. Admittedly, there is no provision in the Evidence Act for making confession of an accused relevant or admissible against the co-accused. In the setting of those provisions Section 30 of the Evidence Act is enacted which is a clear departure from the principles of English Law. It permits taking into consideration of a confession made by one of the persons being tried jointly for the same offence as against the co-accused. It is in such a case a confession of an accused, recorded in accordance with the provisions of the Cr.P.C. and the Evidence Act, has to satisfy the requirements of Section 30 of the Evidence Act for using it against the co-accused.

687. It is now well settled that the expression 'the court may take into consideration such confession' means to lend assurance to the other evidence against the co-accused.

688. Sir John Beaumont, speaking for the Privy Council, in Bhuboni Sahu v. The King MANU/PR/0014/1949, an oft-quoted authority, observed in regard to Section 30 of the Evidence Act, thus:

Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.
About the nature of the evidence of an accomplice, it was pointed out therein:

The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue.

689. In Kashmira Singh v. State of Madhya Pradesh MANU/SC/0031/1952: 1952 Cri LJ 839 this Court approved the principles laid down by the Privy Council in Bhuboni Sahu's case (supra) and observed:

But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

690. In Hari Charan Kurmi and Jogia Hajam v. State of Bihar MANU/SC/0059/1964: 1964 Cri LJ 344, a Constitution Bench of this Court after referring to Bhuboni Sahu's case (supra) and Kashmira Singh's case (supra), observed:

Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so, Section 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession...When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals.

It was held that technically construed, the definition of the term "evidence" in Section 3 would not apply to confession. It was observed:

Even so, Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach, can, however, be adopted by the Court in dealing with a confession, because Section 30 merely enables the Court to take the confession into account.

691. In the cases referred to above, it was held that the confession of a co-accused is not evidence as defined in Section 3 of the Evidence Act and that Section 30 enables the Court to take into consideration the confession of a co-accused to lend assurance to other evidence against the co-accused. The expression 'may take into consideration' means that the use of the evidence of confession of an accused may be used for purposes of corroborating the evidence on record against the co-accused and that no conviction can be based on such confession.

692. The amendments effected in Section 15(1) and Section 21(1) of the TADA Act by Act 43 of 1993 may be noticed here. The words 'co-accused, abettor or conspirator' and the proviso are added in Sub-section (1) of Section 15; Clauses (c)and (d) of Sub-section (1) of Section 21 are deleted. before the amendment of Sections 15 and 21, the sweep of the legal presumption contained therein was that in a prosecution for any offence under Sub-section (1) of Section 3 of the TADA Act on proof of the facts mentioned in Clauses (a), (b), (c) and (d) of Sub-section (1) of Section 21, it was mandated that the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence. Clauses (c) and (d), which are deleted from Sub-section (1) of Section 21 by Act 43 of 1993, related to a confession made by a co-accused that the accused had committed the offence and to the confession made by the accused of the offence to any person other than a police officer. The effect of the said clauses was that in the event of the co-accused making confession inculpating the accused or in the event of the accused himself making an extra-judicial confession to any person other than a police officer the legal presumption that the accused had committed such offence would arise.

693. Section 4 of the Evidence Act defines "shall presume" as follows:

Shall presume.-whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
694. The presumption is, however, rebuttable so the burden of showing that the offence was not committed would shift to the accused. The normal presumption in criminal cases is that till it is proved to the contrary the accused will be deemed to be innocent and that position is altered by Section 21(1). After deletion of Clauses (c) and (d) by Act 43 of 1993 the statutory presumption under Section 21(1) will not apply to situations where a confession is made by a co-accused that the accused had committed the offence (clause (c)) or where the accused himself made a confession of the offence to any person other than a police officer (clause (d)) and the normal rule of presumption of innocence of the accused will apply. What was in the realm of 'as proved' has after the amendment become only substantive evidence admissible as against the co-accused.

695. I have already pointed out the difference in the phraseology of Section 15 of the TADA Act. The Parliament used the expression "shall be admissible in the trial of such person or co-accused, abettor or conspirator" in Section 15 which is different from the language employed in Section 30 of the Evidence Act which says that the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. It has to be presumed that the Parliament was aware of the interpretation placed by the courts including Privy Council and Supreme Court on Section 30 of the Evidence Act but chose to frame Section 15 differently obviously intending to avoid the meaning given to the phrase the court may take into consideration such confession as against such other person....' used in Section 30 of the Evidence Act. On the language of Section 15(1), it is clear that the intention of the Parliament is to make

the confession of an accused substantive evidence both against the accused as well as the co-accused.

696. Brother Thomas, J. proceeded on the assumption that under unamended Section 21(1), the confession of an accused as against a co-accused was to be treated by the court as 'substantive evidence'. But in view of the use of the expression 'shall presume' in Section 21(1) of the TADA Act, the confession of one accused as against the other co-accused cannot be said to be 'substantive evidence'; such a confession will be regarded as proof of the fact that the accused had committed such offence unless the contrary is proved. In my view, 'substantive evidence' of a fact by itself does not amount to 'proof of that fact'. There is no presumption in law that substantive evidence of a fact has to be treated as proof of that fact.

697. After the amendment of Section 21(1), the confession of an accused recorded by the police officer under Section 15(1) of the TADA Act is in the same position as that recorded by a Magistrate under Section 164 Cr.P.C. and that it cannot be placed on a higher pedestal in regard to its evidential value. If that be so, in a trial under the TADA Act when there are two categories of confessions - one a judicial confession recorded by a Magistrate under Section 164 Cr.P.C. and the other by a police officer under Section 15(1) of the TADA Act, the court will have to give the same evidential value to such confessions as against the co-accused.

698. If the expression 'substantive evidence' is understood in the sense of evidence of a fact in issue or a relevant fact and not proof of what it contains and that it has to be evaluated by the Court like any other category of evidence no difficulty arises. The difficulty will, however, arise if 'substantive evidence' is equated with the position flowing from the application of legislative mandate by incorporating 'shall presume' as Brother Thomas, J. has indicated in his judgment as that will, in my view, nullify the effect of legal presumption in Section 21(1) of the TADA Act. I, therefore, respectfully differ from the view taken by the Bench in Kalpnath Rai's case (supra) and brother Thomas, J. in his judgment in this case and in respectful agreement with the view expressed by brother Wadhwa, J. in his judgment that a confession of an accused under Section 15(1) of the TADA Act is substantive evidence against the co-accused, abettor or conspirator jointly tried with the accused.

699. But I wish to make it clear that even if confession of an accused as against co-accused tried with accused in the same case is treated 'substantive evidence' understood in the limited sense of fact in issue or relevant fact, the rule of prudence requires that the court should examine the same with great care keeping in mind the following caution given by the Privy Council in Bhuboni Sahu's case which has been noted with approval by this Court in Kashmira Singh (supra) and I quote:

This tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard the danger.

700. It is also to be borne in mind that the evidence of confession of co-accused is not required to be given on oath, nor is given in the presence of the accused, and its veracity cannot be tested by cross examination. Though the evidence of an accomplice is free from these shortcomings yet an accomplice is a person who having taken part in the commission of offence, to save himself, betrayed his former associates and placed himself on a safer plank - 'a position in which he can hardly fail to have a strong bias in favour of the prosecution' the position of the accused who has given confessional statement implicating a co-accused is that he has placed himself on the same plank and thus he sinks or sails along with the co-accused on the basis of his confession. For these reasons, in so far as use of confession of an accused against a co-accused is concerned, rule of prudence cautions the judicial discretion that it cannot be relied upon unless corroborated generally by other evidence on record.

701. Now adverting to merits of the appeals, learned brother Thomas, J. having considered the confession of A-20 (S. Bhagyanathan) Exh.P-69, A-21 (S. Padma) Exh. P-73, A-1 (S. Nalini) Exh.P-77, A-3 (V. Sriharan) Exh.P-81. A-9 (Robert Payas) Exh.P-85, A-18 (Arivu) Exh.P-87, A-10 (Jayakumar) Exh.P-91, A-8 (Athirai) Exh.P-97, A-12 (Vijayan) Exh.P-101, A-2 (Santhan) Exh.P-104, A-24 (Rangan) Exh.P-109, A-23 (Dhanasekaran) Exh.P-113, A-19 (Irumborai) Exh.P-117, A-16 (Ravichandran) Exh. P-121, A-17 (Suseendran) Exh.123, A-25 (Vigneswara).Exh.P-127, A-15 (Thambianna alias Shanmugavadivelu) Exh.P-139, meticulously examined other oral and documentary evidence in support of such confessional statement and found A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) guilty of offences under Section 120B read with Section 302 IPC and altered death sentence of A-1, A-9, A-10 and A-16 to life imprisonment while confirming death sentence of A-2, A-3 and A-18.

702. Brother Wadhwa, J. on consideration of all the aforementioned confessions and other evidence against the appellants confirmed conviction of only A-1, A-2, A-3 and A-18 under Section 120B read with Section 302 I.P.C. and confirmed death sentence of all of them while acquitting all other appellants.

703. In the view I have taken in the light of the above discussions and on examining the said statements of confession and the evidence, both oral and documentary, on record, it would be duplication to record here the same reasoning over again on the question of confirmation of conviction of appellants, A-1,A-2, A-3, A-9, A-10, A-16 and A-18. In so far as the conviction of any other appellant is concerned it would serve no practical purpose and will be only of academic interest and an exercise in futility. I, therefore, consider it appropriate to record my respectful agreement with the reasoning and

conclusion arrived at by Thomas, J. in confirming the conviction of A-1, A-2, A-3, A-9, A-10, A-16 and A-18 for the aforementioned offences.

704. The last crux in these cases is the question of punishment. The Indian Penal Code gives a very wide discretion to the Court in the matter of awarding punishment. The maximum and the minimum punishments are prescribed under the IPC and awarding of appropriate punishment is left to the discretion of the court. There are no general guidelines in the IPC but in the exercise of its discretion the Courts have to take into consideration the aggravating and mitigating circumstances of each case to determine appropriate sentence commensurate with the gravity of the offence and role of the convict.

705. On the question of awarding the sentence for the offences for which the punishment prescribed is life imprisonment or the death sentence, there has been a complete change in the legislative policy which is reflected in Sub-section (3) of Section 354 of the CrPC. It enjoins that in the case in which the court awards sentence of death, the judgment shall state special reasons for such sentence.

706. In Bachan Singh v. State of Punjab AIR 1980 SC 989, the constitutional validity of Section 354(3) Cr.P.C. was considered by a Constitution Bench of this Court. The change in the policy of sentencing is pointed out thus:

Section 354(3) of the CrPC, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment of life provided for murder and for certain other capital offences under the Penal Code were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.
It will be useful to note the principles for awarding punishment contained in the following observations:

...for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case.... In many cases, the extremely cruel and beastly manner of the commission of murder is itself a demonstrated index of a depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only

when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist.

(Emphasis supplied)

707. In Machhi Singh and Ors. v. State of Punjab MANU/SC/0211/1983: 1983 Cri LJ 1457 the following observations of Thakkar, J., speaking for a three-Judge Bench of this Court, are worth noticing. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. In such a situation the community feels that for the sake of self preservation the killer has to be killed and it may withdraw the protection afforded to him from being killed. It might do so in 'rarest of the rare' cases. When its collective conscience is so shocked, it would expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty. The learned Judge catalogued various factors which would bring a case in the 'rarest of the rare' cases. Among them is included the case where the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

708. In Kehar Singh and Ors. v. State (Delhi Administration) MANU/SC/0241/1988: 1989 Cri LJ 1, the security guards of Smt. Indira Gandhi, the then Prime Minister of India, assassinated her. This Court confirmed the death sentence of Satwant Singh who actually committed the murder as well as of Kehar Singh who conspired and inspired for commission of the crime. Applying the principles laid down in Bachan Singh's case (supra) and Machhi Singh's case (supra) that case was classified as a 'rarest of the rare' case, inter alia, on the ground that the convicts were involved in assassinating a great daughter of India and the Prime Minister of India and that the act of the accused not only took away the life of the popular leader but also undermined our democratic system which had been working so well for the last 40 years.

709. To determine the rarest of the rare case it was suggested that the answers to the following questions would be helpful

(a) Is there something uncommon about the crime which renders sentence of the imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence after according maximum weightage to the mitigating circumstances which speak in favour of the offender.

710. The leading cases on the subject suggest that discretion of the Court in awarding punishment when conviction is for an offence punishable with death or with imprisonment for life is controlled by Section 354(3) Cr.P.C. so if the Court proposes to

impose capital punishment it must record 'special reasons' for so doing. What constitutes special reasons cannot be stated with any precision and that has to be determined having regard to the facts and circumstances of each case. If a case falls in the category of 'rarest of the rare case' it would justify the requirement of special reasons. But again in deciding whether a case falls within 'rarest of the rare case', the Court has to consider both aggravating as well as the mitigating circumstances in each case in the light of the above noted principles.

711. In numerous cases these principles are being applied. There is no need to multiply the cases here. It is now time to address to the facts of the case.

712. On applying the well-settled principles laid down by this Court, Brother Thomas, J, felt that the confirmation of death sentence awarded by the Designated Court to A-2, A-3 and A-18 is justified whereas brother Wadhwa, J. on the same principles confirmed the death sentence awarded by the Designated Court to A-1, A-2, A-3 and A-18. So far as the confirmation of death sentence of A-2. A-3 and A-18 is concerned both the learned brethern concur and I record my respectful agreement with their conclusions. The difference of opinion between them is with regard to confirmation of death sentence of A-1. It is now my view which determines the result of this issue.

713. I may express my feelings that ill behoves a person to order the death of another. He who gives life alone has the authority to take life. In dispensing justice a Judge is not only discharging a sovereign function but he is also doing a divine function. Even so the most difficult task for a Judge is to choose the punishment of death in preference to the punishment of life imprisonment for he is conscious of the fact that once the life of a person is taken away by a judicial order it cannot be restored by another judicial order of the highest authority in this world. Having taken upon himself the onerous responsibility of doing justice according to Constitution and the laws the Judge must become independent of his conviction and ideology to maintain the balance of scales of justice.

714. Mr. Natarajan pleaded for not confirming the death sentence of A-1 highlighting the mitigating circumstances. She is a woman and is mother of a small girl who was born during the period of her confinement in jail. She is very young. She has also subsequently regretted her act and her participation was the result of indoctrination by A-3. She did not play any major role. These are indisputably the mitigating circumstances and I am not unmindful of these facts. Indeed the dilemma whether sentence of death should be pronounced upon a woman has been troubling my mind for a considerable time. Surely in our culture a woman has to be treated with beneficence and kindness. But then in this case the person Dhanu who opted to become a human bomb was a woman. Subha who gave moral support to sacrifice her life on the anvil of some ideology and to end up by annihilating others lives, was also a woman. About the role of A-1 (Nalini), it is not a case where she was caught up in a sudden situation and became a mute comrade, the mind not towing the body. It was indeed the other way round.

715. On her own saying she had developed a strong feeling against Shri Rajiv Gandhi and decided that the lesson should be taught for the mass killings and rapes in Sri Lanka and particularly in view of the death of eleven LTTE leaders by consuming cyanide and thought that she was justified for taking any retaliatory action. She admitted that she was mentally prepared by Sivarasan, Murugan, Dhanu and Subha for any kind of retaliatory action including killing of leaders. Even on May 2, 1991, she felt that the said persons were going to assassinate the leaders and she voluntarily participated thereafter and attended the meeting addressed by Shri V.P. Singh on the night of 7th May, 1991 in Madras. She had never been free from the feeling that Sivarasan, Murugan, Dhanu and Subha had come for a dangerous mission and after the meeting of Mr. V.P. Singh it had become clear to her that Dhanu and Subha had come for a dangerous mission. She was, however, closely associated with them. On 19th May itself, according to her Sivarasan came to her house along with a clipping of an evening newspaper of Tamil Nadu in which there was news of the visit of Shri Rajiv Gandhi to Tamil Nadu for election campaign. He said that they had come only for that and that they would attend the meeting. She entertained strong feeling about the danger ahead after briefing of Sivarasan about attending the meeting of Shri Rajiv Gandhi at Sriperumbudur on 21st May, 1991. On 21st May, 1991 at about 3.45 p.m. Subha told her that Dhanu was going to create history that day by assassinating Shri Rajiv Gandhi and that they would be very happy if she also participated in that and she agreed. before leaving for Sriperambudur she was aware of the fact that Dhanu was concealing an apparatus inside her dress. Nonetheless she went along with Subha and Dhanu to provide cover to them as planned by Sivarasan for which she had already agreed earlier. She did accompany them and provided the required cover. Without her providing cover to Dhanu and Subha, perhaps they would not have the confidence for attending the meetings including the fateful meeting. She was actually present at the scene of occurrence along with Dhanu and Subha when Dhanu exploded herself as a human bomb as a result of which Shri Rajiv Gandhi and 18 other persons died and 43 persons were seriously injured which included police officers and innocent persons.

716. Brother Thomas, J. noted that in the confessional statement of A-20 (Baghyanathan) it is stated A-1 (Nalini) had confided to him that she realised only at Sriperumbudur that Dhanu was going to kill Shri Rajiv Gandhi. He appears to have been impressed by that statement and observed that perhaps that might be a true fact and if that be so, she would not have dared to retreat from the scene as she was tucked into the tentacles of the conspiracy octopus from where it was impossible for a woman like A-1 (Nalini) to get extricated herself would have been justified.

717. From the facts pointed out above which strongly suggest her participation was not the result of helplessness but a well designed action with her free will to make her part of the contribution to the unholy plan and wicked conspiracy so I am not inclined to place

any reliance on that confessional statement of her brother A-20 which is referred to by my learned brother Thomas, J.

718. I am convinced that the facts of this case are uncommon; A crime committed on Indian soil against the popular national leader, a former Prime Minister of India, for a political decision taken by him in his capacity as the head of the executive and which met with the approval of the Parliament, by persons running political organisation in a foreign country and their agents in concert with some Indians for the reason that it did not suit their political objectives and of their organisation, cannot but be a 'rarest of the rare' case. In such a case the part played by A-1 (Nalini) is a candid participation in the crime of conspiracy to assassinate Shri Rajiv Gandhi who was himself a young popular leader so much loved and respected by his fellow citizens and had been the Prime Minister of India. The conspirators including A-1 (Nalini) had nothing personal against him but he was targeted for the political decision taken by him as the Prime Minister of India. She inspite of being an Indian citizen joined the gang of conspirators and engaged herself in pursuit of common intention to commit the crime only because she was infatuated by the love and affection developed for A-3 (Murugan), and thus played her part in execution of the conspiracy which resulted in the assassination of Shri Rajiv Gandhi and death of many police officers and innocent citizens including a small girl. For a person like A-1, taking into consideration all the mitigating circumstances, in my view, there is no room for any leniency, kindness and beneficence.

719. On the facts of this case, discussed above, once A-1 (Nalini) is found to fall in the rarest of the rare case, declining to confirm the death sentence will, in my view, stultify the course of law and justice.

720. It is apt to quote here the following observations of this Court in Mahesh v. State of Madhya Pradesh MANU/SC/0246/1987: 1987 Cri LJ 1073, with which I am in respectful agreement:

It will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.
721. Thus, I conclude that the sentence of imprisonment for life is inadequate and there is no alternative but to confirm the death sentence awarded by the Designated Court to A-1 (Nalini). Therefore, with respect I concur with brother Wadhwa, J. in confirming the death sentence of first appellant A-1 (Nalini) awarded by the Designated Court.

722. In the result I agree with brother Thomas, J. and set aside the conviction of all the appellants recorded by the Designated Court for offences under the TADA Act mentioned in category 'B' and also the conviction A-4 (Shankar alias Koneswaran), A-5

(D. Vijayanandan alias Hari Ayya), A-6 (Sivaruban alias Suresh alias Suresh Kumar alias Ruban), A-7 (S. Kanagasabapathy alias Radhayya), A-8 (A. Chandralekha alias Athirari alias Sonia alias Gowri), A-11 (J. Shanthi), A-12 (S. Vijayan alias Perumal Vijayan), A-13 (V. Selvaluxmi), A-14 (S. Bhaskaran alias Velayudam), A-15 (S. Shanmugavadivelu alias Thambi Anna), A-17 (M. Suseemdram alias Mahesh), A-19 (S. Irumborai alias Duraisingam), A-20 (S. Bhagyanathan), A-21 (S. Padma), A-22 (A. Sundaram), A-23 (K. Dhanasekaran alias Raju), A-24 (N. Rajasuriya alias Rangan), A-25 (T. Vigneswaran alias Vicky), A-26 (J. Ranganath) for the offences under Section 120B read with Section 302 IPC. Their appeals are accordingly allowed.

723. Agreeing with brother Thomas, J. confirm the conviction of A-1 (Nalini), A-2 (Santhan) and A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) finding them guilty of offences under Section 120B read with Section 302 IPC. them guilty of offences under Section 120B read with Section 302 IPC.

724. On the facts and in the circumstances. I am also of the same view as expressed by brother Thomas, J. that it is not a fit case to confirm the death sentence awarded to A-9 (Robert Payas), A-10 (Jayakumar) and A-16 (Ravichandran) and their death sentence is commuted to life imprisonment and their appeals are allowed to this extent.

725. The death sentence awarded to A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed the death sentence of A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) agreeing with Thomas, J. as well as Wadhwa, J. and the death sentence of A-1 (Nalini) agreeing with Wadhwa, J. Their appeals are dismissed and Death Reference is accordingly answered.

(S.S.M. Quadri)
***
ORDER

726. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA are set aside in respect of all those appellants who were found by the trial court guilty under the said counts.

727. The conviction and sentence passed by the trial court of the offences under Section 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-5) of the Arms Act, Section 5 of the Explosive Substance Act, Section 12 of the passports Act, and Section 6(1-A) of the Wireless and Telegraph Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those Counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.

728. The conviction for the offence under Section 120-B read with Section 302, Indian Penal Code as against A-1 (Nalini), A-2 (Santhan alias Raviraj) A-3 (Murugan alias Thas), A-9 (royert Pauyyas), A-10 (Jayakumar), A-16 (Ravichandran alias Ravi) and A-13 (Perarivlan alias Arivu), is confirmed.

729. We set aside the conviction and sentence of the offences under Section 302 read with Section 120B passed by the trial court on the remaining accused.

730. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), AA-3 (Murugan and A-18 (Aivu), is cofirmed. The death sentence passed on A-9 (Royert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The reference is answered accordingly.

731. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan, A-9 (Royert Payas), A-10 (Jayakumaro, A-16 (Ravichandran and A-18 (Arivu), all the remaining appellants shall appellants shall be set at liberty forth with.

MANU/SC/0781/2012

Back to Section 120B of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

SLP (Crl.) No. 8989 of 2010 and SLP (Crl.) Nos. 6138 of 2006, 5921 of 2009, 6324 of 2009, 7148 of 2009, 259 of 2011, 5203 of 2011 and Criminal Appeal Nos. 2107-2125 of 2011

Decided On: 24.09.2012

Gian Singh Vs. State of Punjab and Ors.

Hon'ble Judges/Coram:
R.M. Lodha, Anil R. Dave and S.J. Mukhopadhaya, JJ.

Counsels:
For Appearing Parties: P.P. Malhotra, ASG, P.P. Rao, Abhishek Manu Singhvi, V. Giri, Sr. Advs., Rajiv Kataria, Adv., for Delhi Law Chambers, P. Parmeswaran, Rajiv Nanda, T.A. Khan, Ranjana Narayan, Priyanka Mathur, Arvind Kumar Sharma, Baldev Krishan Satija, Sameer Sodhi, Amit Bhandari, Ashok Jain, Pankaj Jain, Bijoy Kumar Jain, Pragati Neekhra, Suryanarayana Singh, Yashoda Sharma, Sushil Karanjkar, Nikhilesh Kumar, Mohammed Sadique T.A., K.N. Rai, A.V. Rangam, Buddy A. Ranganadhan, Richa Bhardwaj, V. Prabhakar, R. Chandrachud, Jyoti Parashar, Yasir Rauf, Vishwaaman Kandwal, Kailash Chand, Sunil Kumar Verma, Asha Gopalan Nair, Praveen Swarup, Nikhil Jain, Atishi Dipankar, Manu Beni, Ashish Agarwal, Yash Pal Dhingra, Deepak Dhingra, Partha Sil, Rajesh Tyagi, Anil Kumar Bakshi, Pawan Kumar, Shekhar Kumar and Ravi Bassi, Advs.

JUDGMENT
R.M. Lodha, J.

1. When the special leave petition in Gian Singh v. State of Punjab and Anr. came up for hearing, a two-Judge Bench (Markandey Katju and Gyan Sudha Misra, JJ.) doubted the correctness of the decisions of this Court in B.S. Joshi and Ors. v. State of Haryana and Anr. MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant v. Central Bureau of Investigation and Anr. MANU/SC/7957/2008: (2008) 9 SCC 677 and Manoj Sharma v. State and Ors. MANU/SC/8122/2008: (2008) 16 SCC 1 and referred the matter to a larger Bench. The reference order reads as follows:

Heard Learned Counsel for the Petitioner.

The Petitioner has been convicted Under Section 420 and Section 120B, Indian Penal Code by the learned Magistrate. He filed an appeal challenging his conviction before the learned Sessions Judge. While his appeal was pending, he filed an application before the

learned Sessions Judge for compounding the offence, which, according to the Learned Counsel, was directed to be taken up along with the main appeal. Thereafter, the Petitioner filed a petition Under Section 482, Code of Criminal Procedure. for quashing of the FIR on the ground of compounding the offence. That petition Under Section 482 Code of Criminal Procedure. has been dismissed by the High Court by its impugned order. Hence, this petition has been filed in this Court.

Learned Counsel for the Petitioner has relied on three decisions of this Court, all by two Judge Benches. They are B.S. Joshi v. State of Haryana MANU/SC/0230/2003: (2003) 4 SCC 675; Nikhil Merchant v. Central Bureau of Investigation and Anr. MANU/SC/7957/2008: (2008) 9 SCC 677; and Manoj Sharma v. State and Ors. MANU/SC/8122/2008: (2008) 16 SCC 1. In these decisions, this Court has indirectly permitted compounding of non-compoundable offences. One of us, Hon'ble Mr. Justice Markandey Katju, was a member to the last two decisions.

Section 320, Code of Criminal Procedure. mentions certain offences as compoundable, certain other offences as compoundable with the permission of the Court, and the other offences as non-compoundable vide Section 320(7).

Section 420, Indian Penal Code, one of the counts on which the Petitioner has been convicted, no doubt, is a compoundable offence with permission of the Court in view of Section 320, Code of Criminal Procedure. but Section 120B Indian Penal Code, the other count on which the Petitioner has been convicted, is a non-compoundable offence. Section 120B (Criminal conspiracy) is a separate offence and since it is a non-compoundable offence, we cannot permit it to be compounded.

The Court cannot amend the statute and must maintain judicial restraint in this connection. The Courts should not try to take over the function of the Parliament or executive. It is the legislature alone which can amend Section 320 Code of Criminal Procedure.

We are of the opinion that the above three decisions require to be re-considered as, in our opinion, something which cannot be done directly cannot be done indirectly. In our, prima facie, opinion, non-compoundable offences cannot be permitted to be compounded by the Court, whether directly or indirectly. Hence, the above three decisions do not appear to us to be correctly decided.

It is true that in the last two decisions, one of us, Hon'ble Mr. Justice Markandey Katju, was a member but a Judge should always be open to correct his mistakes. We feel that these decisions require re-consideration and hence we direct that this matter be placed before a larger Bench to reconsider the correctness of the aforesaid three decisions.

Let the papers of this case be placed before Hon'ble Chief Justice of India for constituting a larger Bench.

2. This is how these matters have come up for consideration before us.

3. Two provisions of the Code of Criminal Procedure, 1973 (for short, 'Code') which are vital for consideration of the issue referred to the larger Bench are Sections 320 and 482. Section 320 of the Code provides for compounding of certain offences punishable under the Indian Penal Code, 1860 (for short, 'Indian Penal Code'). It reads as follows:

Section. 320. Compounding of offences.-(1) The offences punishable under the sections of the Indian Penal Code, (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table:

TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:-

TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3

(3) When an offence is compoundable under this section, the abatement of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable Under Section 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner.

(4) (a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf, may, with the permission of the Court, compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 of such person may, with the consent of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision Under Section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section.

4. Section 482 saves the inherent power of the High Court and it reads as follows:

Section. 482. Saving of inherent power of High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.
5. In B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, the undisputed facts were these: the husband was one of the Appellants while the wife was Respondent No. 2 in the appeal before this Court. They were married on 21.7.1999 and were living separately since 15.7.2000. An FIR was registered Under Sections 498-A/323 and 406, Indian Penal Code at the instance of the wife on 2.1.2002. When the criminal case registered at the instance of the wife was pending, the dispute between the husband and wife and their family members was settled. It appears that the wife filed an affidavit that her disputes with the husband and the other members of his family had been finally settled and she and her husband had agreed for mutual divorce. Based on the said affidavit, the matter was taken to the High Court by both the parties and they jointly prayed for quashing the criminal proceedings launched against the husband and his family members on the basis of the FIR registered at the wife's instance Under Sections 498-A and 406 Indian Penal Code. The High Court dismissed the petition for quashing the FIR as in its view the offences Under Sections 498-A and 406, Indian Penal Code were non-compoundable and the inherent powers Under Section 482 of the Code could not be invoked to by-pass Section

320 of the Code. It is from this order that the matter reached this Court. This Court held that the High Court in exercise of its inherent powers could quash criminal proceedings or FIR or complaint and Section 320 of the Code did not limit or affect the powers Under Section 482 of the Code. The Court in paragraphs 14 and 15 (Pg. 682) of the Report held as under:

14. There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hypertechnical view would be counterproductive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers Under Section 482 of the Code.

6. In Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677, a company, M/s. Neemuch Emballage Ltd., Mumbai was granted financial assistance by Andhra Bank under various facilities. On account of default in repayment of loans, the bank filed a suit for recovery of the amount payable by the borrower company. The bank also filed a complaint against the company, its Managing Director and the officials of Andhra Bank for diverse offences, namely, Section 120-B read with Sections 420, 467, 468, 471 of the Indian Penal Code read with Sections 5(2) and 5(1)(d) of the Prevention of Corruption Act, 1947 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The suit for recovery filed by the bank against the company and the Managing Director of the Company was compromised. The suit was compromised upon the Defendants agreeing to pay the amounts due as per the schedule mentioned in the consent terms. Clause 11 of the consent terms read, "agreed that save as aforesaid neither party has any claim against the other and parties do hereby withdraw all the allegations and counter-allegations made against each other". Based on Clause 11 of the consent terms, the Managing Director of the Company, the Appellant who was accused No. 3 in charge sheet filed by CBI, made application for discharge from the criminal complaint. The said application was rejected by the Special Judge (CBI), Greater Bombay, which came to be challenged before the Bombay High Court. The contention before the High Court was that since the subject matter of the dispute had been settled between the Appellant and the bank, it would be unreasonable to continue with the criminal proceedings. The High Court rejected the application for discharge from the criminal cases. It is from this order that the matter reached this Court by way of special leave. The Court having regard to the facts of the case and the earlier decision of this Court in B.S.

Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, set aside the order of the High Court and quashed the criminal proceedings by consideration of the matter thus:

28. The basic intention of the accused in this case appears to have been to misrepresent the financial status of the Company, M/s Neemuch Emballage Ltd., Mumbai, in order to avail of the credit facilities to an extent to which the Company was not entitled. In other words, the main intention of the Company and its officers was to cheat the Bank and induce it to part with additional amounts of credit to which the Company was not otherwise entitled.

29. Despite the ingredients and the factual content of an offence of cheating punishable Under Section 420 Indian Penal Code, the same has been made compoundable under Sub-section (2) of Section 320 Code of Criminal Procedure with the leave of the court. of course, forgery has not been included as one of the compoundable offences, but it is in such cases that the principle enunciated in B.S. Joshi case becomes relevant.

30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the Appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi case and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.

7. In Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1, the Court was concerned with the question whether an F.I.R. Under Sections 420/468/471/34/120-B Indian Penal Code can be quashed either Under Section 482 of the Code or under Article 226 of the Constitution when the accused and the complainant have compromised and settled the matter between themselves. Altamas Kabir, J., who delivered the lead judgment referred to B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 and the submission made on behalf of the State that B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 required a second look and held that the Court was not inclined to accept the contention made on behalf of the State that the decision in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 required

reconsideration, at least not in the facts of the case. It was held that what was decided in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 was the power and authority of the High Court to exercise jurisdiction Under Section 482 of the Code or under Article 226 of the Constitution to quash offences which were not compoundable. The law stated in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 simply indicated the powers of the High Court to quash any criminal proceeding or first information report or complaint whether the offences were compoundable or not. Altamas Kabir, J. further observed, "The ultimate exercise of discretion Under Section 482 Code of Criminal Procedure or under Article 226 of the Constitution is with the court which has to exercise such jurisdiction in the facts of each case. It has been explained that the said power is in no way limited by the provisions of Section 320 Code of Criminal Procedure. We are unable to disagree with such statement of law. In any event, in this case, we are only required to consider whether the High Court had exercised its jurisdiction Under Section 482 Code of Criminal Procedure legally and correctly." Then in paragraphs 8 and 9 (pg. 5) of the Report, Altamas Kabir, J., inter alia, held as under:

8....Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. We do not suggest that while exercising its powers under Article 226 of the Constitution the High Court could not have refused to quash the first information report, but what we do say is that the matter could have been considered by the High Court with greater pragmatism in the facts of the case.

9....In the facts of this case we are of the view that continuing with the criminal proceedings would be an exercise in futility....

8. Markandey Katju, J. although concurred with the view of Altamas Kabir, J. that criminal proceedings in that case deserved to be quashed but observed that question may have to be decided in some subsequent decision or decisions (preferably by a larger Bench) as to which non-compoundable cases can be quashed Under Section 482 of the Code or Article 226 of the Constitution on the basis that the parties have entered into compromise. In paragraphs 27 and 28 (pg. 10) of the report he held as under:

27. There can be no doubt that a case Under Section 302 Indian Penal Code or other serious offences like those Under Sections 395, 307 or 304-B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power Under Section 482 Code of Criminal Procedure or in writ jurisdiction on the basis of compromise. However, in some other cases (like those akin to a civil nature), the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. Where a line is to be drawn will have to be decided in some later decisions of this Court, preferably by a larger Bench (so as to make it more authoritative). Some guidelines will have to be evolved in this connection and the matter cannot be left at the sole unguided discretion of Judges, otherwise there may be conflicting decisions and judicial anarchy. A judicial discretion

has to be exercised on some objective guiding principles and criteria, and not on the whims and fancies of individual Judges. Discretion, after all, cannot be the Chancellor's foot.

28. I am expressing this opinion because Shri B.B. Singh, Learned Counsel for the Respondent has rightly expressed his concern that the decision in B.S. Joshi case should not be understood to have meant that Judges can quash any kind of criminal case merely because there has been a compromise between the parties. After all, a crime is an offence against society, and not merely against a private individual.

9. Dr. Abhishek Manu Singhvi, learned senior Counsel for the Petitioner in SLP(Crl.) No. 6324 of 2009 submitted that the inherent power of the High Court to quash a non-compoundable offence was not circumscribed by any of the provisions of the Code, including Section 320. Section 482 is a declaration of the inherent power pre-existing in the High Court and so long as the exercise of the inherent power falls within the parameters of Section 482, it shall have an overriding effect over any of the provisions of the Code. He, thus, submitted that in exercise of its inherent powers Under Section 482, the High Court may permit compounding of a non-compoundable offence provided that in doing so it satisfies the conditions mentioned therein. Learned senior Counsel would submit that the power to quash the criminal proceedings Under Section 482 of the Code exists even in non-compoundable offence but its actual exercise will depend on facts of a particular case. He submitted that some or all of the following tests may be relevant to decide whether to quash or not to quash the criminal proceedings in a given case; (a) the nature and gravity of case; (b) does the dispute reflect overwhelming and pre-dominantly civil favour; (c) would the quashing involve settlement of entire or almost the entire dispute; (d) the compromise/settlement between parties and/or other facts and the circumstances render possibility of conviction remote and bleak; (e) not to quash would cause extreme injustice and would not serve ends of justice and (f) not to quash would result in abuse of process of court.

10. Shri P.P. Rao, learned senior Counsel for the Petitioner in Special Leave Petition (Crl.) No. 5921 of 2009 submitted that Section 482 of the Code is complete answer to the reference made to the larger Bench. He analysed Section 482 and Section 320 of the Code and submitted that Section 320 did not limit or affect the inherent powers of the High Court. Notwithstanding Section 320, High Court can exercise its inherent power, inter alia, to prevent abuse of the process of any court or otherwise to secure the ends of justice. To secure the ends of justice is a wholesome and definite guideline. It requires formation of opinion by High Court on the basis of material on record as to whether the ends of justice would justify quashing of a particular criminal complaint, FIR or a proceeding. When the Court exercises its inherent power under Section 482 in respect of offences which are not compoundable taking into account the fact that the accused and the complainant have settled their differences amicably, it cannot be viewed as permitting compounding of offence which is not compoundable.

11. Mr. P.P. Rao, learned senior Counsel submitted that in cases of civil wrongs which also constitute criminal offences, the High Court may pass order Under Section 482 once both parties jointly pray for dropping the criminal proceeding initiated by one of them to put an end to the dispute and restore peace between the parties.

12. Mr. V. Giri, learned senior Counsel for the Respondent (accused) in Special Leave Petition (Crl.) No. 6138 of 2006 submitted that the real question that needs to be considered by this Court in the reference is whether Section 320(9) of the Code creates a bar or limits or affects the inherent powers of the High Court Under Section 482 of the Code. It was submitted that Section 320(9) does not create a bar or limit or affect the inherent powers of the High Court in the matter of quashing any criminal proceedings. Relying upon various decisions of this Court, it was submitted that it has been consistently held that the High Court has unfettered powers Under Section 482 of the Code to secure the ends of justice and prevent abuse of the process of the Court. He also submitted that on compromise between the parties, the High Court in exercise of powers Under Section 482 can quash the criminal proceedings, more so the matters arising from matrimonial dispute, property dispute, dispute between close relations, partners or business concerns which are predominantly of civil, financial or commercial nature.

13. Learned Counsel for the Petitioner in Special Leave Petition (Crl.) No. 8989 of 2010 submitted that the court should have positive view to quash the proceedings once the aggrieved party has compromised the matter with the wrong doer. It was submitted that if the court did not allow the quashing of FIR or complaint or criminal case where the parties settled their dispute amicably, it would encourage the parties to speak lie in the court and witnesses would become hostile and the criminal proceeding would not end in conviction. Learned Counsel submitted that the court could also consider the two questions (1) can there be partial quashing of the FIR qua accused with whom the complainant/aggrieved party enters into compromise. (2) can the court quash the proceedings in the cases which have not arisen from the matrimonial or civil disputes but the offences are personal in nature like grievous hurt (Section 326), attempt to murder (Section 307), rape (Section 376), trespassing (Section 452) and kidnapping (Section 364, 365) etc.

14. Mr. P.P. Malhotra, learned Additional Solicitor General referred to the scheme of the Code. He submitted that in any criminal case investigated by police on filing the report Under Section 173 of the Code, the Magistrate, after applying his mind to the chargesheet and the documents accompanying the same, if takes cognizance of the offences and summons the accused and/or frames charges and in certain grave and serious offences, commits the accused to be tried by a court of Sessions and the Sessions Court after satisfying itself and after hearing the accused frames charges for the offences alleged to have been committed by him, the Code provides a remedy to accused to challenge the order taking cognizance or of framing charges. Similar situation may follow in a

complaint case. Learned Additional Solicitor General submitted that power Under Section 482 of the Code cannot be invoked in the non-compoundable offences since Section 320(9) expressly prohibits the compounding of such offences. Quashing of criminal proceedings of the offences which are non-compoundable would negative the effect of the order of framing charges or taking cognizance and therefore quashing would amount to taking away the order of cognizance passed by the Magistrate.

15. Learned Additional Solicitor General would submit that when the Court takes cognizance or frames charges, it is in accordance with the procedure established by law. Once the court takes cognizance or frames charges, the method to challenge such order is by way of appropriate application to the superior court under the provisions of the Code.

16. If power Under Section 482 is exercised, in relation to non-compoundable offences, it will amount to what is prohibited by law and such cases cannot be brought within the parameters 'to secure ends of justice'. Any order in violation and breach of statutory provisions, learned Additional Solicitor General would submit, would be a case against the ends of justice. He heavily relied upon a Constitution Bench decision of this Court in Central Bureau of Investigation and Ors. v. Keshub Mahindra and Ors. MANU/SC/0589/2011: (2011) 6 SCC 216 wherein this Court held, 'no decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code.' With reference to B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, learned Additional Solicitor General submitted that that was a case where the dispute was between the husband and wife and the court felt that if the proceedings were not quashed, it would prevent the woman from settling in life and the wife had already filed an affidavit that there were temperamental differences and she was not supporting continuation of criminal proceedings. As regards, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677, learned Additional Solicitor General submitted that this Court in State of Madhya Pradesh v. Rameshwar and Ors. MANU/SC/0521/2009: (2009) 11 SCC 424 held that the said decision was a decision under Article 142 of the Constitution. With regard to Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1, learned Additional Solicitor General referred to the observations made by Markandey Katju, J. in paragraphs 24 and 28 of the Report.

17. Learned Additional Solicitor General submitted that the High Court has no power to quash criminal proceedings in regard to offences in which a cognizance has been taken by the Magistrate merely because there has been settlement between the victim and the offender because the criminal offence is against the society.

18. More than 65 years back, in Emperor v. Khwaja Nazir Ahmed MANU/MH/0097/1944: (1945) 47 Bom. L.R. 245, it was observed by the Privy Council that Section 561A (corresponding to Section 482 of the Code) had not given increased powers to the Court which it did not possess before that section was enacted. It was

observed, `The section gives no new powers, it only provides that those which the court already inherently possess shall be preserved and is inserted lest, as their Lordships think, it should be considered that the only powers possessed by the court are those expressly conferred by the Code of Criminal Procedure and that no inherent power had survived the passing of the Code'.

19. In Khushi Ram v. Hashim and Ors. AIR 1959 SC 542, this Court held as under:

It is unnecessary to emphasis that the inherent power of the High Court Under Section 561A cannot be invoked in regard to matters which are directly covered by the specific provisions of the Code...
20. The above view of Privy Council in Khwaja Nazir Ahmed and Anr. MANU/MH/0097/1944: (1945) 47 Bom. L.R. 245 decision in Lala Jairam Das and Ors. v. Emperor MANU/PR/0005/1945: AIR 1945 PC 94 was expressly accepted by this Court in State of Uttar Pradesh. v. Mohammad Naim MANU/SC/0062/1963: AIR 1964 SC 703. The Court said:

7. It is now well settled that the section confers no new powers on the High Court. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. The section provides that those powers which the court inherently possesses shall be preserved lest it be considered that the only powers possessed by the court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code....
21. In Pampathy v. State of Mysore MANU/SC/0090/1966: 1966 (Supp) SCR 477, a three-Judge Bench of this Court stated as follows:

The inherent power of the High Court mentioned in Section 561A, Code of Criminal Procedure can be exercised only for either of the three purposes specifically mentioned in the section. The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that Section 561A can come into operation....
22. In State of Karnataka v. L. Muniswamy and Ors. MANU/SC/0143/1977: (1977) 2 SCC 699, a three- Judge Bench of this Court referred to Section 482 of the Code and in paragraph 7 (pg. 703) of the Report held as under:

7.... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of

harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.
23. The Court then observed that the considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by Section 482 ought not to be encased within the straitjacket of a rigid formula.

24. A three-Judge Bench of this Court in Madhu Limaye v. The State of Maharashtra MANU/SC/0103/1977: (1977) 4 SCC 551, dealt with the invocation of inherent power Under Section 482 for quashing interlocutory order even though revision Under Section 397(2) of the Code was prohibited. The Court noticed the principles in relation to the exercise of the inherent power of the High Court as under:

(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

25. In Raj Kapoor and Ors. v. State and Ors. MANU/SC/0210/1979: (1980) 1 SCC 43, the Court explained the width and amplitude of the inherent power of the High Court Under Section 482 vis-à-vis revisional power Under Section 397 as follows:

10....The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye's case this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code,

such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution

would be to say that the bar provided in Sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction.

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10)

The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this Court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not

been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified.

26. In Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and Anr. MANU/SC/0440/1990: (1990) 2 SCC 437, the Court considered the scope of Section 482 of the Code in a case where on dismissal of petition Under Section 482, a second petition Under Section 482 of the Code was made. The contention before this Court was that the second petition Under Section 482 of the Code was not entertainable; the exercise of power Under Section 482 on a second petition by the same party on the same ground virtually amounts to review of the earlier order and is contrary to the spirit of Section 362 of the Code and the High Court was in error in having quashed the proceedings by adopting that course. While accepting this argument, this Court held as follows:

3....The inherent power Under Section 482 is intended to prevent the abuse of the process of the court and to secure ends of justice. Such power cannot be exercised to do something which is expressly barred under the Code. If any consideration of the facts by way of review is not permissible under the Code and is expressly barred, it is not for the court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred Under Section 362.

5. Section 362 of the Code expressly provides that no court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error save as otherwise provided by the Code. Section 482 enables the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. The inherent powers, however, as much are controlled by principle and precedent as are its express powers by statute. If a matter is covered by an express letter of law, the court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction.

7. The inherent jurisdiction of the High Court cannot be invoked to override bar of review Under Section 362. It is clearly stated in Sooraj Devi v. Pyare Lal, that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. The law is therefore clear that the inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. The court is not empowered to review its own decision under the purported exercise of inherent power. We find that the impugned order in this case is in effect one reviewing

the earlier order on a reconsideration of the same materials. The High Court has grievously erred in doing so. Even on merits, we do not find any compelling reasons to quash the proceedings at that stage.

27. In Dharampal and Ors. v. Ramshri (Smt.) and Ors. MANU/SC/0214/1993: 1993 Cri. L.J. 1049, this Court observed as follows:

...It is now well settled that the inherent powers Under Section 482 of the Code cannot be utilized for exercising powers which are expressly barred by the Code....
28. In Arun Shankar Shukla v. State of Uttar Pradesh and Ors. MANU/SC/0410/1999: AIR 1999 SC 2554, a two-Judge Bench of this Court held as under:

...It is true that Under Section 482 of the Code, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of the process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of the process of law or the ends of justice could only be secured in accordance with law including procedural law and not otherwise. Further, inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in Section 482 of the Code in cases where there is no express provision empowering the High Court to achieve the said object. It is well-neigh settled that inherent power is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provision of the Code. In the present case, the High Court overlooked the procedural law which empowered the convicted accused to prefer statutory appeal against conviction of the offence. The High Court has intervened at an uncalled for stage and soft-pedalled the course of justice at a very crucial stage of the trial.
29. In G. Sagar Suri and Anr. v. State of U.P. and Ors. MANU/SC/0045/2000: (2000) 2 SCC 636, the Court was concerned with the order of the High Court whereby the application Under Section 482 of the Code for quashing the criminal proceedings Under Sections 406 and 420 of the Indian Penal Code pending in the Court of Chief Judicial Magistrate, Ghaziabad was dismissed. In paragraph 8 (pg. 643) of the Report, the Court held as under:

8. Jurisdiction Under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction Under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

30. A three-Judge Bench of this Court in State of Karnataka v. M. Devendrappa and Anr. MANU/SC/0027/2002: (2002) 3 SCC 89 restated what has been stated in earlier decisions that Section 482 does not confer any new powers on the High Court, it only saves the inherent power which the court possessed before the commencement of the Code. The Court went on to explain the exercise of inherent power by the High Court in paragraph 6 (Pg.94) of the Report as under:

6....It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice....
The Court in paragraph 9 (Pg. 96) further stated:

9.....the powers possessed by the High Court Under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. of course, no hard-and-fast rule can be laid down in regard

to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage....
31. In Central Bureau of Investigation v. A. Ravishankar Prasad and Ors. MANU/SC/0808/2009: (2009) 6 SCC 351, the Court observed in paragraphs 17, 19, 20 and 39 (Pgs. 356, 357 and 363) of the Report as follows:

17. Undoubtedly, the High Court possesses inherent powers Under Section 482 of the Code of Criminal Procedure. These inherent powers of the High Court are meant to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court.

19. This Court time and again has observed that the extraordinary power Under Section 482 Code of Criminal Procedure should be exercised sparingly and with great care and caution. The Court would be justified in exercising the power when it is imperative to exercise the power in order to prevent injustice. In order to understand the nature and scope of power under Section 482 Code of Criminal Procedure it has become necessary to recapitulate the ratio of the decided cases.

20. Reference to the following cases would reveal that the Courts have consistently taken the view that they must use the court's extraordinary power only to prevent injustice and secure the ends of justice. We have largely inherited the provisions of inherent powers from the English jurisprudence, therefore the principles decided by the English courts would be of relevance for us. It is generally agreed that the Crown Court has inherent power to protect its process from abuse. The English courts have also used inherent power to achieve the same objective.

39. Careful analysis of all these judgments clearly reveals that the exercise of inherent powers would entirely depend on the facts and circumstances of each case. The object of incorporating inherent powers in the Code is to prevent abuse of the process of the court or to secure ends of justice.

32 In Devendra and Ors. v. State of Uttar Pradesh and Anr. MANU/SC/0941/2009: (2009) 7 SCC 495, while dealing with the question whether a pure civil dispute can be subject matter of a criminal proceeding Under Sections 420, 467, 468 and 469 Indian Penal Code, a two-Judge Bench of this Court observed that the High Court ordinarily would exercise its jurisdiction Under Section 482 of the Code if the allegations made in the First Information Report, even if given face value and taken to be correct in their entirety, do not make out any offence.

33. In Sushil Suri v. Central Bureau of Investigation and Anr. MANU/SC/0563/2011: (2011) 5 SCC 708, the Court considered the scope and ambit of the inherent jurisdiction of the High Court and made the following observations in para 16 (pg. 715) of the Report:

16. Section 482 Code of Criminal Procedure itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely, (i) to give effect to an order under Code of Criminal Procedure; (ii) to prevent an abuse of the process of court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdiction Under Section 482 Code of Criminal Procedure. Though it is emphasised that exercise of inherent powers would depend on the facts and circumstances of each case, but the common thread which runs through all the decisions on the subject is that the Court would be justified in invoking its inherent jurisdiction where the allegations made in the complaint or charge-sheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged.
34. Besides B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 and Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1, there are other decisions of this Court where the scope of Section 320 vis-à-vis the inherent power of the High Court under Section 482 of the Code has come up for consideration.

35. In Madan Mohan Abbot v. State of Punjab MANU/SC/1204/2008: (2008) 4 SCC 582, in the appeal before this Court which arose from an order of the High Court refusing to quash the FIR against the Appellant lodged Under Sections 379, 406, 409, 418, 506/34, Indian Penal Code on account of compromise entered into between the complainant and the accused, in paragraphs 5 and 6 (pg. 584) of the Report, the Court held as under:

5. It is on the basis of this compromise that the application was filed in the High Court for quashing of proceedings which has been dismissed by the impugned order. We notice from a reading of the FIR and the other documents on record that the dispute was purely a personal one between two contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against the accused. We are, therefore, of the opinion that no useful purpose would be served in continuing with the proceedings in the light of the compromise and also in the light of the fact that the complainant has on 11-1-2004 passed away and the possibility of a conviction being recorded has thus to be ruled out.

6. We need to emphasis that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in

deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law.

36. In Ishwar Singh v. State of Madhya Pradesh MANU/SC/8126/2008: (2008) 15 SCC 667, the Court was concerned with a case where the accused - Appellant was convicted and sentenced by the Additional Sessions Judge for an offence punishable Under Section 307, Indian Penal Code. The High Court dismissed the appeal from the judgment and conviction. In the appeal, by special leave, the injured - complainant was ordered to be joined as party as it was stated by the counsel for the Appellant that mutual compromise has been arrived at between the parties, i.e. accused on the one hand and the complainant - victim on the other hand during the pendency of the proceedings before this Court. It was prayed on behalf of the Appellant that the appeal be disposed of on the basis of compromise between the parties. In para 12 (pg. 670) of the Report, the Court observed as follows:

12. Now, it cannot be gainsaid that an offence punishable Under Section 307 Indian Penal Code is not a compoundable offence. Section 320 of the Code of Criminal Procedure, 1973 expressly states that no offence shall be compounded if it is not compoundable under the Code. At the same time, however, while dealing with such matters, this Court may take into account a relevant and important consideration about compromise between the parties for the purpose of reduction of sentence.

37. The Court also referred to the earlier decisions of this Court in Jetha Ram v. State of Rajasthan MANU/SC/2586/2005: (2006) 9 SCC 255, Murugesan v. Ganapathy Velar MANU/SC/2358/2000: (2001) 10 SCC 504, Ishwarlal v. State of M.P. (2008) 15 SCC 671 and Mahesh Chand and Anr. v. State of Rajasthan MANU/SC/0268/1988: 1990 (supp) SCC 681 and noted in paragraph 13 (pg. 670) of the Report as follows:

13. In Jetha Ram v. State of Rajasthan, Murugesan v. Ganapathy Velar and Ishwarlal v. State of M.P. this Court, while taking into account the fact of compromise between the parties, reduced sentence imposed on the Appellant-accused to already undergone, though the offences were not compoundable. But it was also stated that in Mahesh Chand v. State of Rajasthan such offence was ordered to be compounded.

Then, in paragraphs 14 and 15 (pg. 670) the Court held as under:

14. In our considered opinion, it would not be appropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory provisions. In our judgment, however, limited submission of the Learned Counsel for the Appellant deserves consideration that while imposing substantive sentence, the factum of compromise between the parties is indeed a relevant circumstance which the Court may keep in mind.

15. In the instant case, the incident took place before more than fifteen years; the parties are residing in one and the same village and they are also relatives. The Appellant was

about 20 years of age at the time of commission of crime. It was his first offence. After conviction, the Petitioner was taken into custody. During the pendency of appeal before the High Court, he was enlarged on bail but, after the decision of the High Court, he again surrendered and is in jail at present. Though he had applied for bail, the prayer was not granted and he was not released on bail. Considering the totality of facts and circumstances, in our opinion, the ends of justice would be met if the sentence of imprisonment awarded to the Appellant (Accused 1) is reduced to the period already undergone.

38. In Rumi Dhar (Smt.) v. State of West Bengal and Anr. MANU/SC/0544/2009: (2009) 6 SCC 364, the Court was concerned with applicability of Section 320 of the Code where the accused was being prosecuted for commission of offences Under Sections 120-B/420/467/468/471 of the Indian Penal Code along with the bank officers who were being prosecuted Under Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988. The accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal. The accused prayed for her discharge on the grounds (i) having regard to the settlement arrived at between her and the bank, no case for proceeding against her has been made out; (ii) the amount having already been paid and the title deeds having been returned, the criminal proceedings should be dropped on the basis of the settlement and (iii) the dispute between the parties were purely civil in nature and that she had not fabricated any document or cheated the bank in any way whatsoever and charges could not have been framed against her. The CBI contested the application for discharge on the ground that mere repayment to the bank could not exonerate the accused from the criminal proceeding. The two-Judge Bench of this Court referred to Section 320 of the Code and the earlier decisions of this Court in CBI v. Duncans Agro Industries Limited MANU/SC/0622/1996: (1996) 5 SCC 591, State of Haryana v. Bhajan Lal MANU/SC/0115/1992: 1992 Supp (1) SCC 335 State of Bihar v. P.P. Sharma MANU/SC/0542/1992: 1992 Supp (1) SCC 222 Janata Dal v. H.S. Chowdhary MANU/SC/0532/1992: (1992) 4 SCC 305 and Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 which followed the decision in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 and then with reference to Article 142 of the Constitution and Section 482 of the Code refused to quash the charge against the accused by holding as under:

24. The jurisdiction of the Court under Article 142 of the Constitution of India is not in dispute. Exercise of such power would, however, depend on the facts and circumstances of each case. The High Court, in exercise of its jurisdiction Under Section 482 of the Code of Criminal Procedure, and this Court, in terms of Article 142 of the Constitution of India, would not direct quashing of a case involving crime against the society particularly when both the learned Special Judge as also the High Court have found that a prima facie case has been made out against the Appellant herein for framing the charge.

39. In Shiji alias Pappu and Ors. v. Radhika and Anr. (2011) 10 SCC 705 this Court considered the exercise of inherent power by the High Court Under Section 482 in a

matter where the offence was not compoundable as the accused was already involved in commission of the offences punishable Under Sections 354 and 394 Indian Penal Code. The High Court rejected the prayer by holding that the offences with which Appellants were charged are not 'personal in nature' to justify quashing the criminal proceedings on the basis of a compromise arrived at between the complainant and the Appellants. This Court considered earlier decisions of this Court, the provisions contained in Sections 320 and 394 of the Code and in paragraphs 17, 18 and 19 (pgs. 712 and 713) of the Report held as under:

17. It is manifest that simply because an offence is not compoundable Under Section 320 Code of Criminal Procedure is by itself no reason for the High Court to refuse exercise of its power Under Section 482 Code of Criminal Procedure. That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial court or in appeal on the one hand and the exercise of power by the High Court to quash the prosecution Under Section 482 Code of Criminal Procedure on the other. While a court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable Under Section 320, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court Under Section 482 Code of Criminal Procedure are not for that purpose controlled by Section 320 Code of Criminal Procedure.

18. Having said so, we must hasten to add that the plenitude of the power Under Section 482 Code of Criminal Procedure by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power Under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition Under Section 482 of the Code of Criminal Procedure. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked.

19. Coming to the case at hand, we are of the view that the incident in question had its genesis in a dispute relating to the access to the two plots which are adjacent to each

other. It was not a case of broad daylight robbery for gain. It was a case which has its origin in the civil dispute between the parties, which dispute has, it appears, been resolved by them. That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception" will be a futile exercise that will serve no purpose. It is noteworthy that the two alleged eyewitnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. The continuance of the proceedings is thus nothing but an empty formality. Section 482 Code of Criminal Procedure could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the courts below.

40. In Ashok Sadarangani and Anr. v. Union of India and Ors. JT 2012 (3) SC 469, the issue under consideration was whether an offence which was not compoundable under the provisions of the Code could be quashed. That was a case where a criminal case was registered against the accused persons Under Sections 120-B, 465, 467, 468 and 471 of Indian Penal Code. The allegation was that accused secured the credit facilities by submitting forged property documents as collaterals and utilized such facilities in a dishonest and fraudulent manner by opening Letters of Credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the Bank to negotiate the Letters of Credit in favour of foreign suppliers and also by misusing the cash credit facility. The Court considered the earlier decisions of this Court including B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677, Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1, Shiji alias Pappu (2011) 10 SCC 705, Duncans Agro Industries Limited MANU/SC/0622/1996: (1996) 5 SCC 591, Rumi Dhar (Smt.) MANU/SC/0544/2009: (2009) 6 SCC 364 and Sushil Suri MANU/SC/0563/2011: (2011) 5 SCC 708 and also referred to the order of reference in one of the cases before us. In paragraphs 17, 18, 19 and 20 of the Report it was held as under:

17. Having carefully considered the facts and circumstances of the case, as also the law relating to the continuance of criminal cases where the complainant and the accused had settled their differences and had arrived at an amicable arrangement, we see no reason to differ with the views that had been taken in Nikhil Merchant's case or Manoj Sharma's case (supra) or the several decisions that have come thereafter. It is, however, no coincidence that the golden thread which runs through all the decisions cited, indicates that continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimately, may conclude in a decision which may be of any consequence to any of the other parties. Even in Sushil Suri's case on which the learned Additional Solicitor General had relied, the learned Judges who decided the said case, took note of the decisions in various other cases, where it had been reiterated that the exercise of inherent powers would depend

entirely on the facts and circumstances of each case. In other words, not that there is any restriction on the power or authority vested in the Supreme Court in exercising powers under Article 142 of the Constitution, but that in exercising such powers the Court has to be circumspect, and has to exercise such power sparingly in the facts of each case. Furthermore, the issue, which has been referred to a larger Bench in Gian Singh's case (supra) in relation to the decisions of this Court in B.S. Joshi's case, Nikhil Merchant's case, as also Manoj Sharma's case, deal with a situation which is different from that of the present case. While in the cases referred to hereinabove, the main question was whether offences which were not compoundable, Under Section 320 Code of Criminal Procedure. could be quashed Under Section 482 Code of Criminal Procedure., in Gian Singh's case the Court was of the view that a non-compoundable offence could not be compounded and that the Courts should not try to take over the function of the Parliament or executive. In fact, in none of the cases referred to in Gian Singh's case, did this Court permit compounding of non-compoundable offences. On the other hand, upon taking various factors into consideration, including the futility of continuing with the criminal proceedings, this Court ultimately quashed the same.

18. In addition to the above, even with regard to the decision of this Court in Central Bureau of Investigation v. Ravi Shankar Prasad and Ors.: [MANU/SC/0808/2009: (2009) 6 SCC 351], this Court observed that the High Court can exercise power Under Section 482 Code of Criminal Procedure. to do real and substantial justice and to prevent abuse of the process of Court when exceptional circumstances warranted the exercise of such power. Once the circumstances in a given case were held to be such as to attract the provisions of Article 142 or Articles 32 and 226 of the Constitution, it would be open to the Supreme Court to exercise its extraordinary powers under Article 142 of the Constitution to quash the proceedings, the continuance whereof would only amount to abuse of the process of Court. In the instant case the dispute between the Petitioners and the Banks having been compromised, we have to examine whether the continuance of the criminal proceeding could turn out to be an exercise in futility without anything positive being ultimately achieved.

19. As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.

20. In the present case, the fact situation is different from that in Nikhil Merchant's case (supra). While in Nikhil Merchant's case the accused had misrepresented the financial status of the company in question in order to avail of credit facilities to an extent to which the company was not entitled, in the instant case, the allegation is that as part of a larger conspiracy, property acquired on lease from a person who had no title to the leased properties, was offered as collateral security for loans obtained. Apart from the above,

the actual owner of the property has filed a criminal complaint against Shri Kersi V. Mehta who had held himself out as the Attorney of the owner and his family members. The ratio of the decisions in B.S. Joshi's case and in Nikhil Merchant's case or for that matter, even in Manoj Sharma's case, does not help the case of the writ Petitioners. In Nikhil Merchant's case, this Court had in the facts of the case observed that the dispute involved had overtures of a civil dispute with criminal facets. This is not so in the instant case, where the emphasis is more on the criminal intent of the Petitioners than on the civil aspect involving the dues of the Bank in respect of which a compromise was worked out.

The Court distinguished B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 and Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 by observing that those cases dealt with different fact situation.

41. In Rajiv Saxena and Ors. v. State (NCT of Delhi) and Anr. MANU/SC/0062/2012: (2012) 5 SCC 627, this Court allowed the quashment of criminal case Under Sections 498-A and 496 read with Section 34 Indian Penal Code by a brief order. It was observed that since the parties had settled their disputes and the complainant agreed that the criminal proceedings need not be continued, the criminal proceedings could be quashed.

42. In a very recent judgment decided by this Court in the month of July, 2012 in Jayrajsinh Digvijaysinh Rana v. State of Gujarat and Anr. MANU/SC/0585/2012: JT 2012 (6) SC 504, this Court was again concerned with the question of quashment of an FIR alleging offences punishable Under Sections 467, 468, 471, 420 and 120-B Indian Penal Code. The High Court refused to quash the criminal case Under Section 482 of the Code. The question for consideration was that inasmuch as all those offences, except Section 420 Indian Penal Code, were non-compoundable offences Under Section 320 of the Code, whether it would be possible to quash the FIR by the High Court Under Section 482 of the Code or by this Court under Article 136 of the Constitution of India. The Bench elaborately considered the decision of this Court in Shiji alias Pappu (2011) 10 SCC 705 and by invoking Article 142 of the Constitution quashed the criminal proceedings. It was held as under:

10. In the light of the principles mentioned above, inasmuch as Respondent No. 2 -the Complainant has filed an affidavit highlighting the stand taken by the Appellant (Accused No. 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, we accept the terms of settlement insofar as the Appellant herein (Accused No. 3) is concerned.

11. In view of the same, we quash and set aside the impugned FIR No. 45/2011 registered with Sanand Police Station, Ahmedabad for offences punishable Under Sections 467, 468, 471, 420 and 120-B of Indian Penal Code insofar as the Appellant (Accused No. 3) is concerned. The appeal is allowed to the extent mentioned above.

43. In Y. Suresh Babu v. State of A.P. MANU/SC/0900/1987: (2005) 1 SCC 347 decided on April 29, 1987, this Court allowed the compounding of an offence Under Section 326 Indian Penal Code even though such compounding was not permitted by Section 320 of the Code. However, in Ram Lal and Anr. v. State of J and K (MANU/SC/0034/1999: 1999 2 SCC 213, this Court observed that Y. Suresh Babu MANU/SC/0900/1987: (2005) 1 SCC 347 was per incuriam. It was held that an offence which law declares to be non-compoundable cannot be compounded at all even with the permission of the Court.

44. Having surveyed the decisions of this Court which throw light on the question raised before us, two decisions, one given by the Punjab and Haryana High Court and the other by Bombay High Court deserve to be noticed.

45. A five-Judge Bench of the Punjab and Haryana High Court in Kulwinder Singh and Ors. v. State of Punjab and Anr. MANU/PH/0222/2007: (2007) 4 CTC 769 was called upon to determine, inter alia, the question whether the High Court has the power Under Section 482 of the Code to quash the criminal proceedings or allow the compounding of the offences in the cases which have been specified as non-compoundable offences under the provisions of Section 320 of the Code. The five-Judge Bench referred to quite a few decisions of this Court including the decisions in Madhu Limaye MANU/SC/0103/1977: (1977) 4 SCC 551, Bhajan Lal MANU/SC/0115/1992: 1992 Supp (1) SCC 335, L. Muniswamy MANU/SC/0143/1977: (1977) 2 SCC 699, Simrikhia MANU/SC/0440/1990: (1990) 2 SCC 437, B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675 and Ram Lal (MANU/SC/0034/1999: 1999 2 SCC 213 and framed the following guidelines:

a. Cases arising from matrimonial discord, even if other offences are introduced for aggravation of the case.

b. Cases pertaining to property disputes between close relations, which are predominantly civil in nature and they have a genuine or belaboured dimension of criminal liability. Notwithstanding a touch of criminal liability, the settlement would bring lasting peace and harmony to larger number of people.

c. Cases of dispute between old partners or business concerns with dealings over a long period which are predominantly civil and are given or acquire a criminal dimension but the parties are essentially seeking a redressal of their financial or commercial claim.

d. Minor offences as Under Section 279, Indian Penal Code may be permitted to be compounded on the basis of legitimate settlement between the parties. Yet another offence which remains non-compoundable is Section 506 (II), Indian Penal Code, which is punishable with 7 years imprisonment. It is the judicial experience that an offence Under Section 506 Indian Penal Code in most cases is based on the oral declaration with

different shades of intention. Another set of offences, which ought to be liberally compounded, are Sections 147 and 148, Indian Penal Code, more particularly where other offences are compoundable. It may be added here that the State of Madhya Pradesh vide M.P. Act No. 17 of 1999 (Section 3) has made Sections 506(II) Indian Penal Code, 147 Indian Penal Code and 148, Indian Penal Code compoundable offences by amending the schedule Under Section 320, Code of Criminal Procedure.

e. The offences against human body other than murder and culpable homicide where the victim dies in the course of transaction would fall in the category where compounding may not be permitted. Heinous offences like highway robbery, dacoity or a case involving clear-cut allegations of rape should also fall in the prohibited category. Offences committed by Public Servants purporting to act in that capacity as also offences against public servant while the victims are acting in the discharge of their duty must remain non-compoundable. Offences against the State enshrined in Chapter-VII (relating to army, navy and air force) must remain non-compoundable.

f. That as a broad guideline the offences against human body other than murder and culpable homicide may be permitted to be compounded when the court is in the position to record a finding that the settlement between the parties is voluntary and fair.

While parting with this part, it appears necessary to add that the settlement or compromise must satisfy the conscience of the court. The settlement must be just and fair besides being free from the undue pressure, the court must examine the cases of weaker and vulnerable victims with necessary caution.

To conclude, it can safely be said that there can never be any hard and fast category which can be prescribed to enable the Court to exercise its power Under Section 482 of the Code of Criminal Procedure. The only principle that can be laid down is the one which has been incorporated in the Section itself, i.e., "to prevent abuse of the process of any Court" or "to secure the ends of justice.

It was further held as under:

23. No embargo, be in the shape of Section 320(9) of the Code of Criminal Procedure., or any other such curtailment, can whittle down the power Under Section 482 of the Code of Criminal Procedure.

25. The only inevitable conclusion from the above discussion is that there is no statutory bar under the Code of Criminal Procedure. which can affect the inherent power of this Court Under Section 482. Further, the same cannot be limited to matrimonial cases alone and the Court has the wide power to quash the proceedings even in non-compoundable offences notwithstanding the bar Under Section 320 of the Code of Criminal Procedure., in order to prevent the abuse of law and to secure the ends of justice. The power Under

Section 482 of the Code of Criminal Procedure. is to be exercised ex-debito Justitiae to prevent an abuse of process of Court. There can neither be an exhaustive list nor the defined para-meters to enable a High Court to invoke or exercise its inherent powers. It will always depend upon the facts and circumstances of each case. The power Under Section 482 of the Code of Criminal Procedure. has no limits. However, the High Court will exercise it sparingly and with utmost care and caution. The exercise of power has to be with circumspection and restraint. The Court is a vital and an extra-ordinary effective instrument to maintain and control social order. The Courts play role of paramount importance in achieving peace, harmony and ever-lasting congeniality in society. Resolution of a dispute by way of a compromise between two warring groups, therefore, should attract the immediate and prompt attention of a Court which should endeavour to give full effect to the same unless such compromise is abhorrent to lawful composition of the society or would promote savagery.

46. A three-Judge Bench of the Bombay High Court in Abasaheb Yadav Honmane v. State of Maharashtra MANU/MH/0218/2008: 2008 (2) Mh.L.J. 856 dealt with the inherent power of the High Court Under Section 482 of the Code vis-à-vis the express bar for compounding of the non-compoundable offences in Section 320(9) of the Code. The High Court referred to various decisions of this Court and also the decisions of the various High Courts and then stated as follows:

The power of compounding on one hand and quashing of criminal proceedings in exercise of inherent powers on the other, are incapable of being treated as synonymous or even inter-changeable in law. The conditions precedent and satisfaction of criteria in each of these cases are distinct and different. May be, the only aspect where they have any commonality is the result of exercise of such power in favour of the accused, as acquittal is the end result in both these cases. Both these powers are to be exercised for valid grounds and with some element of objectivity. Particularly, the power of quashing the FIR or criminal proceedings by the Court by taking recourse to inherent powers is expected to be used sparingly and that too without losing sight of impact of such order on the criminal justice delivery system. It may be obligatory upon the Court to strike a balance between the nature of the offence and the need to pass an order in exercise of inherent powers, as the object of criminal law is protection of public by maintenance of law and order.

47. Section 320 of the Code articulates public policy with regard to the compounding of offences. It catalogues the offences punishable under Indian Penal Code which may be compounded by the parties without permission of the Court and the composition of certain offences with the permission of the court. The offences punishable under the special statutes are not covered by Section 320. When an offence is compoundable Under Section 320, abatement of such offence or an attempt to commit such offence or where the accused is liable Under Section 34 or 149 of the Indian Penal Code can also be compounded in the same manner. A person who is under 18 years of age or is an idiot or a lunatic is not competent to contract compounding of offence but the same can be done

on his behalf with the permission of the court. If a person is otherwise competent to compound an offence is dead, his legal representatives may also compound the offence with the permission of the court. Where the accused has been committed for trial or he has been convicted and the appeal is pending, composition can only be done with the leave of the court to which he has been committed or with the leave of the appeal court, as the case may be. The revisional court is also competent to allow any person to compound any offence who is competent to compound. The consequence of the composition of an offence is acquittal of the accused. Sub-section (9) of Section 320 mandates that no offence shall be compounded except as provided by this Section. Obviously, in view thereof the composition of an offence has to be in accord with Section 320 and in no other manner.

48. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable Under Section 320 of the Code.

49. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, 'nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

50. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power Under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

51. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised

in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court Under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

52. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers Under Section 482. No precise and inflexible guidelines can also be provided.

53. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court Under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

54. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under Indian Penal Code or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the

framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

55. B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677, Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1 and Shiji alias Pappu (2011) 10 SCC 705 do illustrate the principle that High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power Under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court Under Section 482. Can it be said that by quashing criminal proceedings in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677, Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1 and Shiji alias Pappu (2011) 10 SCC 705, this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence Under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power Under Section 482. The two powers are distinct and different although ultimate consequence may be same viz., acquittal of the accused or dismissal of indictment.

56. We find no incongruity in the above principle of law and the decisions of this Court in Simrikhia MANU/SC/0440/1990: (1990) 2 SCC 437, Dharampal MANU/SC/0214/1993: 1993 Cri. L.J. 1049, Arun Shankar Shukla MANU/SC/0410/1999: AIR 1999 SC 2554, Ishwar Singh MANU/SC/8126/2008: (2008) 15 SCC 667, Rumi Dhar (Smt.). MANU/SC/0544/2009: (2009) 6 SCC 364 and Ashok Sadarangani JT 2012 (3) SC 469. The principle propounded in Simrikhia MANU/SC/0440/1990: (1990) 2 SCC 437 that the inherent jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In Dharampal MANU/SC/0214/1993: 1993 Cri. L.J. 1049, the Court observed the same thing that the inherent powers Under Section 482 of the Code cannot be utilized for exercising powers which are expressly barred by the Code. Similar statement of law is made in Arun Shankar Shukla MANU/SC/0410/1999: AIR 1999 SC 2554. In Ishwar Singh MANU/SC/8126/2008: (2008) 15 SCC 667, the accused was alleged to have committed an offence punishable Under Section 307, Indian Penal Code and with reference to Section 320 of the Code, it was held that the offence punishable Under Section 307 Indian Penal Code was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In Rumi Dhar (Smt.)28 although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for commission of offences Under Section 120-B/420/467/468/471 of the Indian Penal Code along with the bank officers

who were being prosecuted Under Section 13(2) read with 13(1)(d) of Prevention of Corruption Act. The Court refused to quash the charge against the accused by holding that the Court would not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. Ashok Sadarangani JT 2012 (3) SC 469 was again a case where the accused persons were charged of having committed offences Under Sections 120-B, 465, 467, 468 and 471, Indian Penal Code and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilized such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 and Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1 and it was held that B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, and Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 dealt with different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in Ashok Sadarangani JT 2012 (3) SC 469 was more on the criminal intent than on a civil aspect. The decision in Ashok Sadarangani JT 2012 (3) SC 469 supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing.

57. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences Under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil favour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc.

or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

58. In view of the above, it cannot be said that B.S. Joshi MANU/SC/0230/2003: (2003) 4 SCC 675, Nikhil Merchant MANU/SC/7957/2008: (2008) 9 SCC 677 and Manoj Sharma MANU/SC/8122/2008: (2008) 16 SCC 1 were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the concerned Bench(es).

MANU/SC/0074/1962

Back to Section 124 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 169 of 1957

Decided On: 20.01.1962

Kedar Nath Singh Vs. State of Bihar

Hon'ble Judges/Coram:
B.P. Sinha, C.J., A.K. Sarkar, J.R. Mudholkar, N. Rajagopala Ayyangar and S.K. Das, JJ.

JUDGMENT
B.P. Sinha, C.J.

1. In these appeals the main question in controversy is whether Sections 124A and 505 of the Indian Penal Code have become void in view of the provisions of Article 19(1)(a) of the Constitution. The constitutionality of the provisions of s. 124A, which was mainly canvassed before us, is common to all the appeals, the facts of which may shortly be stated separately.

2. In Criminal Appeal 169 of 1957, the appellant is one Kedar Nath Singh, who was prosecuted before a Magistrate, 1st Class, at Begusarai, in the district of Monghyr, in Bihar. He framed the following charges against the accused person, which are set out in extenso in order to bring out the gravamen of the charge against him.

"First. - That you on 26th day of May, 1953 at village Barauni, P. S. Taghra (Monghyr) by speaking the words, to wit,

(a) To-day the dogs of the C.I.D. are loitering round Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country and elected these Congress goondas to the gaddi and seated them on it. To-day these Congress goondas are sitting on the gaddi due to mistake of the people. When we drove out the Britishers, we shall strike and turn out these Congress goondas as well. These official dogs will also be liquidated along with these Congress goondas. These Congress goondas are banking upon the American dollars and imposing various kinds of taxes on the people to-day. The blood of our brothers - mazdoors and Kishans is being sucked. The capitalists and the zamindars of this country help these Congress goondas. These zamindars and capitalists will also have to be brought before the people's court along with these Congress goondas.

(b) On the strength of the organisation and unity of Kisans and mazdoors the Forward Communists Party will expose the black deeds of the Congress goondas, who are just like the Britishers. Only the colour of the body has changed. They have to-day established a rule of lathis and bullets in the country. The Britishers had to go away from this land. They had aeroplanes, guns, bombs and other weapons with them.

(c) The Forward Communist Party does not believe in the doctrine of vote itself. The party had always been believing in revolution and does so even at present. We believe in that revolution, which will come and in the flames of which the capitalists, zamindars and the Congress leaders of India, who have made it their profession to loot the country, will be reduced to ashes and on their ashes will be established a Government of the poor and the downtrodden people of India.

(d) It will be a mistake to expect anything from the Congress rulers. They (Congress rulers) have set up V. Bhave in the midst of the people by causing him wear a langoti in order to divert the people's attention from their mistakes. To-day Vinova is playing a drama on the stage of Indian politics. Confusion is being created among the people. I want to tell Vinova and advice his agents, "you should understand it that the people cannot be deceived by this Yojna, illusion and fraud of Vinova". I shall advise Vinova not to become a puppet in the hands of the Congress men. These persons, who understand the Yojna of Vinova, realise that Vinova is an agent of the Congress Government.

(e) I tell you that this Congress Government will do no good to you.

(f) I want to tell the last word even to the Congress Tyrants, "you play with the people and ruin them by entangling them in the mesh of bribery, black-marketing and corruption. To-day the children of the poor are hankering for food and you Congress men are assuming the attitude of Nawabs sitting on the chairs....."

3. Brought or attempted to bring into hatred or contempt or excited or attempted to excite disaffection towards the Government established by law in the Indian Union and thereby committed an offence punishable under section 124A of the Indian Penal Code and within my cognizance.

Secondly. - That you on the 26th day of May, 1953 at village Barauni, P. S. Tegra (Monghyr) made the statement, to wit,

(a) To-day the dogs of the C.I.D. are loitering round Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country, and elected these Congress Goondas to the gaddi and seated them on it. To-day these Congress Goondas are sitting on the gaddi due to the mistake of the people. When we have driven out the Britishers, we shall strike and turn out these Congress Goondas as well. These official dogs will also be liquidated along with these Congress Goondas.

These Congress Goondas are banking upon the American dollars and imposing various kinds of taxes on the people to-day. The blood of our brothers Mazdoors and Kisans is being sucked. The capitalists and the zamindars of this country help these Congress Goondas. These zamindars and capitalists will also have to be brought before the people's Court along with these Congress Goondas.

(b) On the strength of organisation and unity of kisans and mazdoors the Forward Communist Party will expose the black-deeds of the Congress Goondas, who are just like the Britishers. Only the colour of the body has changed. They have, to-day, established a rule of lathis and bullets in the country. The Britishers had to go away from this land. They had aeroplanes, guns, bombs, and other reasons with them.

(c) The Forward Communist party does not believe in the doctrine of votes itself. The party had always been believing in revolution and does so even at present. We believe in that revolution, which will come and in the flames of which the capitalists, zamindars and the Congress leaders of India, who have made it their profession to loot the country, will be reduced to ashes, and on their ashes will be established a Government of the poor and the downtrodden people of India.

(d) It will be a mistake to expect anything from the Congress rulers. They (Congress rulers) have set up V. Bhave in the midst of the people by causing him wear a langoti in order to divert the attention of the people from their mistakes. To-day Vinova is playing a drama on the stage of Indian politics. Confusion is being created among the people. I want to tell Vinova and advise his agents, "You should understand it that the people cannot be delivered by this Yojna, illusion and fraud of Vinova. I shall advise Vinova not to become a puppet in the hands of the Congress men. Those persons who understand the Yojna of Vinova, realise that Vinova is an agent of Congress Government.

(e) I tell you that no good will be done to you by this Congress Government.

(f) I want to tell the last word even to Congress tyrants "you play with the people and ruin them by entangling them in the mesh of bribery, black-marketing and corruption. To-day the children to the poor are hankering for food and you (Congress men) are assuming the attitude of Nawabs sitting on the chairs".....

with intent to cause or which was likely to cause fear or alarm to the public whereby any persons might be induce to commit an offence against the State of Bihar and against the public tranquillity, and thereby committed an offence punishable under section 505(b) of the Indian Penal Code and within my cognizance."

4. After recording a substantial volume of oral evidence, the learned Trial Magistrate convicted the accused person both under Sections 124A and 505(b) of the Indian Penal

Code, the sentenced him to under go rigorous imprisonment for one year. No separate sentence was passed in respect of the conviction under the latter section.

5. The convicted person preferred an appeal to the High Court of Judicature at Patna, which was heard by the late Mr. Justice Naqui Imam, sitting singly. By his judgment and order dated April 9, 1956, he upheld the convictions and the sentence and dismissed the appeal. In the course of his Judgment, the learned Judge observed that the subject-matter of the charge against the appellant was nothing but a vilification of the Government; that it was full of incitements to revolution and that the speech taken as a whole was certainly seditious. It is not a speech criticising any particular policy of the Government or criticising any of its measures. He held that the offences both under Sections 124A and 505(b) of the Indian Penal Code had been made out.

6. The convicted person moved this Court and obtained special leave to appeal. It will be noticed that the constitutionality of the provisions of the sections under which the appellant was convicted had not been canvassed before the High Court. But in the petition for special leave, to this Court, the ground was taken that Sections 124A and 505 of the Indian Penal Code "are inconsistent with Art. 19(1)(a) of the Constitution". The appeal was heard in this Court, in the first instance, by a Division Bench on May 5, 1959. The Bench, finding that the learned counsel for the appellant had raised the constitutional issue as to the validity of Sections 124A and 505 of the Indian Penal Code, directed that the appeal be placed for hearing by a Constitution Bench. The case was then placed before a Constitution Bench, on November 4, 1960, when that Bench directed notice to issue to the Attorney General of India under r. 1, O. 41 of the Supreme Court Rules. The matter was once again placed before constitution Bench on February 9, 1961, when it was adjourned for two months in order to enable the State Governments concerned with this appeal, as also with the connected Criminal Appeals Nos. 124-126 of 1958 (in which the Government of Uttar Pradesh is the appellant) to make up their minds in respect of the prosecutions, as also in view of report that the Law Commission was considering the question of amending the law of sedition in view of the new set-up. As the States concerned have instructed their counsel to press the appeals, the matter has finally come before us.

7. In Criminal Appeals 124-126 of 1958, the State of Uttar Pradesh is the appellant, though the respondents are different. In Criminal Appeal 124 of 1958, the accused person is one Mohd. Ishaq Ilmi. He was prosecuted for having delivered a speech at Aligarh as Chairman of the Reception Committee of the All India Muslim Convention on October 30, 1953. His speech on that occasion, was thought to be seditions. After the necessary sanction, the Magistrate held an enquiry, and finding a prima facie case made out against the accused, committed him to the Court of Session. The learned Sessions Judge, by his Judgment dated January 8, 1955, acquitted him of the charge under s. 153A, but convicted him of the other charge under s. 124A, of the Indian Penal Code, and sentenced him to rigorous imprisonment for one year. The convicted person preferred an appeal to the

High Court. In the High Court the constitutionality of s. 124A of the Indian Penal Code was challenged.

8. In Criminal Appeal No. 125 of 1958, the facts are that on May 29, 1954, a meeting of the Bolshovik Party was organised in village Hanumanganj, in the District of Basti, in Uttar Pradesh. On that occasion, the respondent Rama and was found to have delivered an objectionable speech in so far as he advocated the use of violence for overthrowing the Government established by law. After the sanction of the Government to the prosecution had been obtained, the learned Magistrate held an enquiry and ultimately committed him to take his trial before the Court of Sessions. In due course, the learned Sessions Judge convicted the accused person under s. 124A of the Indian Penal Code and sentenced him to rigorous imprisonment for three years. He held that the accused person had committed the offence by inciting the audience to an open violent rebellion against the Government established by law, by the use of arms. Against the aforesaid order of conviction and sentence, the accused person preferred an appeal to the High Court of Allahabad.

9. In Criminal Appeal 126 of 1958, the respondent is one Parasnath Tripathi. He is alleged to have delivered a speech in village Mansapur, P. S. Akbarpur, in the district of Faizabad, on September 26, 1955, in which he is said to have exhorted the audience to organise a volunteer army and resist the Government and its servants by violent means. He is also said to have excited the audience with intent to create feelings of hatred and enmity against the Government. When he was placed on trial for an offence under s. 124A of the Indian Penal Code, the accused person applied for a writ of Habeas Corpus in the High Court of Judicature at Allahabad on the ground that his detention was illegal inasmuch as the provisions s. 124A of the Indian Penal Code were void as being in contravention of his fundamental rights of free speech and expression under Art. 19(1)(a) of the Constitution. This matter, along with the appeals which have given rise to appeals Nos. 124 and 125, as aforesaid, were ultimately placed before a Full Bench, consisting of Desai, Gurtu and Beg, JJ. The learned judges, in separate but concurring judgments, took the view that s. 124A of the Indian Penal Code was ultra vires Art. 19(1)(a) of the Constitution. In that view of the matter, they acquitted the accused persons, convicted as aforesaid in the two appeals Nos. 124 and 125, and granted the writ petition of the accused in Criminal Appeal No. 126. In all these cases the High Court granted the necessary certificate that the case involved important questions of law relating to the interpretation of the Constitution. That is how these appeals are before us on a certificate of fitness granted by the High Court.

10. Shri C. B. Agarwala, who appeared on behalf of the State of Uttar Pradesh in support of the appeals against the orders of acquittal passed by the High Court, contended that the judgment of the High Court, contended that the judgment of the High Court, (now reported in Ram Nandan v. State I.L.R. (1958) All. 84 in which it was laid down by the Full Bench that s. 124A of the Indian Penal Code was ultra vires Art. 19(1)(a) of the Constitution and, therefore, void for the person that it was not in the interest of public

order and that the restrictions imposed thereby were not reasonable restrictions on the freedom of speech and expression, was erroneous. He further contended that the section impugned came within the saving clause (2) of Art. 19, and that the reasons given by the High Court to the contrary were erroneous. He relied upon the observations of the Federal Court in Niharendu Dutt Majumdar v. The King Emperor [1943] F.C.R. 38. He also relied on Stephen's Commentaries on the Laws of England, Volume IV, 21st Edition, page 141, and the Statement of the Law in Halsbury's Laws of England, 3rd Edition, volume 10, page 569, and the cases referred to in those volumes. Mr. Gopal Behari, appearing on behalf of the respondents in the Allahabad cases has entirely relied upon the full Bench decision of the Allahabad High Court in his favour. Shri Sharma appearing on behalf of the appellant in the appeal from the Patna High Court has similarly relied upon the decision aforesaid of the Allahabad High Court.

11. Before dealing with the contentions raised on behalf of the parties, it is convenient to set out the history of the law, the amendments it has undergone and the interpretations placed upon the provisions of s. 124A by the Courts in India, and by their Lordships of the judicial Committee of the Privy Council. The section corresponding to s. 124A was originally s. 113 of Macaulay's Draft Penal Code of 1837-39, but the section was omitted from the Indian Penal Code as it was enacted in 1860. The reason for the omission from the Code as enacted is not clear, but perhaps the legislative body did not feel sure above its authority to enact such a provision in the Code. Be that as it may, s. 124A was not placed on the Statute Book until 1870, by Act XXVII of 1870. There was a considerable amount of discussion at the time the amendment was introduced by Sir James, Stephen, but what he said while introducing the bill in the legislature may not be relevant for our present purposes. The section as then enacted ran as follows:-

"124A. Exciting Disaffection -

Whoever, by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.
Explanation - Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause."

12. The first case in India that arose under the section is what is known as the Bangobasi case (Queen-Emprees v. Jogendra Chunder Bose I.L.R. (1892) Cal. 35 which was tried by

a Jury before Sir Comer Petheram, C.J. while charging the jury, the learned Chief Justice explained the law to the jury in these terms:

"Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a men's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his bearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling."

13. The next case is the celebrated case of Queen-Empress v. Balgangadhar Tilak I.L.R. (1898) 22 Bom. 112 which came before the Bombay High Court. The case was tried by a jury before Strachey, J. The learned judge, in the course of his charge to the jury, explain the law to them in these terms:

"The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are "feelings of disaffection"? I agree with Sir Comer Petheram in the Bangobasi case that disaffection means simply the absence of affection. It means hatred, enmity dislike, hostility, contempt and every from of ill-will to the Government. "Disloyalty" is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment; if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will, of course, find him guilty. But if you should hold that that charge is not made out, and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places on absolutely the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find

that either of the prisoners has tried to excite such feeling in others, you must convict him even if there is nothing to show that he succeeded. Again, it is important that you should fully realise another point. The offence consists in exciting or attempting to excite in others certain bad feeling towards the Government. It is not the exciting or attempting to excite in others certain bad feeling towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section, and to a misapplication of the explanation beyond its true scope."

14. The long quotation has become necessary in view of what followed later, namely, that this statement of the law by the learned judge came in for a great deal of comment and judicial notice. We have omitted the charge to the jury relating to the explanation to s. 124A because that explanation has not yielded place to three separate explanations in view of judicial opinions expressed later. The jury, by a majority of six to three, found Shri Balgangadhar Tilak guilty. Subsequently, he, on conviction, applied under clause 41 of the Letters Patent for leave to appeal to the Privy Council. The application was heard by a Full Bench consisting of Farran, C.J. Candy and Strachey, JJ. It was contended before the High Court at the leave stage, inter alia, that the sanction given by the Government was not sufficient in law in that it had not set out the particulars of the offending articles, and, secondly, that the judge misdirected the jury as to the meaning of the word "disaffection" insofar as he said that it might be equivalent to "absence of affection". With regard to the second point, which is only relevant point before us; the Full Bench expressed itself to the following effect:

"The other ground upon which Mr. Russell has asked as to certify that this is a fit case to be sent to Her Majesty in Council is that there has been a misdirection, and he based his argument on one major and two minor grounds. The major ground was that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section, and we need not say more upon that ground. The first of the minor points is that Mr. Justice Strachey in summing up the case to the jury stated that disaffection meant the

"absence of affection". But although if that phrase has stood alone it might have misled the jury, yet taken in connection with the context we think it is impossible that the jury could have been misled by it. That expression was used in connection with the law as led down by Sir Comer Petheram, in Calcutta in the Bangobashi case. There the Chief Justice instead of using the words "absence of affection" used the words "contrary to affection". If the words "contrary to affection" had been used instead of "absence of affection" in this case there can be no doubt that the summing up would have been absolutely correct in this particular. But taken in connection with the context it is clear that by the words "absence of affection" the learned Judge did not mean the negation of affection but some active sentiment on the other side. Therefore on that point we consider that we cannot certify that this is a fit case for appeal."
In this connection is must be remembered that it is not alleged that there has been a miscarriage of Justice."

15. After making those observations, the Full Bench refused the application for leave. The case was then taken to Her Majesty in Council, by way of application for special leave to appeal to the Judicial Committee. Before their Lordships of the Privy Council, Asquith, Q.C. assisted by counsel of great experience and eminence like Mayne, W. C. Bonnerjee and others, contended that there was a misdirection as to the meaning of section 124A of the Penal Code in that offence had been defined in terms to wide to the effect that "disaffection" meant simply "absence of affection" and that it comprehended every possible form of bad feeling to the Government. In this connection reference was made to the observations of Petheram, C.J. in Queen-Empress v. Jogender Bose I.L.R. (1892) Cal. 35. It was also contended that the appellant's comments had not exceeded what in England would be considered within the functions of a Public journalist and that the misdirection complained of was of the greatest importance not merely to the affected person but to the whole of the Indian Press and also to all her Majesty's subjects; and that it injuriously affected the liberty of the press and the right free speech in public meetings. But in spite of the strong appeal made on behalf of the petitioner for special leave, the Lord Chancellor, delivering the opinion of the Judicial Committee, while dismissing the application, observed that taking in view of the whole of the summing up they did not see any reason to dissent from it, and that keeping in view the rules which Their Lordships observed in the matter of granting leave to appeal in criminal cases, they did not think that the case raised questions which deserve further consideration by the Privy Council. (vide Gangadhar Tilak v. Queen Empress) I.L.R. (1897) IndAp 1.

16. Before noticing the further changes in the Statute, it is necessary to refer to the Full Bench decision of the Allahabad High Court in Queen Empress v. Amba Prasad MANU/UP/0084/1897: I.L.R. (1898) All. 55. In that case, Edge, C.J., who delivered the judgment of the Court, made copious quotations from the judgments of the Calcutta and the Bombay High Courts in the cases above referred to. While generally adopting the reasons for the decisions in the aforesaid two cases, the learned Chief Justice observed that a man may be guilty of the offence defined in s. 124A of attempting to excite feelings

of disaffection against the Government established by law in British India, although in particular article or speech he may insist upon the desirability or expediency of obeying and supporting the Government. He also made reference to the decision of Bombay High Court in the Satara I.L.R. (1898) 22 Bom. 452 case. In that case a Full Bench, consisting of Farran, C.J., and Parsons and Ranade, JJ. had laid down that the word "disaffection" in the section is used in a special sense as meaning political alienation or discontent or disloyalty to the Government or existing authority. They also held that the meaning of word "disaffection" in the main portion of the section was not varied by the explanation. Parsons, J., held that the word "disaffection" could not be construed as meaning "absence of or contrary of affection or love'. Ranade J., interpreted the word "disaffection" not as meaning mere absence or negation of love or good will but a positive feeling of aversion, which is akin to ill will, a definite insubordination of authority or seeking to alienate the people and weaken the bond of allegiance, a feeling which tends to bring the Government into hatred and discontent, by imputing base and corrupt motives to it. The learned Chief Justice of the Allahabad High Court observed that if those remarks were meant to be in any sense different from the construction placed upon the section by Strachey, J., which was approved, as aforesaid, by the Judicial Committee of the Privy Council, the later observations of the Bombay High Court could not be treated as authoritative. As the accused in the Allahabad case had pleaded guilty and the appeal was more or less on the question of sentence, it was not necessary for their Lordships to examine in detail the implications of the section, though they expressed their general agreement with the view of the Calcutta and the Bombay High Courts in the first two cases, referred to above.

17. The section was amended by the Indian Penal Code Amendment Act (IV of 1898). As a result of the amendment, the single explanation to the section was replaced by three separate explanations as they stand now. The section, as it now stands in its present form, is the result of the several A.O.s of 1937, 1948 and 1950, as a result of the constitutional changes, by the Government of India Act, 1935, by the Independence Act of 1947 and by the Indian Constitution of 1950. Section 124A, as it has emerged after successive amendments by way of adaptations as aforesaid, reads as follows:

"Whoever by words, either spoken or written, or by signs or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with transportation for life or any shorter term to which fine may be added or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1. The expression "disaffection" includes disloyalty and all feelings or enmity.

Explanation 2. Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

Explanation 3. Comments expressing disapprobation of the administrative of other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

18. This offence, which is generally known as the offence of Sedition, occurs in Chapter VI of the Indian Penal Code, headed 'Of offences against the State'. This species of offence against the State was not an invention of the British Government in India, but has been known in England for centuries. Every State, whatever its form of Government, has to be armed with the power to punish those who, by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder. In England, the crime has thus been described by Stephen in his Commentaries, on the Laws of England, 21st Edition, volume IV, at pages 141-142, in these words:

"Section IX. Sedition and Inciting to Disaffection - We are now concerned with conduct which, on the one hand, fall short of treason, and on the other does not involve the use of force or violence. The law has here to reconcile the right of private criticism with the necessity of securing the safety and stability of the State. Sedition may be defined as conduct which has, either as its object or as its natural consequence, the unlawful display of dissatisfaction with the Government or with the existing order of society.

The seditions conduct may be by words, by deed, or by writing. Five specific heads of sedition may be enumerated according to the object of the accused. This may be either

1. to excite disaffection against the King, Government, or Constitution, or against Parliament or the administration of justice;

2. to promote, by unlawful means, any alteration in Church or State;

3. to incite a disturbance of the peace;

4. to raise discontent among the King's subjects;

5. to excite class hatred.

It must be observed that criticism on political matters is not of itself seditions. The test is the manner in which it is made. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair criticism. More especially will this be the case when the natural consequence of the prisoner's conduct is to promote public disorder."

22. This statement of the law is derived mainly from the address to the Jury by Fitzerald, J., in the case of Reg v. Alexander Martin Sullivan (1868) 11 CCLC 44. In the course of his address to the Jury the learned Judge observed as follows:

"Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is comprehensive term, and it embraces all those practices, whether by word deed or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."

23. That the law has not changed during the course of the centuries is also apparent from the following statement of the law by Coleridge, J., in the course of his summing up to the Jury in the case of Rex. v. Aldred (1909) 22 CCLC 1:

"Nothing is clearer than the law on this head - namely, that whoever by language, either written or spoken incites or encourages other to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditions libel. The word "sedition" in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form....."

24. In that case, the learned Judge was charging the Jury in respect of the indictment which contained the charge of seditious libel by a publication by the defendant.

25. While dealing with a case arising under Rule 34(6)(e) of the Defence of India Rules under the Defence of India Act (XXXV of 1939) Sir Maurice Gwyer, C.J., speaking for the Federal Court, made the following observations in the case of Niharendu Dutt Majumdar v. The King Emperor MANU/FE/0005/1942: (1942) F.C.R. 38; and has pointed out that the language of s. 124A of the Indian Penal Code, which was in pari materia with that of the Rule in question, had been adopted from the English Law, and referred with approval to the observations of Fitzerald, J., in the case quoted above; and made the following observations which are quite apposite:

".... generally speaking, we think that the passage accurately states the law as it is to be gathered from an examination of a great number of judicial pronouncements.

The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilisation and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make

the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Government, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable mean that that is their intention or tendency."

26. This statement of the law was not approved by their Lordships of the Judicial Committee of the Privy Council in the case of King-Emperor v. Sadashiv Narayan Bhalerao I.L.R. (1947) IndAp 89. The Privy Council, after quoting the observations of the learned Chief Justice in Niharendu's case MANU/FE/0005/1942: (1942) F.C.R. 38, while disapproving of the decision of the Federal Court, observed that there was no statutory definition of "Sedition" in England, and the meaning and content of the crime had to be gathered from any decisions. But those were not relevant considerations when one had to construe the statutory definition of 'Sedition' as in the Code. The Privy Council held that the language of s. 124A, or of the Rule aforesaid, under the Government of India Act, did not justify the statement of the law as made by the learned Chief Justice in Niharendu's case MANU/FE/0005/1942: (1942) F.C.R. 38 they also held that the expression "excite disaffection" did not include "excite disorder", and that, therefore, the decision of the Federal Court in Niharendu's case MANU/FE/0005/1942: (1942) F.C.R. 38 proceeded on a wrong construction of s. 124A of the Penal Code, and of sub-para (e), sub-rule (6) of Rule 34 of the Defence of India Rules. Their Lordships approved of the dicta in the case of Bal Gangadhar Tilak I.L.R. (1898) 22 Bom. 112, and in the case of Annie Basant v. Advocate General of Madras I.L.R. (1919) IndAp 176, which was a case under s. 4 of the Indian Press Act. (I of 1910), which was closely similar in language to s. 124A of the Penal Code.

27. The Privy Council also referred to their previous decision in Wallace-Johnson v. The King [1940] A.C. 231 which was a case under sub-s. 8 of s. 326 of the Criminal Code of the Gold Coast, which defined "seditious intention" in terms similar to the words of s. 124A of the Penal Code. In that case, their Lordships had laid down that incitement to violence was not a necessary ingredient of the Crime of sedition as defined in that law.

28. Thus, there is a direct conflict between the decision of the Federal Court in Niharendu's case MANU/FE/0005/1942: (1942) F.C.R. 38 and of the Privy Council in a

number of cases from India and the Gold Coast, referred to above. It is also clear that either view can be taken and can be supported on good reasons. The Federal Court decision takes into consideration, as indicated above, the pre-existing Common Law of England in respect of sedition. It does not appear from the report of the Federal Court decision that the rulings aforesaid of the Privy Council had been brought to the notice of their Lordships of the Federal Court.

29. So far as this Court is concerned, the question directly arising for determination in this batch of cases has not formed the subject matter of decision previously. But certain observations made by the Court in some cases, to be presently noticed, with reference to the interpretation between freedom of speech and seditious writing or speaking have been made in the very first year of the coming into force of the Constitution. Two cases involving consideration of the fundamental right of freedom of speech and expression and certain laws enacted by some of the States imposing restrictions on that right came up for consideration before this Court. Those cases reported in Romesh Thappar v. The State of Madras MANU/SC/0006/1950: 1950CriLJ1514, and Brij Bhushan v. The State of Delhi MANU/SC/0007/1950: 1950CriLJ1525 were heard by Kania C.J. Pazl Ali, Patanjali Shastri, Mehr Chand Mahajan, Mukherjea and Das, JJ, and judgments were delivered on the same day (May 26, 1950). In Romesh Thappar's case MANU/SC/0006/1950: 1950CriLJ1514, the majority of the Court declared s. 9(1-A) of the Madras Maintenance of Public Order Act (Mad. XXXIII of 1949), which had authorised imposition of restrictions on the fundamental right of freedom of speech, to be in excess of clause (2) of Art. 19 of the Constitution authorising such restrictions, and, therefore void and unconstitutional. In Brij Bhushan's case MANU/SC/0007/1950: 1950CriLJ1525, the same majority struck down s. 7(1)(c) of the East Punjab Public Safety Act, 1949, as extended to the Province of Delhi, authorising the imposition of restrictions on the freedom of speech and expression for preventing or combating any activity prejudicial to the public safety or the maintenance of public order. The Court held those provisions to be in excess of the powers conferred on the Legislature by clause (2) of Art. 19 of the Constitution. Mr. Justice Patanjali Sastri, speaking for the majority of the Court in Romesh Thapper's case MANU/SC/0006/1950: 1950CriLJ1514 made the following observations with reference to the decisions of the Federal Court and the Judicial Committee of the Privy Council as to what the law of Sedition in India was:

"It is also worthy of note that the word "sedition" which occurred in article 13(2) of the Draft Constitution prepared by the Drafting Committee was deleted before the article was finally passed as article 19(2). In this connection it may be recalled that the Federal Court had, in defining sedition Niharendu Dutt Majumdar v. The King emperor MANU/FE/0005/1942: (1942) F.C.R. 38 held that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency", but the Privy Council overruled that decision and emphatically reaffirmed the view expressed in Tilak's case to the effect that "the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government

and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small" - King Emperor v. Sadashiv Narayan Bhalerao. Deletion of the word "sedition" from the draft article 13(2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security of or tend to overthrow the State. It is also significant that the corresponding Irish formula of "undermining the public order or the authority of the State" (article 40(6)(i) of the Constitution of Fire, 1937) did not apparently find favour with the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible, freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was "the leading spirit in the preparation of the First Amendment of the Federal Constitution" that "it is better the leave a few of its noxious branches to their luxuriant growth, than, by pruning them away to injure the vigour of those yielding the proper fruits": (quoted in Near v. Minnesotta).

30. Those observations were made to bring out the difference between the "security of the State" and "public order". As the latter expression did not find a place in Art. 19(2) of the Constitution, as it stood originally, the section was struck down as unconstitutional. Fazl Ali, J., dissented from the views thus expressed by the majority and reiterated his observations in Brij Bhushan's case MANU/SC/0007/1950: 1950CriLJ1525. In the course of his dissenting judgment, he observed as follows:

"It appears to me that in the ultimate analysis the real question to be decided in this case is whether "disorders involving menace to the peace and tranquillity of the Province" and affecting "Public safety" will be a matter which undermines the security of the State or not. I have borrowed the words quoted within inverted commas from the preamble of the Act which shows its scope and necessity and the question raised before us attacking the validity of the Act must be formulated in the manner I have suggested. If the answer to the question is in the affirmative, as I think it must be, then the impugned law which prohibits entry into the State of Madras of "any document or class of documents" for securing public safety and maintenance of public order should satisfy the requirements laid down in article 19(2) of the Constitution. From the trend of the arguments addressed to us, it would appear that if a document is seditious, its entry could be validly prohibited, because sedition is a matter which undermines the Security of the State; but if on the other hand, the document is calculated to disturb public tranquillity and affect public safety, its entry cannot be prohibited, because public disorder and disturbance of public tranquillity are not matters which undermine the security of the State. Speaking for myself, I cannot understand this argument. In Brij Bhushan v. The State. I have quoted good authority to show that sedition owes its gravity to its tendency to create disorders

and an authority on Criminal Law like Sir James Stephen has classed sedition as an offence against public tranquility

31. In Brij Bhushan case MANU/SC/0007/1950: 1950CriLJ1525, Fazl Ali, J., who was again the dissenting judge, gave his reasons to greater detail. He referred to the judgment of the Federal Court in Niharendu Dutt Majumdar's case [1942 S.C.R. 38 and to the judgment of the Privy Council to the contrary in King Emperor v. Sada Shiv Narayan 74 I.A. 89. After having pointed out the divergency of opinion between the Federal Court of India and the Judicial Committee of the Privy Council, the learned Judge made the following observations in order to explain why the term "sedition" was not specifically mentioned in Art. 19(2) of the Constitution:

"The framers of the Constitution must have therefore found themselves face to face with the dilemma as to whether the word "sedition" should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way or other with public disorder; and, on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word "sedition" in clause (2) but used the more general words which cover sedition and everything else which makes sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the state usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore, it is difficult to hold that public disorder or disturbance of public tranquillity are not matters which undermine the security of the State."

32. As a result of their differences in the interpretation of Art. 19(2) of the Constitution, the Parliament amended clause (2) of Art. 19, in the form in which it stands at present, by the Constitution (First Amendment) Act, 1951, by s. 3 of the Act, which substituted the original c. (2) by the new clause (2). This amendment was made with retrospective effect, thus indicating that it accepted the statement of the law as contained in the dissenting judgment of Fazl Ali, J., in so far as he had pointed out that the concept of "security of the state" was very much allied to the concept of "public order" and that restrictions on freedom of speech and expression could validly be imposed in the interest of public order.

33. Again the question of the limits of legislative powers with reference to the provisions of Arts. 19(1)(a) and 19(2) of the Constitution came up for decision by a Constitution Bench of this Court in Ramji Lal Modi v. The State of U.P. MANU/SC/0101/1957: 1957CriLJ1006. In that case, the validity of s. 295A of the Indian Penal Code was challenged on the ground that it imposed restrictions on the fundamental right of freedom of speech and expression beyond the limits prescribed by clause (2) of Art. 19 of the Constitution. In this connection, the Court observed as follows:

"the question for our consideration is whether the impugned section can be properly said to be a law imposing reasonable restrictions on the exercise of the fundamental rights to freedom of speech and expression in the interests of public order. It will be noticed that language employed in the amended clause is "in the interests of" and not "for the maintenance of". As one of us pointed out in Debi Saron v. The State of Bihar, the expression "in the interests of" makes the ambit of the protection very wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order." Though the observations quoted above do not directly bear upon the present controversy, they throw a good deal of light upon the ambit of the power of the legislature to impose reasonable restrictions on the exercise of the fundamental right of freedom of speech and expression.

35. In this case, we are directly concerned with the question how for the offence, as defined in s. 124A of the Indian Penal Code, is consistent with the fundamental right guaranteed by Art. 19(1)(a) of the Constitution, which is in these terms:

"19. (1) All citizens shall have the right.

(a) to freedom of speech and expression..." This guaranteed right is subject to the right of the legislature to impose reasonable restrictions, the ambit of which is indicated by clause (2), which, in its amended form, reads as follows:

"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

36. It has not been questioned before us that the fundamental right guaranteed by Art. 19(1)(a) of the freedom of speech and expression is not an absolute right. It is common ground that the right is subject to such reasonable restrictions as would come within the purview of clause (2), which comprises (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc., etc. With reference to the constitutionality of s. 124A or s. 505 of the Indian Penal Code, as to how far they are consistent with the requirements of clause (2) of Art. 19 with particular reference to security of the State and public order, the section, it must be noted, penalises any spoke or written words or signs or visible representations, etc., which have the effect of bringing, or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression "the Government established by law" has to be distinguished from the person's for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence the continued existence of the Government established by law is an essential condition of the stability of the State. That

is why 'sedition', as the offence in s. 124A has been characterised, comes under Chapter VI relating to offences against the State. Hence any acts within the meaning of s. 124A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.

37. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the definition of 'sedition'. What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But, in our opinion, such words written or spoke would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine quo non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words, which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the

Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order. We have, therefore, to determine how far the Sections 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt Majumdar v. The King Emperor MANU/FE/0005/1942: (1942) F.C.R. 38 that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorders by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced s. 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in clause (2) of Art. 19 of the Constitution, if on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as load down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in clause (2) aforesaid.

38. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of Sections 124A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of clause (2) of Art. 19, Sections 124A and 505 are clearly violative of Art. 19(1)(a) of the Constitution. But then we have to see how far the saving clause, namely, clause (2) of Art. 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended clause (2), quoted above, the expression "in the interest of.... public order" are words of great amplitude and are much more comprehensive than the expression "for the maintenance of", as observed by this Court in the case of Virendra v. The State of Punjab MANU/SC/0023/1957: [1958]1SCR308. Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoke which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make then unconstitutional in view of Art. 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it

reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress (vide (1)). The Bengal Immunity Company Limited v. The State of Bihar MANU/SC/0083/1955: [1955]2SCR603 and MANU/SC/0020/1957: [1957]1SCR930 R. M. D. Chamarbaugwalla v. The Union of India MANU/SC/0020/1957: [1957]1SCR930. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.

39. We may also consider the legal position, as it should emerge, assuming that the main s. 124A is capable of being construed in the literal sense in which the Judicial Committee of the Privy Council has construed it in the cases referred to above. On that assumption, it is not open to this Court to construe the section in such a way as to avoid the alleged unconstitutionality by limiting the application of the section in the way in which the Federal Court intended to apply it? In our opinion, there are decisions of this Court which amply justify our taking that view of the legal position. This Court, in the case of R.M.D. Chamarbaugwalla v. The Union of India MANU/SC/0020/1957: [1957]1SCR930 has examined in detail the several decisions of this Court, as also of the Courts in America and Australia. After examining those decisions, this Court came to the conclusion that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned section or Act, the Court will take that view of the matter and limit its application accordingly, in preference to the view which would make it unconstitutional on another view of the interpretation of the words in question. In that case, the Court had to choose between a definition of the expression "Prize Competitions" as limited to those competitions which were of a gambling character and those which were not. The Court chose the former interpretation which made the rest of the provisions of the Act, Prize Competitions Act (XLII of 1955), with particular reference to Sections 4 and 5 of the Act and Rules 11 and 12 framed thereunder, valid. The Court held that the penalty attached only to those competitions which involved the element of gambling and those competitions in which success depended to a substantial degree on skill were held to be out of the purview of the Act. The ratio decidendi in that case, in our opinion, applied to the case in hand in so far as

we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace.

40. We do not think it necessary to discuss or to refer in detail to the authorities cited and discussed in the reported case R. M. D. Chamarbaugwalla v. The Union of India MANU/SC/0020/1957: [1957]1SCR930. We may add that the provisions of the impugned sections, impose restrictions on the fundamental freedom of speech and expression, but those restrictions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference with that fundamental right.

41. It is only necessary to add a few observations with respect to the constitutionality of s. 505 of the Indian Penal Code. With reference to each of the three clauses of the section, it will be found that the gravamen of the offence is making, publishing or circulating any statement, rumour or report (a) with intent to cause or which is likely to cause any member of the Army, May or Air Force to mutiny or otherwise disregard or fail in his duty as such; or (b) to cause fear or alarm to the public or a section of the public which may induce the commission of an offence against the State or against public tranquility or (c) to incite or which is likely to incite one class or community of persons to commit an offence against any other class or community. It is manifest that each one of the constituent elements of the offence under s. 505 has reference to, and a direct effect on, the security of the State or public order. Hence, these provisions would not exceed the bounds of reasonable restrictions on the right of freedom of speech and expression. It is clear, therefore, that clause (2) of Art. 19 clearly saves the section from the vice of unconstitutionality.

42. It has not been contended before us on behalf of the appellant in C.A. 169 of 1957 or on behalf of the respondents in the other appeals (No. 124-126 of 1958) that the words used by them did not come within the purview of the definition of sedition as interpreted by us. No arguments were advanced before us to show that even on the interpretation given by us their cases did not come within the mischief of the one or the other section, as the case may be. It follows, therefore, that the Criminal Appeal 169 of 1957 has to be dismissed. Criminal Appeals 124-126 of 1958 will be remanded to the High Court to pass such order as it thinks fit and proper in the light of the interpretation given by us.

43. Appeal No. 169 of 1957 dismissed.
44. Appeals Nos. 124 to 126 of 1958 allowed.

MANU/SC/0471/2021

Neutral Citation: 2021/INSC/352

Back to Section 146 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 606 and 630-631 of 2021

Decided On: 23.07.2021

Lakshman Singh and Ors. Vs. State of Bihar

Hon'ble Judges/Coram:
Dr. D.Y. Chandrachud and M.R. Shah, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Manoj Swarup, Sr. Adv., Dharmendra Kumar Sinha, AOR, Neelmani Pant, Rajeev Kumar Jha and Sunil Rai, Advs.
For Respondents/Defendant: Arunabh Chowdhury, AAG, Pallavi Langar, AOR, Tapesh Kumar Singh, AOR, Aditya Pratap Singh and Bhaswati Singh, Advs.

JUDGMENT
M.R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 31.10.2018 passed by the High Court of Jharkhand at Ranchi in Criminal Appeal Nos. 232/1999 and 242/1999, by which the High Court has dismissed the said appeals preferred by the Appellants herein and has confirmed the judgment and order of conviction and sentence passed by the learned trial Court convicting the Appellants for the offences Under Sections 323 and 147 Indian Penal Code and sentencing them to undergo six months simple imprisonment under both sections, original Accused Nos. 9, 8, 12, 11, 10, 14, 2 and 13-Lakshman Singh, Shiv Kumar Singh, Upendra Singh, Vijay Singh, Sanjay Prasad Singh, Rajmani Singh, Ayodhya Prasad Singh and Ramadhar Singh have preferred the present appeals.

2. As per the case of the prosecution, an FIR was lodged at Paatan Police Station by the first informant-Rajeev Ranjan Tiwari on 26.11.1989 alleging inter alia that on the eve of general election, he was working as a worker of Bhartiya Janta Party at village Golhana Booth No. 132 under Paatan Police Station and was issuing slips to the voters towards two hundred yards north away from the polling booth; at that time, at around 10:40 a.m., the Accused persons who belong to another village Naudiha came armed with lathis, sticks, country made pistols and asked him to stop issuing voter slips and handover the voters list which he was possessing and on his refusal the Accused persons started

physically beating him (P.W. 8.-Rajiv Ranjan Tiwari) with hands, fists, lathis and sticks; the brother of the first informant- P.W. 8, Priya Ranjan Tiwari (P.W. 10) upon knowing about the incident came to rescue him and at that time Accused Dinanath Singh @ Dina Singh fired gun shot at P.W. 10 with his country made pistol, due to which he received pellet injuries. Accused Ajay Singh fired at Dinesh Tiwari (P.W. 12), due to which he was injured. It was further alleged that due to scuffle, Accused Hira Singh snatched wrist watches of P.W. 8 & P.W. 10; the villagers rushed there and then all the Accused persons ran away towards village Naudhia. Based on the statement of P.W. 8-Rajiv Ranjan Tiwari, which was recorded at 12:30 p.m. on 26.11.1989, an FIR was registered at about 2:00 p.m. on the very day, i.e., 26.11.1989 against 16 Accused named persons for the offences Under Sections 147, 148, 149, 307, 326, 324, 323 Indian Penal Code and Section 27 of the Arms Act. At this stage, it is required to be noted that even some of the Accused-Lakshman Singh, Shiv Kumar Singh and Ayodhya Prasad Singh also sustained injuries. After conclusion of the investigation, the investigating officer filed chargesheet against 15 Accused including the Appellants herein.

2.1. The learned trial Court framed the charge against the Accused persons for the offences Under Sections 323, 307, 147, 149 and 379 Indian Penal Code. Accused Dinanath Singh and Ajay Singh were further charged Under Sections 148 Indian Penal Code and Accused Hira Singh was also charged Under Section 379 Indian Penal Code. As the case was exclusively triable by the Court of Sessions, the case was committed to the learned Sessions Court, which was numbered as Sessions Trial No. 36 of 1991.

2.2. To prove the case against the Accused, the prosecution examined in all 15 witnesses including P.W. 8, the first informant-Rajiv Ranjan Tiwari, Priya Ranjan Tiwari (P.W. 10) the brother of the first informant and P.W. 5-Dilip Kumar Tiwari, who all were injured eye witnesses. The prosecution also examined Dr. Jawahar Lal (P.W. 7), who examined P.W. 10, P.W. 12 and P.W. 5 on the very day at Sadar Hospital, Daltonganj and who found injuries on the said persons. The prosecution also examined the investigating officer-Shivnandan Mahto (P.W. 13). Prosecution also examined independent witnesses, i.e., P.W. 1, P.W. 3 & P.W. 4. After closure of the evidence on behalf of the prosecution, statements of the Accused persons Under Section 313 Code of Criminal Procedure were recorded. They denied to the allegations. The defence also examined D.W. 1 to prove the injuries on Accused Ayodhya Prasad Singh, Rama Singh, Shiv Kumar Singh and Lakshman Singh and brought on record their injury reports.

2.3. Thereafter, on conclusion of the full-fledged trial and on appreciation of the entire evidence on record and relying upon the deposition of P.W. 8, P.W. 10 & P.W. 5, who all were injured eyewitnesses and other eyewitnesses, the learned trial Court convicted the Appellants herein for the offences Under Sections 323 and 147 Indian Penal Code and sentenced them to undergo six months simple imprisonment for both the offences. The learned trial Court also convicted Accused Dinanath Singh for the offences Under Sections 326 & 148 Indian Penal Code and sentenced him to undergo seven years and two

years RI respectively. The learned trial Court also convicted Accused Ajay Singh for the offences Under Sections 324 & 148 Indian Penal Code and sentenced him to undergo three years & two years RI respectively.

2.4. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence, convicting and sentencing the Appellants herein, original Accused Nos. 9, 8, 12, 11, 10, 14, 2 preferred appeal along with other Accused being Criminal Appeal No. 232 of 1999 and Accused No. 13 preferred appeal being Criminal Appeal No. 242 of 1999 before the High Court. By the common impugned judgment and order, the High Court has dismissed the said appeals and has confirmed the judgment and order of conviction and sentence passed by the learned trial Court.

2.5. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court, original Accused Nos. 9, 8, 12, 11, 10, 14, 2 & 13 have preferred the present appeals.

3. Shri Manoj Swarup, learned Senior Advocate has appeared on behalf of the Appellants-Accused and Shri Arunabh Chowdhury, learned Additional Advocate General in Criminal Appeal No. 606/2021 and Shri Tapesh Kumar Singh, learned Advocate in Criminal Appeal Nos. 630-631/2021 have appeared for the State of Jharkhand.

3.1. Learned Senior Advocate appearing on behalf of the Appellants-Accused has vehemently submitted that in the facts and circumstances of the case both, the learned trial Court as well as the High Court have committed a grave error in convicting the Accused for the offences Under Sections 323, 147 Indian Penal Code.

3.2. It is further submitted that both the courts below have materially erred in relying upon the deposition of P.W. 8, P.W. 10 & P.W. 5. It is submitted that the aforesaid witnesses are unreliable and untrustworthy. It is submitted that they are not the independent witnesses. It is submitted that as such P.W. 12-Dinesh Tiwary turned hostile. It is submitted that the aforesaid witnesses belong to the same village.

3.3. It is further submitted that even both the courts below have materially erred in coming to the conclusion that the Appellants were part of the unlawful assembly and thereby have committed a grave error in convicting the Accused for the offence Under Section 147 Indian Penal Code.

3.4. It is further submitted that the motive has not been established and proved. It is submitted that the common object was alleged to be to cast bogus votes, which was never cast. It is submitted that even the voter slip was also available with all other parties and therefore the motive as per the prosecution case is questionable.

3.5. It is further submitted that so far as the impugned judgment and order passed by the High Court is concerned, the individual role and/or the merits of the case qua the respective Appellants-Accused have not at all been considered by the High Court. It is submitted that the High Court has only stated at page 26, para 23 qua the present Appellants that so far as the rests of the Appellants are concerned, they have been rightly held guilty Under Sections 323 & 147 Indian Penal Code. It is submitted that there is no independent assessment of the evidence qua the Appellants herein.

3.6. It is further submitted that both the courts below have not properly appreciated the fact that the presence of the Accused at the polling station was natural. It is submitted that because of the bye-election, the Accused persons along with the other persons belonging to different political parties were present. It is submitted that it was natural for the people belonging to different parties to call persons from different villages or otherwise to be present at booth and that itself would not be sufficient to prove the guilt.

3.7. It is further submitted that even otherwise, the courts below have materially erred in convicting the Accused for the offence Under Section 323 Indian Penal Code. It is submitted that so far as P.W. 8-informant is concerned, there was no injury sustained by him. It is submitted that no injury certificate of P.W. 8 has been brought on record. It is submitted that the prosecution has brought on record the injury certificates of three persons only, namely, P.W. 10 -Priya Ranjan Tiwari, P.W. 12-Dinesh Tiwari and P.W. 5-Dilip Tiwari. It is submitted that all the injuries are by gunshot except two simple injuries caused to Dinesh Tiwari-P.W. 12. It is submitted that P.W. 12 turned hostile. It is submitted that the Appellants are alleged to have used lathis and sticks only against the first informant-P.W. 8 as per the prosecution case. It is submitted that therefore in the absence of any corroborating evidence/material in support of the case of the prosecution that the Appellants have beaten P.W. 8 and sustained injuries, the courts below have materially erred in convicting the Accused for the offence Under Section 323 Indian Penal Code.

3.8. It is further submitted that even the conduct on the part of the first informant-P.W. 8 creates doubt about his credibility. It is submitted that he has roped in several persons belonging to the opposite camp. It is submitted that after the incident he went to the village and the police SHO came to his house and taken him to the government hospital, Patan and thereafter recorded his fardbyan (statement). It is submitted that neither he went to his injured brother nor he has ever gone to see him at the hospital nor any family member went to see the injured in the hospital. It is submitted that in such circumstances, P.W. 8 is not a reliable and trustworthy witness and therefore the courts below ought not to have relied upon the deposition of P.W. 8.

3.9. It is further submitted that even there is no recovery of lathis and sticks. It is submitted that even the voting slips have also not been recovered from the informant. It is submitted that non-exhibit of voter slips demolishes the case of the prosecution. It is

submitted that FIR, P.W. 1 and informant and consistently all witnesses have stated that Rajiv Ranjan Tiwari refused to give voter slips to the Accused, upon which scuffle occurred. It is submitted that the voting slips are not exhibited. It is submitted therefore uncorroborated testimony of asking voter slips is not proved.

3.10. Making the above submissions and relying upon the decisions of this Court in the cases of Kutumbaka Krishna Mohan Rao v. Public Prosecutor, High Court of A.P., reported in MANU/SC/0313/1991: 1991 Supp. 2 SCC 509 and Inder Singh v. State of Rajasthan, reported in MANU/SC/0009/2015: (2015) 2 SCC 734, it is prayed to allow the present appeals.

4. The present appeals are opposed by the learned Counsel appearing on behalf of the State of Jharkhand.

4.1. It is submitted that as such there are concurrent findings of fact recorded by both, the learned trial Court as well as the High Court, holding the Appellants guilty for the offences Under Sections 323 & 147 Indian Penal Code.

4.2. It is submitted that in the present case the prosecution has been successful in proving the case against the Accused by examining P.W. 8, P.W. 10 & P.W. 5, who are the injured eyewitnesses. It is submitted that the injured eyewitnesses-P.W. 8, P.W. 10 & P.W. 5 are reliable and trustworthy. It is submitted that all the aforesaid three witnesses were thoroughly cross-examined and from cross-examination, nothing adverse to the case of the prosecution has been brought on record by the Accused. It is submitted that even the prosecution examined thee other witnesses, P.W. 1, P.W. 3 & P.W. 4 who are independent witnesses, who supported the case of the prosecution. It is submitted that as such the learned trial Court has discussed the entire evidence on record and analysed the injury reports and thereafter by a detailed judgment has convicted the Appellants for the offence of voluntarily causing hurt Under Section 323 Indian Penal Code and for the offence of rioting Under Section 147 Indian Penal Code. It is submitted that all the Appellants have been guilty for the offence of rioting punishable Under Section 147 Indian Penal Code. It is submitted that for the offence of rioting, there has to be,

i) an unlawful assembly of 5 or more persons as defined in Section 141 Indian Penal Code, i.e., an assembly of 5 or more persons and such assembly was unlawful;

ii) the unlawful assembly must use force or violence. Force is defined in Section 349 Indian Penal Code; and

iii) the force or violence used by an unlawful assembly or by any member thereof must be in prosecution of the common object of such assembly in which case every member of such assembly is guilty of the offence of rioting.

It is submitted that in the present case, all the ingredients of rioting as defined Under Section 146 of the Indian Penal Code has been established and proved.

4.3. It is submitted that as held by this Court in the case of Mahadev Sharma v. State of Bihar, MANU/SC/0078/1965: (1966) 1 SCR 18: AIR 1966 SC 302, 'that every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence'. It is submitted that as held by this Court, 'offence of rioting Under Section 146 Indian Penal Code is said to be committed when the unlawful assembly or any member thereof in prosecution of the common object of such assembly uses force or violence'. It is submitted that therefore once the unlawful assembly is established in prosecution of the common object, i.e., in the present case, as held by the courts below, the common object was "to snatch the voter list and to cast bogus voting", each member of the unlawful assembly is guilty for the offence of rioting. It is submitted that the use of force, even though it be the slightest possible character by any one member of the assembly, once established as unlawful constitutes rioting. It is submitted that it is not necessary that force or violence must be by all but the liability accrues to all the members of the unlawful assembly. It is submitted that some may encourage by words, others by signs while others may actually cause hurt and yet all members of the unlawful assembly would be equally guilty of rioting. It is submitted that in the present case both the courts below have found the Appellants as an active participant in the offence and they cannot be said to be the wayfarers or spectators.

4.4. It is submitted that so far as the offence of voluntarily causing hurt as defined Under Section 321 Indian Penal Code and punishable Under Section 323 Indian Penal Code is concerned, it is submitted that the injuries sustained by P.W. 5 to P.W. 8 and P.W. 12 are simple injuries while P.W. 10 sustained grievous injuries. It is submitted that as such considering the nature of the injuries, the Appellants have been let off lightly by the courts below.

It is further submitted that as such the Accused Lakshman Singh, Shiv Kumar Singh and Ayodhya Prasad Singh sustained injuries which establish beyond doubt their presence and participation. It is submitted that in their statement Under Section 313 Code of Criminal Procedure, they have not explained their injuries at all.

4.5. It is further submitted that as P.W. 5, P.W. 8 & P.W. 10 are injured witnesses, as held by this Court in catena of decisions, evidence of an injured eye witness has great evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. It is submitted that very cogent and convincing grounds are required to discard the evidence of the injured witness. Reliance is placed on the judgments of this Court in the cases of State of MP v. Mansingh MANU/SC/0596/2003: (2003) 10 SCC 414(para 9); Abdul Sayeed v. State of MP MANU/SC/0702/2010: (2010) 10 SCC 259; Ramvilas v. State of Madhya Pradesh, MANU/SC/0876/2015: (2016) 16 SCC 316 (para

6); State of Uttar Pradesh v. Naresh, MANU/SC/0228/2011: (2011) 4 SCC 324 (para 27); and the recent decision in the case of Kalabhai Hamirbhai Kachhot v. State of Gujarat.

4.6. It is further submitted that in the present case, right from the very beginning, all the Accused were named in the FIR and their role and complicity have been established with trustworthy, reliable and cogent evidence. It is submitted that all the Accused persons including the present Appellants formed the unlawful assembly in furtherance of the common object "to snatch the voter list and to cast bogus voting" and actually participated in the occurrence and committed the offences. It is submitted that as such there is no ground to disbelieve the evidence of the injured eye witnesses/eye witnesses.

4.7. It is further submitted that as such the learned trial Court took a very lenient view in imposing the sentence of only six months simple imprisonment. It is submitted that once the Appellants were found to be the members of the unlawful assembly with a common object and looking to the injuries sustained by P.W. 5, P.W. 10 & P.W. 12 who sustained injuries by fired arm also, as such, all the Appellants-Accused ought to have been convicted along with other Accused for the offences Under Sections 307, 326, 324 and 148 Indian Penal Code also.

4.8. It is further submitted that bogus voting seriously undermines the most basic feature of democracy and interferes with the conduct of free and fair election which has been held by this Court in the case of People's Union for Civil Liberties v. Union of India, MANU/SC/0987/2013: (2013) 10 SCC 1, to include within its ambit the right of an elector to cast his vote without fear or duress. It is submitted that as held by this Court in the aforesaid decision, free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. It is submitted that therefore when the trial Court has shown leniency to the Appellants in sentencing them only for six months simple imprisonment, no interference of this Court is called for.

4.9. Making the above submissions and relying upon the aforesaid decisions, it is prayed to dismiss the present appeals.

5. We have heard the learned Counsel for the respective parties at length. We have meticulously scanned the entire evidence on record and also the findings recorded by the learned trial Court, which are on appreciation of the evidence on record. At the outset, it is required to be noted that all the Accused herein are convicted for the offences Under Section 323 and 147 Indian Penal Code and are sentenced to undergo six months simple imprisonment for both the offences and the sentences are directed to run concurrently.

It is true that in the impugned judgment the High Court has not at all dealt with and/or considered the case on behalf of the Accused/Appellants herein and has not discussed the evidence qua each Accused, which ought to have been done while deciding the first

appeal against the judgment and order of conviction. However, as for the reasons stated hereinbelow and ultimately, we agree with the final conclusion of the High Court confirming the judgment and order passed by the learned trial Court, instead of remanding the matter to the High Court, we ourselves have re-appreciated the entire evidence on record.

5.1. In the present case, while convicting the Accused, the learned trial Court has heavily relied upon the deposition of P.W. 1, P.W. 3 and P.W. 4, who are the independent witnesses and P.W. 5, P.W. 8 & P.W. 10, who are the injured witnesses. The presence of the independent witnesses and even the injured witnesses at the place of the incident is natural. P.W. 1, P.W. 3 & P.W. 4, all of whom were the residents of the village and they came there to cast their votes and witnessed the incident. All the witnesses, P.W. 1, P.W. 3 & P.W. 4 have identified all the Accused persons and supported the case of the prosecution fully. P.W. 5, P.W. 8, P.W. 10 and even P.W. 12 are injured eyewitnesses. Injuries on P.W. 5, P.W. 10 & P.W. 12 have been established and proved by the prosecution by examining Dr. Jawahar Lal (P.W. 7), who examined the above injured witnesses. Their injury reports are placed on record by way of Exhibit 1, 1/1 and ½. All the witnesses have unequivocally and in the same voice have stated that at the relevant time when the voting was going on for the Lok Sabha constituency and at that time P.W. 8 - Rajiv Ranjan Tiwari was giving slips to the voters and at that time at about 10:40 a.m. all the Accused persons belonging to another village came there and asked him to stop giving slips and to handover the voter list and on refusal the Accused persons assaulted him with fists, slaps and lathis and he sustained injuries. Meanwhile, his brother Priya Ranjan Tiwari came for his rescue and at that time one Dinanath Singh took out his country made pistol and fired upon him causing several fire-armed injuries. All the Accused persons were named right from the very beginning of lodging the FIR and all the Accused persons were specifically named by all the witnesses and/or fully supported the case of the prosecution. At this stage, it is required to be noted that even some of the Accused namely,-Lakshman Singh, Shiv Kumar Singh and Ayodhya Prasad Singh sustained injuries and they have failed to explain their injuries in their 313 statements. Thus, their presence at the time and place of incident has been established and proved even otherwise. At the cost of the repetition, it is observed that P.W. 5, P.W. 8 and P.W. 10 are the injured witnesses. Even after they have been fully cross-examined, they have fully supported the case of the prosecution, even after thorough cross-examination on behalf of the Accused.

6. In the case of Mansingh (supra), it is observed and held by this Court that "the evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly".

It is further observed in the said decision that "minor discrepancies do not corrode the credibility of an otherwise acceptable evidence".

It is further observed that "mere non-mention of the name of an eyewitness does not render the prosecution version fragile".

6.1. A similar view has been expressed by this Court in the subsequent decision in the case of Abdul Sayeed (supra). It was the case of identification by witnesses in a crowd of assailants. It is held that "in cases where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him". It is further observed that "when incident stood concluded within few minutes, it is natural that exact version of incident revealing every minute detail, i.e., meticulous exactitude of individual acts, cannot be given by eyewitnesses". It is further observed that "where witness to occurrence was himself injured in the incident, testimony of such witness is generally considered to be very reliable, as he is a witness that comes with an inbuilt guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone". It is further observed that "thus, deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on basis of major contradictions and discrepancies therein".

6.2. The aforesaid principle of law has been reiterated again by this Court in the case of Ramvilas (supra) and it is held that "evidence of injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard their evidence". It is further observed that "being injured witnesses, their presence at the time and place of occurrence cannot be doubted".

7. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we see no reason to doubt the credibility and/or trustworthiness of P.W. 1, P.W. 3 & P.W. 4 and more particularly P.W. 5, P.W. 8 & P.W. 10, who are the injured witnesses. All the witnesses are consistent in their statements and they have fully supported the case of the prosecution. Under the circumstances, the courts below have not committed any error in convicting the Accused, relying upon the depositions of P.W. 1, P.W. 3, P.W. 4, P.W. 5, P.W. 8 & P.W. 10.

8. Now so far as the submission on behalf of the Appellants-Accused that all the Appellants were alleged to have armed with lathis and so far as P.W. 8 is concerned, no injury report is forthcoming and/or brought on record and therefore they cannot be convicted for the offence Under Section 323 Indian Penal Code is concerned, at the outset, it is required to be noted that P.W. 8 in his examination-in-chief/deposition has specifically stated that after he sustained injuries, treatment was provided at Government Hospital, Paatan. He has further stated in the cross-examination on behalf of all the Accused persons except Accused Dinanath Singh that he sustained 2-3 blows of truncheons. He has also stated that he does not exactly remember that how many blows he suffered. According to him, he first went to Police Station, Paatan along with the SHO of Police Station, Paatan, where his statement was recorded and thereafter the SHO sent him to Paatan Hospital for treatment. Thus, he was attacked by the Accused persons by lathis/sticks and he sustained injuries and was treated at Government Hospital, Paatan

has been established and proved. It may be that there might not be any serious injuries and/or visible injuries, the hospital might not have issued the injury report. However, production of an injury report for the offence Under Section 323 Indian Penal Code is not a sine qua non for establishing the case for the offence Under Section 323 Indian Penal Code. Section 323 Indian Penal Code is a punishable Section for voluntarily causing hurt. "Hurt" is defined Under Section 319 Indian Penal Code. As per Section 319 Indian Penal Code, whoever causes bodily pain, disease or infirmity to any person is said to cause "hurt". Therefore, even causing bodily pain can be said to be causing "hurt". Therefore, in the facts and circumstances of the case, no error has been committed by the courts below for convicting the Accused Under Section 323 Indian Penal Code.

9. Now so far as the conviction of the Accused Under Section 147 Indian Penal Code is concerned, the presence of all the Accused persons at the time of incident and their active participation has been established and proved by the prosecution by examining the aforesaid witnesses who are the independent witnesses and injured witnesses also. The Accused persons belong to another village. They formed an unlawful assembly in prosecution of common object, i.e., "to snatch the voters list and to cast bogus voting". It has been established and proved that they used the force and, in the incident, P.W. 5, P.W. 8, P.W. 10 & P.W. 12 sustained injuries. All the Accused persons-Appellants were having lathis. Section 147 Indian Penal Code is a punishable Section for "rioting". The offence of "rioting" is defined in Section 146 Indian Penal Code, which reads as under:

146. Rioting-Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

On a fair reading of the definition of "rioting" as per Section 146 Indian Penal Code, for the offence of "rioting", there has to be,

i) an unlawful assembly of 5 or more persons as defined in Section 141 Indian Penal Code, i.e., an assembly of 5 or more persons and such assembly was unlawful;

ii) the unlawful assembly must use force or violence. Force is defined in Section 349 Indian Penal Code; and

iii) the force or violence used by an unlawful assembly or by any member thereof must be in prosecution of the common object of such assembly in which case every member of such assembly is guilty of the offence of rioting.

9.1. "Force" is defined Under Section 349 Indian Penal Code. As per Section 349 Indian Penal Code, "force" means "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other....."

As observed hereinabove, all the Accused persons were the members of the unlawful assembly and the common intention was "to snatch the voters slips and to cast bogus voting". They used force and violence also, as observed hereinabove. It is the case on behalf of the Accused that there is no specific role attributed to them for the offence of rioting Under Section 147 Indian Penal Code. However, as observed hereinabove and as held by this Court in the case of Abdul Sayeed (supra), where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him. In the present case, the incident too concluded within few minutes and therefore it is natural that exact version of incident revealing every minute detail, i.e., meticulous exactitude of individual acts cannot be given by eyewitnesses. Even otherwise, as held by this Court in the case of Mahadev Sharma (supra), every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence. In paragraph 7, it is observed and held as under:

7. Section 146 then defines the offence of rioting. This offence is said to be committed when the unlawful assembly or any member thereof in prosecution of the common object of such assembly uses force or violence. It may be noticed here that every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence. There is thus vicarious responsibility when force or violence is used in prosecution of the common object of the unlawful assembly.

Thus, once the unlawful assembly is established in prosecution of the common object, i.e., in the present case, "to snatch the voters list and to cast bogus voting", each member of the unlawful assembly is guilty of the offence of rioting. The use of the force, even though it be the slightest possible character by any one member of the assembly, once established as unlawful constitutes rioting. It is not necessary that force or violence must be by all but the liability accrues to all the members of the unlawful assembly. As rightly submitted by the learned Counsel appearing on behalf of the State, some may encourage by words, others by signs while others may actually cause hurt and yet all the members of the unlawful assembly would be equally guilty of rioting. In the present case, all the Accused herein are found to be the members of the unlawful assembly in prosecution of the common object, i.e., "to snatch the voters list and to cast bogus voting" and P.W. 5, P.W. 8, P.W. 10 & P.W. 12 sustained injuries caused by members of the unlawful assembly, the Appellants-Accused are rightly convicted Under Section 147 Indian Penal Code for the offence of rioting.

10. In view of the above, we are of the firm view that the Appellants are rightly convicted Under Sections 323 and 147 Indian Penal Code and sentenced to undergo six months simple imprisonment only for the said offences.

Before parting, we may observe that though in the present case it has been established and proved that all the Accused were the members of the unlawful assembly in prosecution of the common object, namely, "to snatch the voters list and to cast bogus

voting" and have been convicted for the offence Under Section 147 Indian Penal Code, the trial Court has imposed the sentence of only six months simple imprisonment. In the case of People's Union for Civil Liberties (supra), it is observed by this Court that freedom of voting is a part of the freedom of expression. It is further observed that secrecy of casting vote is necessary for strengthening democracy. It is further observed that in direct elections of Lok Sabha or State Legislature, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear or being victimised if his vote is disclosed. It is further observed that democracy and free elections are a part of the basic structure of the Constitution. It is also further observed that the election is a mechanism which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Therefore, any attempt of booth capturing and/or bogus voting should be dealt with iron hands because it ultimately affects the Rule of law and democracy. Nobody can be permitted to dilute the right to free and fair election. However, as the State has not preferred any appeal against imposing of only six months simple imprisonment, we rest the matter there.

11. In view of the above and for the reasons stated hereinabove, all the appeals fail and deserve to be dismissed and are accordingly dismissed. Since, the applications for exemption from surrendering of the Accused-Appellants herein were allowed by this Court vide orders dated 15.03.2019 and 08.07.2019 respectively, the Accused-Appellants are directed to surrender forthwith to serve out their sentence.

MANU/SC/0175/2019

Back to Section 149 of Indian Penal Code, 1860

Neutral Citation: 2019/INSC/180

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1144 of 2009

Decided On: 12.02.2019

Mala Singh and Ors. Vs. State of Haryana

Hon'ble Judges/Coram:
Abhay Manohar Sapre and R. Subhash Reddy, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Karan Bharihoke, (A.C.), Sunny Choudhary and Manoj Kumar, Advs.
For Respondents/Defendant: Atul Mangla, AAG, Ashish Pandey, Inderjeet, Advs. for Monika Gusain, Adv.

JUDGMENT
Abhay Manohar Sapre, J.

1. This appeal is filed by the three Accused persons against the final judgment and order dated 11.02.2008 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 65-DB of 1999 whereby the Division Bench of the High Court allowed the appeal in respect of eight Accused persons and acquitted them from the charges Under Sections 148, 302/149, 323/149 and 506/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") but dismissed the appeal in respect of the three Accused persons (Appellants herein) and convicted them Under Section 302/34 Indian Penal Code instead of Section 302/149 Indian Penal Code.

2. In order to appreciate the controversy involved in this appeal, it is necessary to set out the facts in detail hereinbelow.

3. Eleven (11) Accused persons (hereinafter referred to as "A-1 to A-11") were tried for the offences punishable Under Sections 148, 302/149, 323/149 and 506/149 Indian Penal Code for committing murder of one lady-Mahendro Bai in Sessions Case No. 19 of 1997.

4. Additional Sessions Judge, Faridabad, by judgment/order dated 04.12.1998, convicted all the Accused (A-1 to A-11) Under Sections 148, 302/149, 323/149 and 506/149 Indian Penal Code and accordingly sentenced them to undergo life imprisonment apart from

imposing other lesser sentences. The Additional Sessions Judge held that the prosecution was able to prove the case against all the Accused persons (A-1 to A-11) beyond reasonable doubt and, therefore, all of them deserve to be convicted accordingly.

5. All the Accused persons, namely, Ranjit Singh (A-1), Boor Singh (A-2), Puran Singh (A-3), Balwant Singh (A-4), Inder Singh (A-5), Bagga Singh (A-6), Mala Singh (A-7), Phuman Singh (A-8), Kashmiro (A-9), Laxmi Bai (A-10) and Taro Bai (A-11) were sentenced to suffer rigorous imprisonment for six months Under Section 148 Indian Penal Code, rigorous imprisonment for life and to pay a fine of Rs. 2,000/- (Rs. Two Thousand) Under Section 302/149 Indian Penal Code, in default of payment of fine to further undergo rigorous imprisonment for six months, rigorous imprisonment for three months Under Section 323/149 Indian Penal Code and rigorous Imprisonment for six months Under Section 506/149 Indian Penal Code. All the sentences were to run concurrently.

6. All the Accused persons (A-1 to A-11) felt aggrieved by their conviction and sentence and they filed one common criminal appeal in the High Court of Punjab & Haryana at Chandigarh (Criminal Appeal No. 65-DB of 1999).

7. By impugned order, the High Court allowed the appeal in respect of the eight Accused persons, namely, A-1 to A-6, A-10 & A-11 and acquitted them from all the charges whereas dismissed the appeal in respect of three Accused persons, namely, A-7 to A-9 and accordingly upheld their conviction by taking recourse to Section 34 Indian Penal Code. In other words, the High Court upheld the conviction Under Section 302 read with Section 34 Indian Penal Code in place of 302/149 Indian Penal Code.

8. The three Accused persons, namely, Mala Singh (A-7), Phuman Singh (A-8) and Kashmiro (A-9), who suffered the conviction/sentence felt aggrieved by the aforesaid order of the High Court and they filed the present appeal by way of special leave in this Court.

9. So far as the order of the High Court, which resulted in acquittal of eight Accused, namely, A-1 to A-6, A-10 and A-11 is concerned, the State did not challenge their acquittal order and, therefore, this part of the order of the High Court has now attained finality.

10. We are, therefore, not required to examine the legality and correctness of this part of the impugned order by which eight co-accused (A-1 to A-6, A-10 and A-11) were acquitted.

11. Learned Counsel for the Appellants, at the outset, stated that so far as Appellant No. 1 - Mala Singh (A-7) is concerned, he expired during pendency of the appeal. The appeal of Mala Singh (A-7) (Appellant No. 1 herein) therefore, stands abated. His appeal is accordingly dismissed as having abated.

12. We are, therefore, now concerned with the case of two Accused persons, namely, Phuman Singh (A-8) [Appellant No. 2 herein] and Smt. Kashmiro (A-9) [Appellant No. 3 herein].

13. In other words, now we have to examine in this appeal as to whether the High Court was justified in upholding the conviction and the sentence of Appellant No. 2 (A-8) and Appellant No. 3 (A-9).

14. In order to examine this question, it is necessary to set out the prosecution case in brief hereinbelow.

15. The death of Mahendro Bai occurred as a result of some disputes between the members of one family. One group consisted of one branch of brothers, their sons and the wives whereas the other group consisted of another branch of brothers, their sons and the wives. The dispute was in relation to the ownership and possession of an ancestral property of the family members, i.e., one agricultural land.

16. One Mehar Singh had six brothers. They owned 22 killas of land. This land was orally partitioned amongst all the brothers 30 years back and each brother was cultivating his share. Mehar Singh then purchased some other land measuring 2 1/2 acres in the same area. His three brothers-Mala Singh (A-7), Bagga Singh (A-6) and Inder Singh (A-5) then started demanding their share in this 2 1/2 acres of land from Mehar Singh which he refused saying that it was not an ancestral land and, therefore, no need to partition. This became the cause of dispute among the brothers.

17. On 21.09.1996 at around 12 noon, Mehar Singh, Mal Singh (son of Mehar Singh), Mahendro Bai (wife of Mal Singh-daughter in law of Mehar Singh), Dara Singh (son of Mehar Singh) and Palo Devi (wife of Dara Singh) were sitting on the land (field) and talking to each others then, Mala Singh (A-7), Inder Singh (A-5), Bagga Singh (A-6) Boor Singh (A-2), Balwant Singh (A-4), Puran Singh (A-3), Ranjit Singh (A-1), Phuman Singh (A-8), Taro Bai (A-11) and Kashmiro (A-9) came there with weapons (lathi, country made pistol, sword, ballaum) in their hands.

18. Mala Singh (A-7) gave "Lalkara" saying that they should be taught lesson for non-partitioning the land and be finished. This led to a fight between the two groups resulting in death of Mahendro Bai and also causing injuries to Mehar Singh and Palo Bai.

19. This led to registration of the FIR (Ex-PN/2) by Dara Singh followed by the investigation. The statements of several persons were recorded, evidence was collected, post-mortem report of the deceased was obtained, weapons were seized, FSL report was obtained which led to arrest of the aforementioned eleven persons.

20. The charge-sheet was filed against all the 11 Accused persons (A-1 to A-11). The case was then committed to the Sessions Court for trial. The prosecution examined as many as 14 witnesses. All the Accused persons (A-1 to A-11) were examined Under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.). They denied their involvement in the crime.

21. By judgment/order dated 04.12.1998, the Additional Sessions Judge convicted all the 11 Accused persons (A-1 to A-11) Under Sections 148, 302/149, 323/149 & 506/149 Indian Penal Code, as detailed above, which gave rise to filing of the criminal appeal by all the 11 Accused persons (A-1 to A-11) in the High Court.

22. As mentioned above, the High Court acquitted eight Accused persons (A-1 to A-6, A-10 & A-11) from all the charges by giving them benefit of doubt but upheld the conviction of the present three Appellants (A-7 to A-9) Under Section 302/34 Indian Penal Code instead of 302/149 Indian Penal Code, which was awarded by the Additional Sessions Judge. Against this order of the High Court, the three Accused persons (A-7 to A-9) have felt aggrieved and filed this appeal after obtaining the special leave to appeal in this Court.

23. Heard Mr. Karan Bharihoke, learned amicus curiae, Mr. Sunny Choudhary, learned Counsel for the Appellants-Accused persons and Mr. Atul Mangla, learned Additional Advocate General for the Respondent-State.

24. Learned Counsel for the Appellants (Accused persons A-7 to A-9) while assailing the conviction and sentence of the Appellants submitted that the High Court erred in upholding the conviction of the Appellants. His submission was that the High Court should also have acquitted the Appellants herein along with other eight co-accused persons. Learned Counsel urged that, in any case, the High Court erred in upholding the Appellants' conviction and sentence Under Section 302/34 Indian Penal Code.

25. Learned Counsel urged that it was not in dispute that the Appellants along with other eight co-accused were originally charged and eventually convicted also for an offence punishable Under Section 302 read with Section 149 Indian Penal Code. With this background, when the matter was carried in appeal at the instance of all the eleven Accused persons challenging their conviction, the only question, which fell for consideration before the High Court, was whether the conviction of all the 11 Accused persons Under Section 302/149 is justified or not.

26. Learned Counsel urged that the High Court was, therefore, not justified in altering the charge from Section 302 read with Section 149 Indian Penal Code to Section 302 read with Section 34 Indian Penal Code suo moto and then was not justified in upholding the conviction and that too only qua three Accused persons (Appellants herein) and acquitting other eight co-accused.

27. In other words, his submission was that once the charges were framed Under Section 302/149 Indian Penal Code against all the 11 Accused persons which resulted in their conviction Under Section 302/149 Indian Penal Code, the Appellate Court had no jurisdiction to suo moto alter the charges and convict the Appellants Under Section 302/34 Indian Penal Code without giving them any opportunity to meet the altered charge and simultaneously acquitting remaining eight co-accused from the charge of Section 302/149 Indian Penal Code.

28. Learned Counsel urged that assuming that the Appellate Court had the jurisdiction to alter the charges qua the Appellants (A-7 to A-9) only, yet, in his submission, there was no evidence adduced by the prosecution to split the charges only against the present Appellants Under Section 34 Indian Penal Code for upholding their conviction Under Section 302 Indian Penal Code.

29. In substance, the submission was against the splitting of the charges at the appellate stage by the High Court for convicting the Appellants Under Section 302/34 Indian Penal Code and acquitting the remaining eight co-accused persons Under Section 302/149 Indian Penal Code but not extending the similar benefit of acquittal to the Appellants herein.

30. The last submission of the learned Counsel was that, in a case of this nature, the Appellate Court having acquitted the eight co-accused should have examined the role of each Accused (Appellants herein) in the crime. The reason being, when no case Under Section 149 Indian Penal Code was held made out qua all the Accused persons inasmuch as when eight co-accused stood acquitted Under Section 302/149 Indian Penal Code by the High Court and when there was no evidence to sustain the plea of Section 34 against the three Appellants, the only option available to the Appellate Court was to examine the role of each Appellant individually in the crime in question.

31. It was, therefore, his submission that if the role of the present two Appellants is examined in the commission of the crime then it is clear that the death of Mahendro Bai occurred on account of gun shot injury hit by Puran Singh (A-3) who stood acquitted and Farsa injury inflicted by Mala Singh (A-7), who has since died, and not on account of the injury caused by the present two Appellants.

32. Learned Counsel pointed out from the evidence that so far as Appellant No. 2 - Phuman Singh (A-8) and Appellant No. 3-Kashmiro (lady) (A-9) is concerned, both individually hit the deceased with lathi which caused one simple injury on the right hand and other on left cheek of the deceased and that too before others could inflict the fatal injuries to the deceased.

33. It was, therefore, his submission that in these circumstances, Appellant Nos. 2 and 3 could at best be convicted for an offence punishable Under Section 324 Indian Penal Code but not beyond it keeping in view the law laid down by this Court on such question in Mohd. Khalil Chisti v. State of Rajasthan and Ors. MANU/SC/1090/2012: (2013) 2 SCC 541.

34. Lastly, it was urged that since both these Appellants (A-8 & A-9) have already undergone around seven years of jail sentence and were also released on bail in the year 2009 by this Court and both still continue to be on bail for the last 10 years, the ends of justice would be met, if both the Appellants are awarded the jail sentence of "already undergone" Under Section 324 Indian Penal Code with any fine amount.

35. Mr. Karan Bharihoke, learned amicus curiae brought to our notice the legal position, which apply in this case and argued ably by pointing out the evidence and how the legal principle laid down by this Court apply to the case at hand. He also submitted his written note.

36. In reply, learned Additional Advocate General for the Respondent (State) supported the impugned order and urged that the same be upheld calling for no interference.

37. Having heard the learned Counsel for the parties and learned amicus curiae, we are inclined to allow the appeal finding force in the submissions urged by the learned Counsel for the Appellants as detailed below.

38. Four questions arise for consideration in this appeal-first, whether the High Court was justified in convicting the Appellants Under Section 302 read with Section 34 Indian Penal Code when, in fact, the initial trial was on the basis of a charge Under Section 302 read with Section 149 Indian Penal Code?

39. Second, whether the High Court was justified in altering the charge Under Section 149 to one Under Section 34 in relation to three Accused (Appellants herein) after acquitting eight co-accused from the charges of Section 302/149 Indian Penal Code and then convicting the three Accused (Appellants herein) on the altered charges Under Section 302/34 Indian Penal Code?

40. Third, whether there is any evidence to sustain the charge Under Section 34 Indian Penal Code against the three Accused (Appellants herein) so as to convict them for an offence Under Section 302 Indian Penal Code?

41. And Fourth, in case the charge Under Section 34 Indian Penal Code is held not made out for want of evidence and further when the charge Under Section 149 is already held not made out by the High Court, whether any case against three Accused persons (Appellants herein) is made out for their conviction and, if so, for which offence?

42. Before we examine the facts of the case, it is necessary to take note of the relevant sections, which deal with alter of the charge and powers of the Court/Appellate Court in such cases.

43. Section 216 of Code of Criminal Procedure deals with powers of the Court to alter the charge. Section 386 of Code of Criminal Procedure deals with powers of the Appellate Court and Section 464 of Code of Criminal Procedure deals with the effect of omission to frame, or absence of, or error in framing the charge. These Sections are quoted below:

216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the Accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the Accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the Accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

386. Powers of the Appellate Court. After perusing such record and hearing the Appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal Under Section 377 or Section 378, the Accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the Accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the Accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the Accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the Accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the Accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the Accused in respect of the facts proved, it shall quash the conviction.

44. Combined reading of Sections 216, 386 and 464 of Code of Criminal Procedure would reveal that an alteration of charge where no prejudice is caused to the Accused or the prosecution is well within the powers and the jurisdiction of the Court including the Appellate Court.

45. In other words, it is only when any omission to frame the charge initially or till culmination of the proceedings or at the appellate stage results in failure of justice or causes prejudice, the same may result in vitiating the trial in appropriate case.

46. The Constitution Bench of this Court examined this issue, for the first time, in the context of old Code of Criminal Procedure in a case reported in Willie (William) Slaney v. State of M.P. (MANU/SC/0038/1955: AIR 1956 SC 116).

47. Learned Judge Vivian Bose J. speaking for the Bench in his inimitable style of writing held, "Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (1) the Accused has 'in fact' been misled by it 'and' (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language."

48. In Kantilal Chandulal Mehta v. State of Maharashtra and Anr. MANU/SC/0111/1969: (1969) 3 SCC 166, this Court again examined this very issue arising under the present Code of Criminal Procedure with which we are concerned in the present case. Justice P. Jaganmohan Reddy, speaking for the Bench after examining the scheme of the Code held inter alia "In our view the Code of Criminal Procedure gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the Accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."

49. Now coming to the question regarding altering of the charge from Section 149 to Section 34 Indian Penal Code read with Section 302 Indian Penal Code, this question was

considered by this Court for the first time in the case of Lachhman Singh and Ors. v. The State (MANU/SC/0036/1952: AIR 1952 SC 167) where Justice Fazl Ali speaking for the bench held as under:

It was also contended that there being no charge Under Section 302 read with Section 34 of the Indian Penal Code, the conviction of the Appellants Under Section 302 read with Section 149 could not have been altered by the High Court to one Under Section 302 read with Section 34, upon the acquittal of the remaining Accused persons. The facts of the case are however such that the Accused could have been charged alternatively, either Under Section 302 read with Section 149 or Under Section 302 read with Section 34. The point has therefore no force.

50. This question was again examined by this Court in Karnail Singh and Anr. v. State of Punjab (MANU/SC/0051/1954: AIR 1954 SC 204) wherein the learned Judge Venkatarama Ayyar, J. elaborating the law on the subject held as under:

(7) Then the next question is whether the conviction of the Appellant Under Section 302 read with Section 34, when they had been charged only, Under Section 302 read with Section 149, was illegal The contention of the Appellants is that the scope of Section 149 is different from that of Section 34, that while what Section 149 requires is proof of a common object, it would be necessary Under Section 34 to establish a common intention and that therefore when the charge against the Accused is Under Section 149, it cannot be converted in appeal into one Under Section 34. The following observations of this Court in Dalip Singh v. State of Punjab MANU/SC/0031/1953: AIR 1953 SC 364 were relied on in support of this position:

Nor is it possible in this case to have recourse to Section 34 because the Appellants have not been charged with that even in the alternative and the common intention required by Section 34 and the common object required by Section 149 are far from being the same thing.

It is true that there is substantial difference between the two Sections but as observed by Lord Sumner in Barendra Kumar Ghosh v. Emperor MANU/PR/0064/1924: AIR 1925 PC 1, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge Under Section 149 overlaps the ground covered by Section 34. If the common object which is the subject matter of the charge Under Section 149 does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the Accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge Under Section 149 would be the same 'if the charge were Under Section 34, then the failure to charge the Accused Under Section 34 could not result in any prejudice and in such cases, the substitution of Section 34 for Section 149 must be held to be a formal matter.

We do not read the observations in Dalip Singh v. State of Punjab as an authority for the broad proposition that in law there could be no recourse to, Section 34 when the charge is only Under Section 149. Whether such recourse can be had or not must depend on the facts of each case. This is in accord with the view taken by this Court in Lachhman Singh v. The State, where the substitution of Section 34 for Section 149 was upheld on the ground that the facts were such

that the Accused could have been charged alternatively either Under Section 302 read with Section 149, or Under Section 302 read with Section 34.

51. The law laid down in Lachman Singh (supra) and Karnail Singh (supra) was reiterated in Willie (William) Slaney (Supra) wherein Justice Vivian Bose speaking for the Bench while referring to these two decisions held as under:

(49). The following cases afford no difficulty because they directly accord with the view we have set out at length above. In Lachman Singh v. The State MANU/SC/0036/1952: AIR 1952 SC 167, it was held that when there is a charge Under Section 302 of the Indian Penal Code read with Section 149 and the charge Under Section 149 disappears because of the acquittal of some of the Accused, a conviction Under Section 302 of the Indian Penal Code read with Section 34 is good even though there is no separate charge Under Section 302 read with Section 34, provided the Accused could have been so charged on the facts of the case.

The decision in Karnail Singh v. The State of Punjab MANU/SC/0051/1954: AIR 1954 SC 204 is to the same effect and the question about prejudice was also considered.

52. This principle of law was then reiterated after referring to law laid down in Willie (William) Slaney (Supra) in the case reported in Chittarmal v. State of Rajasthan MANU/SC/0008/2003: (2003) 2 SCC 266 in the following words:

14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the Sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge Under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Sections 34 and Section 149

may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the Accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of Section 149 is, therefore, no bar in convicting the Appellants Under Section 302 read with Section 34 Indian Penal Code, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See Barendra Kumar Ghosh v. King Emperor: MANU/PR/0064/1924: AIR 1925 PC 1; Mannam Venkatadari and Ors. v. State of Andhra Pradesh: MANU/SC/0137/1971: AIR 1971 SC 1467; Nethala Pothuraju and Ors. v. State of Andhra Pradesh: MANU/SC/0479/1991: AIR 1991 SC 2214 and Ram Tahal and Ors. v. State of U.P.: MANU/SC/0171/1971: AIR 1972 SC 254)

53. In the light of the aforementioned principle of law stated by this Court which is now fairly well settled, we have to now examine the evidence of this case with a view to find out as to whether the High Court was justified in convicting Appellant Nos. 2 and 3 herein for commission of offence of murder with the aid of Section 34 Indian Penal Code which was initially not the charge framed against the Appellants herein by the Sessions Judge.

54. Having perused the entire evidence and legal position governing the issues arising in the case, we have formed an opinion that the appeal filed by Appellant Nos. 2 and 3 deserves to be allowed and the conviction of Appellant Nos. 2 and 3 deserves to be altered to Section 324 Indian Penal Code. This we say for the following reasons:

55. First, once eight co-accused were acquitted by the High Court Under Section 302/149 Indian Penal Code by giving them the benefit of doubt and their acquittal attained finality, the charge Under Section 149 Indian Penal Code collapsed against the three Appellants also because there could be no unlawful assembly consisting of less than five Accused persons. In other words, the Appellants (3 in number) could not be then charged with the aid of Section 149 Indian Penal Code for want of numbers and were, therefore, rightly not proceeded with Under Section 149 Indian Penal Code.

56. Second, keeping in view the law laid down by this Court in the cases referred supra, the High Court though had the jurisdiction to alter the charge from Section 149 Indian Penal Code to Section 34 Indian Penal Code qua the three Appellants, yet, in our view, in the absence of any evidence of common intention qua the three Appellants so as to bring their case within the net of Section 34 Indian Penal Code, their conviction Under Section 302/34 Indian Penal Code is not legally sustainable.

57. In other words, in our view, the prosecution failed to adduce any evidence against the three Appellants to prove their common intention to murder Mahendro Bai. Even the High Court while altering the charge from Section 149 Indian Penal Code to Section 34

Indian Penal Code did not refer to any evidence nor gave any reasons as to on what basis these three Appellants could still be proceeded with Under Section 34 Indian Penal Code notwithstanding the acquittal of remaining eight co-accused.

58. It was the case of the prosecution since inception that all the eleven Accused were part of unlawful assembly and it is this case, the prosecution tried to prove and to some extent successfully before the Sessions Judge which resulted in the conviction of all the eleven Accused also but it did not sustain in the High Court.

59. In our view, the evidence led by the prosecution in support of charge Under Section 149 Indian Penal Code was not sufficient to prove the charge of common intention of three Appellants Under Section 34 Indian Penal Code though, as mentioned above, on principle of law, the High Court in its appellate jurisdiction could alter the charge from Section 149 to Section 34 Indian Penal Code.

60. Section 34 Indian Penal Code does not, by itself, create any offence whereas it has been held that Section 149 Indian Penal Code does. As mentioned above, the prosecution pressed their case since inception and accordingly adduced evidence against all the Accused alleging that all were the members of unlawful assembly Under Section 149 Indian Penal Code and not beyond it. The Sessions Court, therefore, rightly framed a charge to that effect.

61. If the prosecution was successful in proving this charge in the Sessions Court against all the Accused persons, the prosecution failed in so proving in the High Court.

62. The prosecution, in our view, never came with a case that all the 11 Accused persons shared a common intention Under Section 34 Indian Penal Code to eliminate Mahendro Bai and nor came with a case even at the appellate stage that only 3 Appellants had shared common intention independent of 8 co-accused to eliminate Mahendro Bai.

63. When prosecution did not set up such case at any stage of the proceedings against the Appellants nor adduced any evidence against the Appellants that they (three) prior to date of the incident had at any point of time shared the "common intention" and in furtherance of sharing such common intention came on the spot to eliminate Mahendro Bai and lastly, the High Court having failed to give any reasons in support of altered conviction except saying in one line that conviction is upheld Under Section 302/34 Indian Penal Code in place of Section 302/149 Indian Penal Code, the invoking of Section 34 Indian Penal Code at the appellate stage by the High Court, in our view, cannot be upheld.

64. True it is that "Lalkara" was given by Mala Singh-Appellant No. 1 (since dead) but it was not to eliminate Mahindrao Bai-the deceased.

65. Learned Counsel for the Respondent (State) was not able to point out any evidence that the Appellants ever shared common intention to eliminate Mahendro Bai independent of acquitted eight Accused. We are, therefore, unable to find any basis to sustain the conviction of the Appellants Under Section 302 read with Section 34 Indian Penal Code for want of any evidence of the prosecution.

66. Now we come to the next issue. It has come in evidence that Mala Singh (A-7) hit with a Farsa and Puran Singh (A-3) fired gun shot which hit Mahendro Bai. As per post-mortem report, Mahendro Bai died due to gun shot injury. So far as the role of Appellant Nos. 2 and 3 in the crime is concerned, both hit single blow-one on hand and other on cheek of Mahendro Bai prior to other two Accused-Mala Singh and Puran Singh inflicting their assault on her.

67. As per post-mortem report, both the assault made by the Appellant Nos. 2 and 3 caused simple injury to Mahendro Bai which did not result in her death and nor could result in her death. (see injury Nos. 2 and 3 in the evidence of PW-3 Dr. P.S. Parihar)

68. In a case of this nature, when there is a fight between the two groups and where there are gun shots exchanged between the two groups against each other and when on evidence eight co-accused are completely let of and where the State does not pursue their plea of Section 149 Indian Penal Code against the acquitted eight Accused which attains finality and where the plea of Section 34 Indian Penal Code is not framed against any Accused and where even at the appellate stage no evidence is relied on by the prosecution to sustain the charge of Section 34 Indian Penal Code qua the three Accused Appellants independent of eight acquitted co-accused and when out of two main Accused assailants, one has died and the other is acquitted and lastly, in the absence of any reasoning given by the High Court for sustaining the conviction of the three Appellants in support of alteration of the charge, we are of the considered view that the two Appellants are entitled to claim the benefit of entire scenario and seek alteration of their conviction for commission of the offence punishable Under Section 324 Indian Penal Code simplicitor rather than to suffer conviction Under Section 302/34 Indian Penal Code, if not complete acquittal alike other eight co-accused.

69. We are, therefore, of the considered opinion that Appellant Nos. 2 and 3 could at best be convicted for an offence punishable Under Section 324 Indian Penal Code and not beyond it on the basis of their individual participation in the commission of the crime.

70. Learned Counsel for the Appellants then stated that out of the total jail sentence awarded, Appellant Nos. 2 and 3 has already undergone around seven years of jail sentence when both were released on bail by orders of this Court on 07.07.2009. So far as the Appellant No. 3 is concerned, she is an aged lady.

71. Taking into consideration the fact that the Appellants Nos. 2 and 3 have already undergone seven years of jail sentence and Appellant No. 3 is an aged lady and is also on bail for the last 10 years and that both did not breach any condition of the bail in last the 10 years, we are inclined to allow the appeal and while setting aside the conviction and sentence of the Appellant Nos. 2 and 3 Under Section 302/34 Indian Penal Code, convert their conviction Under Section 324 Indian Penal Code and sentence them to what they have "already undergone" and impose a fine of Rs. 10,000/- on each Appellant and in default in payment of fine, to further undergo three months' simple imprisonment.

72. In other words, the Appellants (Nos. 2 & 3) need not undergo any jail sentence than what they have already undergone provided each of the Appellants deposit Rs. 10,000/- as fine amount within three months from the date of this order else both the Appellants will have to undergo three months simple imprisonment in default of non-deposit of fine amount.

73. Before parting, we place on record a word of appreciation for the valuable services rendered by Mr. Karan Bharihoke amicus curiae appointed by this Court. He argued the case ably and fairly and also filed effective written submissions, which enabled us to examine the issue involved in this appeal properly.

74. The appeal thus succeeds and is allowed in part. The impugned order is modified to the extent indicated above.

MANU/SC/0404/1988

Back to Section 153a of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 107 of 1988

Decided On: 16.02.1988

Ramesh Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
S. Ranganathan and Sabyasachi Mukherjee, JJ.

For Respondents/Defendant:

JUDGMENT
Sabyasachi Mukherjee, J.

1. This writ Petition was disposed of by our Order MANU/SC/0403/1988: JT1988(1)SC262 dated 1st of February, 1988, we indicated therein that we will give our reasons shortly. This we do by this judgment.

2. The Writ Petition No. 107 of 1988 is a petition under Article 32 of the Constitution. The petitioner is a practising advocate of the Bombay High Court. He approached this Court by means of the petition under Article 32 of the Constitution for issue of a writ in the nature of Prohibition or any other appropriate order restraining the respondents, namely, the Union of India, the Director General of Doordarshan, New Delhi, Blaze Advertising Pvt. Ltd. and Govind Nehalani, being the producer from telecasting or screening the serial titled "Tamas" and to enforce petitioner's fundamental rights under Articles 21 and 25 of the Constitution and declaring the Screening or televising of "Tamas" as violative of Section 5B of the Cinematograph Act, 1952.

3. One Javed Ahmed Siddique filed a writ petition in the High Court of Bombay being Writ Petition No. 201 of 1988. The same came up before a learned single Judge of the High Court of Bombay who while admitting the same on 21st of January, 1988 had granted stay of further telecasting of the said serial on T.V. till further orders. The respondents herein challenged the said order before the Division Bench of the Bombay High Court. The two learned Judges, namely, Justice Lentin and Justice Mrs. Sujata Manohar saw the complete serial on 22nd of January, 1988 and vacated the stay by an order dated 23rd of January, 1988. The judgment is impugned in the special leave petition which is taken on board and is also disposed of by this common judgment. It may also be mentioned that four episodes of the said serial have already been telecast.

4. The petitioner states that the exhibition of the said serial is against public order and is likely to incite the people to indulge in the commission of offences and it is therefore, violative of Section 5B(1) of the Cinematograph Act, 1952 (hereinafter called 'the Act') and destructive of principle embodied under Article 25 of the Constitution. It is also contended that under Section 153A of the Indian Penal Code, this presentation is likely to promote or attempts to promote, on grounds of religion, caste or community disharmony or feelings of enmity, hatred or ill-will among different religious, racial, language or regional groups or castes, or communities and is further prejudicial to the maintenance of harmony between different religious, racial, language or regional groups and incites people to participate or trains them to the use of criminal force or violence or participate in such criminal acts. So, therefore, it is an offence under Section 153A of the Indian Penal Code and it was submitted that the serial is prejudicial to the national integration.

5. Serial "Tamas" depicts the Hindu-Muslim tension and sikh-muslim tension before the partition of India. It further shows how the killings and looting took place between these communities before the pre-independence at Lahore. "Tamas" is based on a book written by Sree Bhisham Sahni. It depicts the period prior to partition and how communal violence was generated by fundamentalists and extremists in both communities and how innocent persons were duped into serving the ulterior purpose of fundamentalists and communalists of both sides and how an innocent boy is seduced to violence resulting in his harming both communities. It further shows how extremist elements in both communities infused tension and hatred for their own ends. That is how the two learned Judges of the High Court of Bombay mentioned hereinbefore have viewed it. They have also seen that realisation ultimately dawns as to the futility of it all and finally how inherent goodness in human mind triumphs and both communities learn to live in amity. They saw that the people learnt this lesson in a hard way. This is the opinion expressed by two experienced Judges of the High Court after viewing the serial.

6. The location of the story is Lahore. The period is just before independence. The very introductory part of the serial which was telecast on 9th of January, 1988 displayed that the idea and message behind the serial is to keep people away from getting involved in such violence arising out of communal animosity. By telecasting it on Doordarshan, Dr. Chitale appearing for the petitioner said, now seen by vast majority of people, the said serial is exposed to persons of all ages, who will fail to grasp the message if any behind the serial. The very first serial, according to the petitioner, depicts one person who is reported to be a member of Scheduled Caste from the Hindu community being asked by one Thekedar to get a pig killed and bring its dead body in order to serve the meal for an English man. The dead body is shown to be axed and collected by one person named 'Kalu' Who is represented to be a Christian. Kalu gets a dead pig from the said member of the Scheduled Caste Hindu who killed it. That dead pig is shown to be found at the door steps of a mosque. This, according to the petitioner, was provocative and was bound to result in instigation in Hindus against Muslims and consequently to rouse Muslim

anger resulting in some reaction on the part of the Muslims, which in its own turn is bound to have reaction by way of some acts of violence on the part of Hindus. According to the petitioner, the total result would be that there is likelihood that members of both the communities will rise in passion and anger against each other and take to acts which would lead to communal violence and riots.

7. The petitioner further states that in the first episode shown on 9th January, 1988 one elderly Hindu Who it depicted as a 'Guru', a preceptor, and is shown as giving inspiration/advice and instigation to a young boy to practise violence, to begin with, by asking the boy to cut the throat of the hen, and when the boy gets nervous and shows his unwillingness and unpreparedness, the Guru warns him that unless he showed his courage to kill a hen to begin with, how can he become bold and courageous to kill his enemy. The petitioner further alleges that in the background of this incident and in context of what precedes and succeeds this incidents between the Guru and the boy, it is clear that Guru has instigated the boy to get into the trend of thought and feeling to be ready to commit, violence against his enemies, in order to kill them, and on viewing the first part of the said serial as a Whole this instigation is to Hindu young boys to take to violence against Muslims. This is nothing but promoting feelings of enmity and hatred between Hindus and Muslims.

8. The petitioner further states that in the first serial the dialogue between the Hindu leaders and Muslim leaders is so arranged that Indian National Congress is suggested to be a Hindu Organisation. In the present background, therefore, the petitioner claims that the exhibition of said serial is likely to create communal disharmony.

9. "Tamas" had been given 'U' certificate by the Central Board of Film Censor. In this connection we may refer to the relevant provisions of the Cinematograph Act, 1952, which is an Act to make provision for the certification of cinematograph films for exhibition and regulating exhibitions by means of cinematograph. Section 3 of the Act provides for Board of Film Censors. Section 4 of the Act provides for examination of films. A film is examined in the first instance by an Examining Committee under Section 4A and, in certain circumstances, it is further examined by a Revising Committee under Section 5. Members of both the Committees are expected to set out not only their recommendations but also the reasons therefore in cases where there is difference of opinion amongst the members of the Committee. Section 5A of the Act provides that if after examining a film or having it examined in the prescribed manner, the Board considers that the film is suitable for unrestricted public exhibition, such a certificate is given which is called 'U' certificate. Section 5B of the Act provides for guidance in certifying films. The said Section 5B provides as follows:

5B. Principles for guidance in certifying films- (1) A film shall not be entitled for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of (the sovereignty and integrity of India) the security

of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of Court or is likely to incite the commission of any offence.

(2) Subject to the provisions contained in Sub-section (1) the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition.

10. Section 5C of the Cinematograph Act provides for the Constitution of Appellate Tribunals, consisting of persons who are familiar with the social, cultural or political institutions of India, have special knowledge of the various regions of India and also special knowledge of films and their impact on society, to hear appeals from the orders of the Censor Board. Under Section 5D, as it stands at present, the Tribunals can hear appeals by persons who, having applied for a certificate in respect of a film, are aggrieved by an order of the Board refusing to grant a certificate or granting a restricted certificate or directing the appellant to carry out certain excisions or modifications in the film. In addition, there is also an overall revisional power in the Central Government to call for the record of any proceeding in relation to any film at any stage, where it is not made the subject matter of appeal to the Appellate Tribunal, to enquire into the matter and make such order in relation thereto as it thinks fit, including a direction that the exhibition of the film should be suspended for a period not exceeding two months. Under the newly added Sub-section 5 of Section 6, Central Government has also been given revisional power in respect of a film certified by the Appellate Tribunal on the ground that it is necessary to pass an order in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or decency or morality.

11. Learned Additional Solicitor General, Shri Kuldeep Singh, for the Central Government, strongly urged before us that the film should be allowed to be exhibited. As a matter of fact in his enthusiasm, he submitted that there should be an order to the Government to exhibit the film again and again. He urged that all the appropriate authorities have considered the film and Doordarshan authorities have also independently examined this question. It has to be borne in mind that there is no allegation of any mala fide or bad motive on the part of the authorities concerned. The only question, therefore, is whether the film has been misjudged or wrongly judged and allowed to be exhibited or serialized in T.V. on a wrong approach. This film indubitably depicts violence. That violence between the communities took place before the pre-partition days is a fact and it is the truth. Dr. Chitale, however, submits that truth in its naked form may not always and in all circumstances be desirable to be told or exhibited.

12. During the course of the arguments before us on the 1st of February, 1988 our attention was drawn to an item in the Hindustan Times of that day which contained an

interview with the author Sree Bhisham Sahni. Strictly speaking such evidence is not admissible but since it is a matter of public interest, we have looked into it. The author has received the Sahitya Akademi award for this novel. It was written in 1974. The book is being taught in various universities. There has been no adverse reaction to the novel during the past fourteen years. The author further said "certain nuances which were however clear in the book are not so in the serial". The author has drawn attention to the incident that the mischief of getting a pig slaughtered and having it placed outside a mosque, was done by a character referred to as "Chaudhuri" in the film. In the novel his full name is mentioned as Murad Ali, which is obviously not a Hindu name, according to the author.

13. Vivian Bose, J. as he then was in the Nagpur High Court in the case of Bhagwati Charan Shukla v. Provincial Government MANU/NA/0057/1946 has indicated the yardstick by which this question has to be judged. There at page 18 of the report the Court observed that the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.

This in our opinion, is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law "the man on the top of a clapham omnibus".

14. This question came to be examined by this Court from a different angle in the case of K.A. Abbas v. The Union of India and Ors. MANU/SC/0053/1970: [1971]2SCR446. There K.A. Abbas the petitioner made documentary film called "A Tale of four Cities", which attempted to portray the contrast between the life of the rich and the poor in the four principal cities of the country. The film included certain shots of the red light district in Bombay. Although the petitioner applied to the Board of Film Censors for a "U" Certificate for unrestricted exhibition of the film, he was granted a certificate only for exhibition restricted to adults, the petitioner then filed the writ petition in this Court. At 'the hearing of the petition the Central Government indicated that it had decided to grant a 'U' certificate to the petitioner's film without the cuts previously ordered. Hidayatullah, C.J. has exhaustively dealt with the question and noted the statutory requirements. In that film there was a scanning shot of a very short duration, much blurred by the movement of the photographer's camera, in the words of Chief Justice, in Which the red light district of Bombay was shown with the inmates of the brothels waiting at the doors or windows. Some of them wore abbreviated skirts showing bare legs upto the knees and sometimes a short above them. This was objected to. The film was shown to the learned Judges in the presence of the lawyers. The learned Chief Justice at page 468 of the report addressed himself to the question: "How far can these restrictions go and how are these to be imposed" The Court examined the provisions of Section 5B(2) of the Act. After examining the relevant provisions and large number of authorities, the Chief Justice noted that the task of the censor was extremely delicate and its duties cannot be the

subject of an exhaustive set of commands established by prior ratiocination. Chief Justice at page 474 of the report observed as follows:

Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censors scissors. Thus audiences in India can be expected to view with equanimity the story of Oedipus son of Latius who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly, scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Blwyn's Phulmat of the Hills or the Same episode in Henryson's Testament of Cresseid (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad shah Rangila. If Nadir Shah "made golgothas of skulls, must we leave them out of the story because people must be made to view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's Candide would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen.
(emphasis supplied)

15. Chief Justice observed that our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationship as banned in toto and for ever from human thought and must give scope for talent to put them before society. In our scheme of things, the Chief Justice noted, ideas having redeeming social or artistic value must also have importance and protection for their growth.

16. Our attention was also drawn by Dr. Chitale to the decision of this Court in Ebrahim Sulaiman Sait v. M.C.Muhammad and Anr. MANU/SC/0347/1979: [1980]1SCR1148, where Gupta, J. speaking for the Court observed that truth was not an answer to a charge of corrupt practice under Section 123(3A) of the said Act; what was relevant was whether the speech promoted or sought to promote feelings of enmity or hatred as mentioned in that provision. But the likelihood must be judged from healthy and reasonable standards.

17. The question was again considered by this Court in Rajkapoor v. Laxman MANU/SC/0211/1979: 1980CriLJ436. This court reiterated that the Penal Code is general and the Cinematograph Act, 1952 is special. The scheme of the Cinematograph Act is deliberately drawn up to meet the explosively expanding cinema menace if it were not strictly policed. No doubt, the cinema is a great instrument for public good if geared to social ends and can be a public curse if directed to antisocial objectives. The decision reiterated that a balance has to be struck. On the evidence available before this Court it appears that a balance has been struck.

18. Dr. Chitale emphasised that in an interview with the author, the author said that "Tamas" was not a historical novel. It merely takes into account certain events from history and builds upon them. He further said that life provided the raw material and a writer moulded it according to his imagination and perception of reality.

19. We have given full thought to the contentions urged on behalf of the petitioner and come to the conclusion that these contentions cannot be accepted for two reasons. Firstly, as we have already pointed out, the Cinematograph Act itself contains several provisions to ensure the fulfilment of the conditions laid down in Section 5B and to ensure that any film which is likely to offend the religious susceptibilities of the people are not screened for public exhibition of the film. That apart we are informed that the Doordarshan authorities also scrutinise a film before it is exhibited on the television screen. Though we do not have the details of the authority or body Which scrutinised the film for purposes of exhibition on the television, the procedure does involve further examination of the film from standards of public acceptability before it is shown on the television. It is true that the remedy of an approach to the Appellate Tribunal is available only to persons aggrieved by the refusal of the Board to grant a certificate or the cuts and modifications proposed by it. It is for the consideration of the Central Government whether the scope of this section should be expanded to permit appeals to the Tribunals even by persons who are aggrieved by the grant of certificate of exhibition to a film on the ground that the principles laid down for the grant of certificates in Section 5B have not been fulfilled. But, even on the statute as it presently stands, the procedure for grant of certificate of exhibition to a film is quite elaborate and the unanimous approval by the examining Committee must be given full weight. As pointed out by Krishna Iyer, J. in the Rajkapoor Case (supra), a Court would be slow to interfere with the conclusion of a body specially constituted for this purpose.

20. Secondly, in this case we have the advantage of the view of two experienced Judges of one of the premier High Courts of this country. The learned Judges found that the message of the film was good. They have stated that the film shows how realisation ultimately dawns as to futility of violence and hatred, and how the inherent goodness in human nature triumphs. Dr. Chitale submitted that the Judges have viewed the film from their point of view but the average persons in the country are not as sober and experienced as Judges of the High Court. But the Judges of the High Court of Bombay

have viewed it, as they said, from the point of view of "how the average person for whom the film is intended will view it" and the learned Judges have come to the conclusion that the average person will learn from the mistakes of the past and realise the machinations of the fundamentalists and will not perhaps commit those mistakes again. The learned Judges further observed that illiterates are not devoid of common sense, or unable to grasp the calumny of the fundamentalist and extremists when it is brought home to them in action on the screen. This is how they have viewed it: those who forget history are condemned to repeat it. It is out of the tragic experience of the past that we can fashion our present in a rational and reasonable manner and view our future with wisdom and care. Awareness in proper light is a first step towards that realisation. It is true that in certain circumstances truth has to be avoided. Tamas takes us to a historical past - unpleasant at times, but revealing and instructive. In those years which Tamas depicts a human tragedy of great dimension took place in this subcontinent - though 40 years ago - it has left a lasting damage to the Indian psyche. It has been said by Lord Morley in "On Compromise" that it makes all the difference in the world whether you put truth in the first place or in the second place. It is true that a writer or a preacher should cling to truth and right, if the very heavens fall. This is a universally accepted basis. Yet in practice, all schools alike are forced to admit the necessity of a measure of accommodation in the very interests of truth itself. Fanatic is a name of such ill repute, exactly because one Who deserves to be so called injuries good causes by refusing timely and harmless concession; by irritating prejudices that a wiser way of urging his own opinion might have turned aside; by making no allowances, respecting no motives, and recognising none of those qualifying principles that are nothing less than necessary to make his own principle true and fitting in a given society. Judged by all standards of a common man's point of view of presenting history with a lesson in this film, these boundaries appear to us could have been kept in mind. This is also the lesson of history that naked truth' in all times will not be beneficial but truth in its proper light indicating the evils and the consequences of those evils is instructive and that message is there in "Tamas" according to the views expressed by the two learned Judges of the High Court. They viewed it from an average, healthy and commonsense point of view. That is the yardstick. There cannot be any apprehension that it is likely to affect public order or it is likely to incite into the commission of any offence. On the other hand, it is more likely that it will prevent incitement to such offences in future by extremists and fundamentalists.

21. Dr. Chitale, relying strongly on certain observations in Abbas Case (supra, at p. 459 of the reports) contended that there was real danger of the film in this case inciting people to violence and to commit other offences arising out of communal disharmony. It is no doubt true that the motion picture is a powerful instrument with a much stronger impact on the visual and aural senses of the spectators than any other medium of communications; likewise, it is also true that the television, the range of which has vastly developed in our country in the past few years, now reaches out to the remotest corners of the country catering to the not so sophisticated, literary or educated masses of people living in distant villages. But the argument overlooks that the potency of the motion

picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion. Unfortunately, modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face the realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this film is to draw a lesson from our country's past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for a motion picture to convey such a message in depth and if it is able to do this, it will be an achievement of great social value. In the present case the finding of the learned Judges of Bombay High Court is that the picture viewed in its entirety, is capable of creating a lasting impression of this message of peace and coexistence and that people are not likely to be obsessed, overwhelmed or carried away by the scenes of violence or fanaticism shown in the film. we see no reason to differ from this conclusion.

22. Before we conclude we note that the petition was based on alleged violation of Articles 21 and 25 of the Constitution. We are unable to see any alleged violation of those articles. We, however accept the position that the petitioner has a right to draw attention of this Court to ensure that the communal atmosphere is kept clean and unpolluted. He has done well to draw attention to this danger. We have examined and found that there is no such danger and the respondents have not acted improperly or imprudently.

23. In the aforesaid view of the matter this petition under Article 32 of the Constitution fails and is accordingly dismissed.

24. Similarly, on similar grounds the special leave petition arising out of the judgement and order of the Bombay High Court dated 23rd January, 1988 in Appeal No. 96/88 is also dismissed.

25. In the facts and circumstances of the case, there will be no order as to costs.

MANU/SC/0080/1964

Back to Section 292 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 178 of 1962

Decided On: 19.08.1964

Ranjit D. Udeshi Vs. State of Maharashtra

Hon'ble Judges/Coram:
P.B. Gajendragadkar, C.J., K.N. Wanchoo, M. Hidayatullah, N. Rajagopala Ayyangar and J.C. Shah, JJ.

JUDGMENT
M. Hidayatullah J.

1. The appellant is one of four partners of a firm which owns a book-stall in Bombay. He was prosecuted along with the other partners under s. 292, Indian Penal Code. All the facts necessary for out purpose appear from the simple charge with two counts which was framed against them. It reads:

"That you caused Nos. 1, 2, 3, 4 on or about the 12th day of December, 1959 at Bombay being the partners of a book-stall named Happy Book Stall were found in possession for the purpose of sale copies of an obscene book called Lady Chatterley's Lover (unexpurgated edition) which inter alia contained, obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code;

AND

That you Gokuldas Shamji on or about the 12th day of December 1959 at Bombay did sell to Bogus Customer Ali Raza Sayeed Hasan a copy of an obscene book called Lady Chatterley's Lover (unexpurgated edition) which inter alia contained obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code."

2. The first count applied to the appellant who was accused No. 2 in the case. The Additional Chief Presidency Magistrate, III Court, Esplanade, Bombay, convicted all the partners on the first count and fined each of them Rs. 20 with one week's simple imprisonment in default. Gokuldas Shamji was additionally convicted on the second count and was sentenced to a further fine of Rs. 20 or like imprisonment in default. The Magistrate held that the offending book was obscene for purposes of the section. The

present appellant filed a revision in the High Court of Bombay. The decision of the High Court was against him. He has now appealed to this Court by special leave and has raised the issue of freedom of speech and expression guarantied by the nineteenth Article. Before the High Court he had questioned the finding of the Magistrate regarding the novel.

3. It is convenient to set out s. 292 of the Indian Penal Code at this stage:

"292. Sale of obscene books etc.: whoever -

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment for either description for a term which may extend to three months, or with fine, or with both.

Exception. - This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

4. To prove the requirements of the section the prosecution examined two witnesses. One was the test purchaser named in the charge and the other an Inspector of the Vigilance Department. these witnesses proved possession and sale of the book which facts are not denied. The Inspector in his testimony also offered his reasons for considering the book to be obscene. On behalf of the accused Mr. Mulkraj Anand, a writer and art critic gave

evidence and in a detailed analysis of the novel, he sought to establish that in spite of its apparent indicate theme and the candidness of its delineation and diction, the novel was a work of considerable literary merit and a classic and not obscene. The question does not altogether depend on oral evidence because the offending novel and the portions which are the subject of the charge must be judged by the court in the light of s. 292, India Penal Code, and the provisions of the Constitution. This raises two broad and independent issues of law - the validity of s. 292, Indian Penal code, and the proper interpretation of the section and its application to the offending novel.

5. Mr. Garg who argued the case with ability, raised these two issues. He bases his argument on three legal grounds which briefly are:

(i) that s. 292 of the Indian Penal code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Art. 19(1)(a) and is not saved by clause (2) of the same article;

(ii) that even if s. 292, Indian Penal Code, be valid, the book is not obscene if the section is properly construed and the book as a whole is considered; and

(iii) that the possession or sale to be punishable under the section must be with the intention to corrupt the public in general and the purchasers in particular.

6. On the subject of obscenity his general submission is that a work of art is not necessarily obscene if it treats with sex even with nudity and he submits that a work of art or a book of literary merit should not be destroyed if the interest of society requires that it be preserved. He submits that it should be viewed as a whole, and its artistic or literary merits should be weighed against the so-called obscenity, the context in which the obscenity occurs and the purpose it seeks or serve. If on a fair consideration of these opposite aspects, he submits, the interest of society prevails, than the work of art or the book must be preserved, for then the obscenity is overborne. In no case, he submits, can stray passage or passages serve to stamp an adverse verdict on the book. He submits that the standard should not be that of an immature teenager or a person who is abnormal but of one who is normal, that is to say, with a mens sana in corporis sana. He also contends that the test adopted in the High Court and the Court below from Queen v. Hicklin (1868) L.R. 3 Q.B. 360 is out of date and needs to be modified and he commends for our acceptance the views expressed recently by the courts in England and the United States.

7. Article 19 of the Constitution which is the main plank to support these arguments reads:

"19(1) All citizens shall have the right -

(a) to freedom of speech and expression;

.....

.....

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of... public order, decency or morality...."

8. No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article I of the International Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hard-core pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse sexual feelings.

9. Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality.

The word obscenity is really not vague because it is a word which is well-understood even if persons differ in their attitude to what is obscene and what is not. Lawrence

thought James Joyce's Ulysses to be an obscene book deserving suppression but it was legalised and he considered Jane Eyre to be pornographic but very few people will agree with him. The former he thought so because it dealt with excretory functions and the latter because it dealt with sex repression. (See Sex, Literature and Censorship pp. 26, 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the propagation of ideas, opinions and informations of public interest or profit." When there is propagation of ideas, opinions and informations of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scale in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Art. 19.

The next question is when can an object be said to be obscene?

10. Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (acts reus), and the law required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is mens rea or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.

11. Next to consider is the second part of the guilty act (actus reus), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that mens rea must always be established by the prosecution through positive evidence. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused

confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. When Wilkes printed a dozen copies of his Essay on Woman for private circulation, the printer took an extra copy for himself. That copy was purchased from the printer and it brought Wilkes to grief before Lord Mansfield. The gist of the offence was taken to be publication-circulation and Wilkes was presumed to have circulated it. Of course, Wilkes published numerous other obscene and libellous writings in different ways and when Madame Pampadour asked him: "How far does the liberty of the Press extend in England?" he gave the characteristic answer: "I do not know. I am trying to find out !" (See 52 Harv. L. Rev. 40)

12. The problem of scienter (knowingly doing an act) has caused anxious thought in the United States under the Comstock law 19 U.S.C. 1461 (1958) which deals with the non-availability of obscene matter. We were cited Manual Enterprises Inc. v. J. Edward Day 370 U.S. 478: 8 L. ed. 2nd 639 but there was so little concurrence in the Court that it has often been said, and perhaps rightly, that the case has little opinion value. The same is perhaps true of the latest case Nico Jacobellis v. State of Ohio (decided on June 22, 1964) of which a copy of the judgment was produced for our perusal.

13. It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc. can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech. No such plea has been raised in this case but we mention it to draw attention to the fact that this may lead to different results in different cases. When Savage published his Progress of a Divine, and was prosecuted for it, his plea was that he had "introduced obscene ideas with a view to exposing them to detestation, and of amending the age by showing the depravity of wickedness" and the plea was accepted (See Dr. Johnson's Life of Savage in his Lives of the Poets). In Hicklin's case (1868) L.R. 3 Q.B. 360 Blackburn J. did not accept a similar plea in respect of the pamphlet before him observing that it would "justify the publication of anything however indecent, however obscene, and however mischievous." We are not called upon to decide this issue in this case but we have found it necessary to mention it because ideas having social importance will prima facie be protected unless obscenity is so gross and decided that the interest of the public dictates the other way. We shall now consider what is meant by the word "obscene" in s. 292, Indian Penal Code.

14. The Indian Penal Code borrowed the word from the English Statute. As the word "obscene" has been interpreted by English Courts something may be said of that interpretation first. The Common law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year Queen v. Read 11 Mod 205 Q.B. was decided, In 1727 in the case against one Curl it was ruled for the first time that it was a Common Law offence 2 Stra. 789 K.B.. In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Vict. C. 83) in Hicklin's case (1868) L.R. 3 Q.B. 360. The section of the English Act is long (they were so in those days), but it used the word "obscene" provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially in pari materia with s. 292, Indian Penal Code, in spite of some differences in language. In Hicklin's case (1868) L.R. 3 Q.B. 360 the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read; "The Confession Unmasked, showing the depravity of Romish priesthood, the iniquity of the confessional, and the questions put to females in confession." It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was "grossly obscene, as relating to impure and filthy acts, words or ideas". Cockburn, C.J. laid down the test of obscenity in these words:

"..... I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."
15. This test has been uniformly applied in India.

16. The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects. The first of these questions invites the Court to reach a decision on a constitutional issue of a most far-reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to

case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angles and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

17. The question is now narrowed to what is obscenity as distinguished from a permissible treating with sex? Mr. Garg relies on some passages from the opinions expressed in the Supreme Court of the United States in Samuel Roth v. U. S. A. (354 U.S. 476; 1 L ed. 2d. 1498 (1957)) and from the charge to the jury by Stable J. in Regina v. Martin Secker and Warburg Ltd. [1954] 1 W.L.R. 738 and invites us to adopt the test of "hard-core pornography" for the interpretation of the word "obscene" in the Indian Penal Code. He points out that the latest statute in England now makes exceptions leading to the same result. He has also referred to some books and literary and artistic publications which have not been considered objectionable.

18. It may be admitted that the world has certainly moved far away from the times when Pamela, Moll Flanders, Mrs. Warren's Profession, and even Mill on the Floss were considered immodest. Today all these and authors from Aristophanes to Zola are widely read and in most of them one hardly notices obscenity. If our attitude to art versus obscenity had not undergone a radical change, books like Caldwell's God's Little Acre and Andre Gide's If It Die would not have survived the strict test. The English novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tess by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which "were strongly disapproved of under the conventions of the age", but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. Curiously, varying results are noticeable in respect of the same book and in the United States the same book is held to be obscene in one State but not in another [See A Suggested Solution to the Riddle of Obscenity (1964), 112 Penn. L. Rev. 834.

19. But even if we agree thus far, the question remains still whether the Hicklin test is to be discarded? We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all

cases. Mr. Garg, however, urges that the test must be modified in two respects. He wants us to say that a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons. He says that the overall effect of the book should be the test and secondly, that the book should only be condemned if it has no redeeming merit at all, for then it is "dirt for dirt's sake", or as Mr. Justice Frankfurter put it in his inimitable way "dirt for money's sake." His contention is that judged of in this light the impugned novel passes the Hicklin test if it is reasonably modified.

20. Mr. Garg is not right in saying that the Hicklin case (1868) L.R. 3 Q.B. 360 emphasised the importance of a few words or a stray passage. The words of the Chief Justice were that "the matter charged" must have "a tendency to deprave and corrupt". The observation does not suggest that even a stray word or an insignificant passage would suffice. Any observation to that effect in the ruling must be read secundum subjectam materiam, that is to say, applicable to the pamphlet there considered. Nor is it necessary to compare one book with another to find the extent of permissible action. It is useful to bear in mind the words of Lord Goddard, Chief Justice in the Reiter case. (1954) 2 Q.B. 16

"The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books..."
21. The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him: "Madam, you must have been looking for them." To adopt such an attitude towards art and literature would make the courts a board of censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of out contemporary society and particularly the influence of the book etc. on it must not overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such caution. This consideration marches with all law and precedent on this subject and so considered we can only say that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered

likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the letter is substantially transgressed the former must give way.

22. We may now refer to Roth's case 354 U.S. 476: 1 L. ed. 2d. 1498 (1957) to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become unduly restrictive and so the offending books must be considered in it entirety. Chief Justice Warren on the other hand made "Substantial tendency to corrupt by arousing lustful desires" as the test. Mr. Justice Harlan regarded as the test that must "tend to sexually impure thoughts". In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal sides of human nature, or having that tendency. Such a treating with sex it offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

23. It now remains to consider the book Lady Chatterley's Lover. The story is simple. A baronet, wounded in the war is paralysed from the waist downwards. He married Constance (Lady Chatterley) a little before he joined up and they had a very brief honeymoon. Sensing the sexual frustration of his wife and their failure to have an heir he leaves his wife free to associate with other men. She first experiences with one Michaelis and later with a game-keeper Mellors in charge of the grounds. The first lover was selfish sexually, the other was something of an artist. He explains to Constance the entire mystery of eroticism and they put it into practice. There are over a dozen descriptions of their sexual intimacies. The game-keeper's speech and vocabulary were not genteel. He knew no Latin which could be used to appease the censors and the human pudenda and other erogenous parts are freely discussed by him and also named by the author in the descriptions. The sexual congress each time is described with great candidness and in prose as tense as it is intense and of which Lawrence was always a consummate master. The rest of the story is a mundane one. There is some criticism of the modern machine civilization and its enervating effects and the production of sexually inefficient men and women and this, according to Lawrence, is the cause of maladjustment of sexes and their unhappiness.

24. Lawrence had a dual purpose in writing the book. The first was to shock the genteel society of the country of his birth which had hounded him and the second was to portray his ideal of sexual relations which was never absent from any of his books. His life was a long battle with censor-morons, as he called them. Even before he became an author he

was in clash with conventions. He had a very repressive mother who could not reconcile herself to the thought that her son had written the White Peacock. His sisters were extremely prim and correct. In his letters he said that he would not like them to read Lady Chatterley's Lover. His school teacher would not let him use the word 'stallion' in an essay and his first love Jessie could not read aloud Ibsen as she considered him immodest. This was a bad beginning for a hyper-sensitive man of "wild and untamed masculinity." Then came the publishers and last of all censors. From 1910 the publishers asked him to prune and prune his writings and he wrote and rewrote his novels to satisfy them. Aldous Huxley tells us that Lady Chatterley's Lover was written three times [Essays (Dent)]. Aldington in his Portrait of a Genius has seen in this a desire to avoid being pornographic but the fact is that Lawrence hated to be bowdlerized. His first publisher Heinemann refused his Sons and Lovers and he went over to Duckworths. They refused his Rainbow and he went to Secker. They brought out his Lost girl and it won a prize but after the Rainbow he was a banned author whose name could not be mentioned in genteel society. He became bitter and decided to produce a "taboo-shattering bomb". At the same time he started writing in defence of his fight for sexual liberation in English writing. This was Lawrence's first reason for writing the book under out review.

25. Lawrence viewed sex with indifference and also with passion. He was indifferent to it because he saw in it nothing to hide and he saw it with passion because to him it was the only "motivating power of life" and the culmination of all human strength and happiness. His thesis in his own words was - "I want men and women to be able to think of sex fully, completely, honestly and cleanly" and not to make of it "a dirty little secret". The taboo on sex in art and literature which was more strict thirty-five years ago, seemed to him to corrode domestic and social life and his definite view was that a candid discussion of sex through art was the only catharsis for purifying and relieving the congested emotions. This is the view he expounded through his writings and sex is never absent from his novels, his poems and his critical writings. As he was inclined freely to use words which Swift had used before him and many more, he never considered his writings obscene. He used them in this book with profusion and they occur in conversation between Mellors and Constance and in the descriptions of the sexual congresses and the erotic love play. The realism is staggering and outpaces the French Realists. But he says of himself:

"I am abused most of all for using the so called 'obscene words'. Nobody quite knows what the word 'obscene' itself means, or what it is intended to mean; but gradually all the old words that belong to the body below the navel, have come to be judged obscene." (introduction to Pansies).

That was the second motivating factor in the book.

One cannot doubt the sincerity of Lawrence's belief and his missionary zeal. Boccaccio seemed fresh and wholesome to him and Dante was obscene. He prepared a theme which

would lend itself to treating with sex on the most erotic plane and one from which the genteel society would get the greatest shock and introduced a game-keeper in whose mouth he could put all the taboo words and then he wrote of sex, of the sex organs and sex actions with brutal candidness. With the magic of words he made the characters live and what might even have passed for allegory and symbolism became extreme realism. He went too far. While trying to edit the book so that it could be published in England he could not excise the prurient parts. He admitted defeat and wrote to Seckers that he "got colour-blind and did not know any more what was supposed to be proper and what not." Perhaps he got colour-blind when he wrote it. He wanted to shock genteel society, a society which had cast him out and banned him. He wrote a book which in his own words was "a revolution - a bit of a bomb". No doubt he wrote a flowering book with pistil and stamens standing but it was to quote his on words again "a phallic novel, a shocking novel". He admitted it was too good for the public. He was a courageous writer but his zeal was misplaced because it was born of hate and his novel was "too phallic for the gross public."

26. This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J.B. Priestly said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses: he is the poet of a world in rut, and and lately he has become its prophet, with unfortunate results in his fiction." [The English Novel. p. 142 (Nelson)]. The expurgated copy is available but the people who would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:

"Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words."

"The whole book really consists of detailed descriptions of their sexual fulfilment. They are not offensive, sometimes very beautiful, but on the whole strangely wearisome. The sexual atmosphere is suffocating. Beyond this sexual atmosphere there is nothing, nothing." [Son of woman (Jonathan Cape)].

27. No doubt Murray says that in a very little while and on repeated readings the mind becomes accustomed to them but he says that the value of the book then diminishes and it leaves no permanent impression. The poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing. The promptings of the unconscious particularly in the region of sex is suggested as the

message in the book. But it is not easy for the ordinary reader to find it. The Machine Age and its impact on social life which is its secondary theme does not interest the reader for whose protection, as we said, the law has been framed.

28. We have dealt with the question at some length because this is the first case before this court invoking the constitutional guarantee against the operation of the law regarding obscenity and the book is one from an author of repute and the center of many controversies. The book is probably an unfolding of his philosophy of life and of the urges of the unconscious but these are unfolded in his other books also and have been fully set out in his Psychoanalysis and the Unconscious and finally in the Fantasia of the Unconscious. There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find the in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy type test we have indicated above.

29. In the conclusion we are of the opinion that the High Court was right in dismissing the revision petition. The appeal fails and is dismissed.

30. Appeal dismissed.

MANU/SC/0180/1976

Back to Section 299 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 214 of 1971

Decided On: 15.09.1976

State of Andhra Pradesh Vs. Rayavarapu Punnayya and Ors.

Hon'ble Judges/Coram:
R.S. Sarkaria and S. Murtaza Fazal Ali, JJ.

JUDGMENT
R.S. Sarkaria, J.

1. This appeal by special leave is directed against a judgment of the High Court of Andhra Pradesh. It arises out of these facts.

2. In Rompicherla village, there were factions belonging to three major communities viz., Reddys, Kammas and Bhatrajus. Rayavarapu (Respondent No. 1 herein) was the leader of Kamma faction, while Chopparapu Subbareddi was the leader of the Reddys. In politics, the Reddys were supporting the Congress Party, while Kammas were supporters of Swatantra Party. There was bad blood between the two factions which were proceeded against under Section 107, Cr. P. C. In the Panchayat elections of 1954, a clash took place between the two parties. A member of the Kamma faction was murdered. Consequently, nine persons belonging to the Reddy faction were prosecuted for that murder. Other incidents also took place in which these warring factions were involved. So much so, a punitive police force was stationed in this village to keep the peace during the period from March 1966 to September 1967. Sarikonda Kotamraju, the deceased person in the instant case, was the leader of Bhatrajus. In order to devise protective measures against the onslaughts of their opponents, the Bhatrajus held a meeting at the house of the deceased, wherein they resolved to defend themselves against the aggressive actions of the respondents and their party-men. PW 1, a member of Bhatrajus faction has a cattle shed. The passage to this cattle-shed was blocked by the other party. The deceased took PW 1 to Police Station Nekarikal and got a report lodged there. On July 22, 1968, the Sub-Inspector of Police came to the village and inspected the disputed wall in the presence of the parties. The Sub-Inspector went away directing both the parties to come to the Police Station on the following morning so that a compromise might be effected.

3. Another case arising out of a report made to the police by one Kallam Kotireddi against Accused 2 and 3 and Anr. in respect of offences under Sections 324, 323 and 325, Penal

Code was pending before a Magistrate at Narasaraopet and the next date for hearing fixed in that case was July 23, 1968.

4. On the morning of July 23, 1968, at about 6-30 a.m., PWs 1, 2 and the deceased boarded Bus No. AP 22607 at Rompicherla for going to Nekarikal. Some minutes later, Accused 1 to 5 (hereinafter referred to as A-l, A2, A3, A4 and A5) also got into the same bus. The accused had obtained tickets for proceeding to Narasaraopet. When the bus stopped at Nekarikal Cross Roads, at about 7-30 a.m., the deceased and his companions alighted for going to the Police Station. The five accused also got down. The deceased and PW 1 went towards a Choultry run by PW 4, While PW 2 went to the roadside to case himself. A-l and A2 went towards the Coffee Hotel situate near the Choultry. From there, they picked up heavy sticks and went after the deceased into the Choultry. On seeing the accused, PW 1 ran away towards a hut nearby. 'The deceased stood up.

5. He was an old man of 55 years. He was not allowed to run. Despite the entreaties made by the deceased with folded hands, A-l and A-2 indiscriminately pounded the legs and arms of the deceased. One of the by-standers, PW 6, asked the assailants as to why they were mercilessly beating a human being, as if he were a buffalo. The assailants angrily retorted that the witness was nobody to question them and continued the beating till the deceased became unconscious. The accused then threw their sticks at the spot, boarded another vehicle, and went away. The occurrence was witnessed by PVVs 1 to 7. The victim was removed by PW 8 to Narasaraopet Hospital in a temporar. There, at about 8.45 a.m., Doctor Konda Reddy examined him and found 19 injuries, out of which, no less than 9 were (internally) found to be grievous. They were:

1. Dislocation of distal end of proximal phalanx of left middle finger.

2. Fracture of right radius in its middle.

3. Dislocation of lower end of right ulna.

4. Fracture of lower end of right femur.

5. Fracture of medial malleolus of right tibia.

6. Fracture of lower 1/3 of right fibula.

7. Dislocation of lower end of left ulna.

8. Fracture of upper end of left tibia.

9. Fracture of right patella.

6. Finding the condition of the injured serious, the Doctor sent information to the Judicial Magistrate for getting his dying declaration recorded. On Dr. K. Reddy's advice, the deceased was immediately removed to the Guntur Hospital where he was examined and given medical aid by Dr. Sastri. His dying declaration, Ex. P-5, was also recorded there by a Magistrate (PW 10) at about 8.05 p.m. The deceased, however, succumbed to his injuries at about 4.40 a.m. on July 24, 1968, despite medical aid.

7. The autopsy was conducted by Dr. P.S. Sarojini (PW 12) in whose opinion, the injuries found on the deceased were cumulatively sufficient to cause death in, the ordinary course of nature. The cause of death, according to the Doctor, was shock and hemorrhage resulting from multiple injuries.

8. The trial Judge convicted A-1 and A-2 under Section 302 as well as under Section 302 read with Section 34, Penal Code and sentenced each of them to imprisonment for life.

9. On appeal by the convicts, the High Court altered their conviction to one under Section 304, Pt. II, Penal Code and reduced their sentence to five years rigorous imprisonment, each.

10. Aggrieved by the judgment of the High Court, the State has come in appeal to this Court after obtaining special leave.

11. A-l, Rayavarappu Punnayya (Respondent 1) has, as reported, by his Counsel, died during the pendency of this appeal. This information is not contradicted by the Counsel appearing for the State. This appeal therefore, in so far as it relates to A-l, abates. The appeal against A-2 (Respondent 2), however, survives for decision.

12. The principal question that falls to be considered in this appeal is whether the offence disclosed by the facts and circumstances established by the prosecution against the respondent, is 'murder' or 'culpable homicide not amounting to murder'.

13. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part of Section 304.

14. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the key words used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

15. Clause (b) of Section 299 corresponds with cls. (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the intentional harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Section 300.

16. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

17. In Clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of) justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in Clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere

possibility. The words "bodily injury...sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury having regard to the ordinary course of nature.

18. For cases to fall within Clause (3), it is not necessary that the offender intended to cause death, so long as death ensues from the intentional-bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant and am. v. State of Kerala MANU/SC/0086/1966: A.I.R. 1966 S.C. 1874 is an apt illustration of this point.

19. In Virsa Singh v. The State of Punjab MANU/SC/0041/1958: 1958CriLJ818 Vivian Bose J. speaking for this Court, explained the meaning and scope of Clause (3), thus (at p. 1500):

The prosecution must prove the following facts before it can bring a case under Section 300, 3rdly'. First, it must establish, quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

20. Thus according to the rule laid down in Virsa Singh's case (supra) even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

21. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general-as distinguished from a particular person or persons-being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

22. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection

between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima jade found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is [the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on. whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code.

23. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so inter-twined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

24. Now let us consider the problem before us in the light of the above enunciation.

25. It is not disputed that the death of the deceased was caused by the accused, there being a direct causal connection between the beating administered by A-1 and A-2 to the deceased and his death. The accused confined the beating to the legs and arms of the deceased, and therefore, it can be said that they perhaps had no "intention to cause death" within the contemplation Clause (a) of Section 299 or Clause. (1) of Section 300. It is nobody's case that the instant case falls within Clause (4) of Section 300. This clause, as already noticed, is designed for that class of cases where the act of the offender is not directed against any particular individual but there is in his act that recklessness and risk of imminent danger, knowingly and unjustifiably incurred, which is directed against the man in general, and places the lives of many in jeopardy. Indeed, in all fairness, Counsel for the appellant has not contended that the case would fall under Clause (4) of Section 300. His sole contention is that even if the accused had no intention to cause death, the facts established fully bring the case within the purview of Clause (3) of Section 300 and as such the offence committed is murder and nothing less. In support of this contention reference has been made to Anda v. State of Rajasthan MANU/SC/0386/1965: 1966CriLJ171 and Rajwant Singh v. State of Kerala (supra).

26. As against this, Counsel for the respondent submits that since the accused selected only non-vital parts of the body of the deceased, for inflicting the injuries, they could not be attributed the mens rea requisite for bringing the case under Clause (3) of Section 300; at the most, it could be said that they had knowledge that the injuries inflicted by them

were likely to cause death and as such the case falls within the third clause of Section 299, and the offence committed was only "culpable homicide not amounting to murder", punishable under Section 304, Part II Counsel has thus tried to support the reasoning of the High Court.

27. The trial Court, us already noticed, had convicted the respondent of the offence of murder. It applied the rule in Virsa Singh's case (supra), and the ratio of Anda v. State and held that the case was clearly covered by clause Thirdly of Section 300. The High Court has disagreed with the trial court and held that the offence was not murder but one under Section 304, Pt. II.

28. The High Court reached this conclusion on the following reasoning:

(a) There was no premeditation in the attack. It was almost a impulsive act.

(b) Though there were 21 injuries, they were all on the arms and legs and not on the head or other vital parts of the body.

(c) There was no compound fracture to result in heavy hemorrhage; there must have been some bleeding, (which) according to PWI might have stopped with in about half an hour to one hour.

(d) Death that had occurred 21 hours later, could have been only due to shock and not due to hemorrhage also, as stated by PW 12... who conducted the autopsy. This reference is strengthened by the evidence of PW 26 who says that the patient was under shock and he was treating him for shock by sending fluids through his vein. From the injuries inflicted the accused therefore could not have intended to cause death.

(e) Al and A2 had beaten the deceased with heavy sticks. These beatings had resulted in fracture of the right radius, right femur, right tibia, right fibula, right patella and left tibia and dislocation of...., therefore considerable force must have been used while inflicting the blows. Accused 1 and 2 should have therefore inflicted these injuries with the knowledge that they are likely, by so beating, to cause the death of the deceased, though they might not have had the knowledge that they were so imminently dangerous that in all probability their acts would result in such injuries as are likely to cause the death. The offence...is therefore culpable homicide falling under.... Section 299, I.P.C. punishable under Section 304 Part II and not murder.

29. With respect, we are unable to appreciate and accept this reasoning. It appears to us to be inconsistent, erroneous and largely speculative.

30. To say that the attack was not premeditated or preplanned is not only factually incorrect but also at war with High Court's own finding that the injuries were caused to

the deceased in furtherance of the common intention of A-1 and A-2 and therefore, Section 34, I.P.C. was applicable. Further, the finding that there was no compound fracture, no heavy hemorrhage and the cause of the death was shock, only, is not in accord with the evidence on the record. The best person to speak about hemorrhage and the cause of the death was Dr. P. S. Sarojini (PW 12) who had conducted the autopsy. She testified that the cause of death of the deceased was "shock and hemorrhage due to multiple injuries". This categorical opinion of the Doctor was not assailed in cross-examination. In the post-mortem examination report Ex. P-8, the Doctor noted that the heart of the deceased was found full of clotted blood. Again in injury No. 6, which also was an internal fracture, the bone was visible through the wound. Dr. D. A. Sastri, PW 26, had testified that he was treating Kotamraju injured of shock, not only by sending fluids through his vein, but also blood. This part of his statement wherein he spoke about the giving of blood transfusion to the deceased, appears to have been overlooked by the High Court. Dr. Kondareddy, PW 11, who was the first Medical Officer to examine the injuries of the deceased, had noted that there was bleeding and swelling around injury No. 6 which was located on the left leg 3 inches above the ankle. Dr. Sarojini, PW 12, found fracture of the left tibia underneath this injury. There could therefore, be no doubt that this was a compound fracture. P.W. 11 found bleeding from the other abraded injuries, also. He however found the condition of the injured grave and immediately sent an information to the Magistrate for recording his dying declaration. PW 11 also advised immediate removal of the deceased to the bigger Hospital at Guntur. There, also. Dr. Sastri finding that life in the patient was ebbing fast, took immediate two-fold action. First, he put the patient on blood transfusion. Second, he sent an intimation for recording his dying declaration. A Magistrate (PW 10) came there and recorded the statement. These are all tell-tale circumstances which unerring by show that there was substantial hemorrhage from some of the injuries involving compound fractures. This being the case, there was absolutely no reason to doubt the sworn word of the Doctor, (PW 12) that the cause of the death was shock and hemorrhage. Although the learned Judges of the High Court have not specifically referred to the quotation from page 289, of Modi's book on Medical Jurisprudence and Toxicology (1961 Edn.) which was put to Dr. Sarojini in cross-examination, they appear to have derived support from the same for the argument that fractures of such bones "are not ordinarily dangerous"; therefore, the accused could not have intended to cause death but had only knowledge that they were likely by such "beating to cause the death of the deceased.

31. It will be worthwhile to extract that Quotation from Mody, as a reference to the same was made by Mr. Subba Rao before us, also. According to Mody: "Fractures are not ordinarily dangerous unless they are compound, when death may occur from loss of blood, if a big vessel is wounded by the split end of a fractured bone."

32. It may be noted, in the first place, that this opinion of the learned author is couched in too general and wide language. Fractures of some vital bones, such as those of the skull and the vertebral column are generally known to be dangerous to life. Secondly, even

this general statement has been qualified by the learned author, by saying that compound fractures involving hemorrhage, are ordinarily dangerous. We have seen, that some of the fractures underneath the injuries of the deceased, were compound fractures accompanied by substantial hemorrhage. In the face of this finding, Mody's opinion, far from advancing the contention of the defence, discounts it.

33. The High Court has held that the accused had no intention to-cause death because they deliberately avoided to hit any vital part of the body, and confined the beating to the legs and arms of the deceased. There is much that can be said in support of this particular finding. But that finding-assuming it to be correct-does not necessarily take the case out of the definition of 'murder'. The crux of the matter is, whether the facts established bring the case within Clause Thirdly of Section 300. This question further narrows down into a consideration of the two-fold issue:
(i) Whether the bodily injuries found on the deceased were intentionally inflicted by the accused?
(ii) If so, were they sufficient to cause death in the ordinary course of nature'? If both these elements are satisfactorily established, the offence will be 'murder', irrespective of the fact whether an intention on the part of the accused to cause death, had or had not been proved.

34. In the instant case, the existence of both these elements was clearly established by the prosecution. There was bitter hostility between the warring factions to which the accused and the deceased belonged. Criminal litigation was going on between these factions since long. Both the factions had been proceeded against under Section 107, Cr. P.C. The accused had therefore a motive to beat the deceased. The attack was premeditated and pre-planned, although the interval between the conception and execution of the plan was not very long. The accused had purchased tickets for going further to Narasaraopet, but on seeing the deceased, their bete noire, alighting at Nekarikal, they designedly got down there and trailed him. They selected heavy sticks about 3 inches in diameter, each, and with those lethal weapons, despite the entreaties of the deceased, mercilessly pounded his legs and arms causing no less than 19 or 20 injuries, smashing at least seven bones, mostly major bones, and dislocating two more. The beating was administered in a brutal and reckless manner. It was pressed home with an unusually fierce, cruel and sadistic determination. When the human conscience of one of the shocked bystanders spontaneously cried out in protest as to why the accused were beating a human being as if he were a buffalo, the only echo it could draw from the assailants, was a mendacious retort, who callously continued their malevolent action, and did not stop the beating till the deceased became unconscious. May be, the intention of the accused was to cause death and they stopped the beating under the impression that the deceased was dead. But this lone circumstance cannot take this possible inference to the plane of positive proof. Nevertheless, the formidable weapons used by the accused in the beating, the savage manner of its execution, the helpless state of the unarmed victim, the intensity of the violence caused, the callous conduct of the accused in persisting in the assault even

against the protest of feeling bystanders-all, viewed against the background of previous animosity between the parties, irresistibly lead to the conclusion that the injuries caused by the accused to the deceased were intentionally inflicted, and were not accidental. Thus the presence of the first element of Clause Thirdly of Section 300 had been cogently and convincingly established.

35. This takes us to the second element of Clause (3). Dr. Sarojiui, PW 12. testified that the injuries of the deceased were cumulatively sufficient in the ordinary course of nature to cause death. In her opinion-which we have found to be entirely trustworthy-the cause of the death was shock and hemorrhage due to the multiple injuries. Dr. Sarojini had conducted the post-mortem examination of the deadtody of the deceased. She had dissected the body and examined the injuries to the internal organs. She was therefore the best informed expert who could opine with authority as to the cause of the death and as to the sufficiency or otherwise of the injuries from which the death ensued. Dr. Sarojini's evidence on this point stood on a better footing than that of the Doctors (PWs. 11 and 26) who had externally examined the deceased in his life-time. Despite this position, the High Court has not specifically considered the evidence of Dr. Sarojini with regard to the sufficiency of the injuries to cause death in the ordinary course of nature. There is no reason why Dr. Sarojini's evidence with regard to the second element of Clause (3) of Section 300 be not accepted. Dr. Sarojini's evidence satisfactorily establishes the presence of the second element of this clause.

36. There is therefore, no escape from the conclusion, that the offence committed by the accused was 'murder', notwithstanding the fact that the intention of the accused to cause death has not been shown beyond doubt.

37. In Anda v. State of Rajasthan (supra), this Court had to deal with a very similar situation. In that case, several accused beat the victim with sticks after dragging him into a house and caused multiple injuries including 16 lacerated wounds on the arms and legs, a hematoma on the forehead and a bruise on the chest. Under these injuries to the arms and legs lay fractures of the right and left ulnas, second and third metacarpal bones on the right hand and second metacarpal bone of the left hand, compound fractures of the right tibia and right fibula. There was loss of blood from the injuries. The Medical Officer who conducted the autopsy opined that the cause of the death was shock and syncope due to multiple injuries; that all the injuries collectively could be sufficient to cause death in the ordinary course of nature, but individually none of them was so sufficient.

38. Question arose whether in such a case when no significant injury had been inflicted on a vital art of the body, and the weapons used were ordinary lathis, and the accused could not be said to have the intention of causing death, the offence would be 'murder' or merely 'culpable homicide not amounting to murder'. This Court speaking through Hidayatullah J. (as he then was), after explaining the comparative scope of and the distinction between Sections 299 and 300, answered the question in these terms:

The injuries were not on a vital part of the body and no weapon was used which can be described as specially dangerous. Only lathis were used. It cannot, therefore, be said safely that there was an intention to cause the death of Bherun within the first clause of Section 300. At the same time, it is obvious that his hands and legs were smashed and numerous bruises and lacerated wounds were caused. The number of injuries shows that every one joined in beating him. It is also clear that the assailants aimed at breaking his arms and legs. Looking at the injuries caused to Bherun in furtherance of the common intention of all it is clear that the injuries intended to be caused were sufficient to cause death in the ordinary course of nature, even if it cannot be said that his death was intended. This is sufficient to bring the case within 3rdly of Section 300.

39. The ratio of Anda v. State of Rajasthan (supra) applies in full force to the facts of the present case. Here, a direct causal connection between the act of the accused and the death was established. The injuries were the direct cause of the death. No secondary factor such as gangrene, tetanus etc., supervened. There was no doubt whatever that the beating was premeditated and calculated. Just as in Anda's case, here also, the aim of the assailants was to smash the arms and legs of the deceased, and they succeeded in that design, causing no less than 19 injuries, including fractures of most of the bones of the legs and the arms. While in Anda's case, the sticks used by the assailants were not specially dangerous, in the instant case they were unusually heavy, lethal weapons. All these acts of the accused were pre-planned and intentional, which, considered objectively in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of Clause 3rdly of Section 300. The expression "bodily injury" in Clause 3rdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under Clause 3rdly of Section 300. All the conditions which are a pre-requisite for the applicability of this clause have been established and the offence, committed by the accused in the instant case was 'murder'.

40. For all the foregoing reasons, we are of opinion that the High Court was in error in altering the conviction of the accused-respondent from one under Section 302, 302/34, to that under Section 304, Part II, Penal Code. Accordingly we allow this appeal and restore the order of the trial Court convicting the accused (Respondent 2 herein) for the offence of murder, with a sentence of imprisonment for life. Respondent 2, if he is not already in jail shall be arrested and committed to prison to serve out the sentence inflicted on him.

MANU/SC/0150/1954

Back to Section 300 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 78 of 1954

Decided On: 15.09.1954

Kapur Singh Vs. State of Pepsu

Hon'ble Judges/Coram:
N.H. Bhagwati, B. Jagannadhadas and T.L. Venkatarama Aiyyar, JJ.

JUDGMENT
N.H. Bhagwati, J.

1. Special leave was granted to the appellant limited to the question of sentence only.

2. About a year before the date of the occurrence, Bachan Singh son of the deceased caused a severe injury on the leg of Pritam Singh, son of the appellant resulting in the amputation of his leg. The appellant harboured a grudge against the father and the son since that time and he was trying to take revenge on a suitable opportunity presenting itself. That opportunity came on 30-9-1952 when the Appellant encountered the deceased, and he and his companion, one Chand Singh, were responsible for the occurrence. Chand Singh held the deceased by the head and the appellant inflicted as many as 18 injuries on the arms and legs of the deceased with a gandasa.

It is significant that out of all the injuries which were thus inflicted none was inflicted on a vital part of the body. The appellant absconded and his companion was in the meantime convicted of an offence under Section 302 and a sentence of transportation for life was imposed on him, which was confirmed by the High Court. The appellant was arrested thereafter and his trial resulted in his conviction under Section 302, The learned Sessions Judge awarded him a sentence of death subject to confirmation by the High Court. The High Court, in due course, confirmed the death sentence.

3. The motive which actuated the appellant in committing this crime was to wreak his vengeance on the family of Bachan Singh. It appears that the appellant intended to inflict on the arms and legs of the deceased such injuries as would result in the amputation of both the arms and both the leg's of the deceased, thus wreaking his vengeance on the deceased for what his son, Bachan Singh, had done to his own son Pritam Singh.

The fact that no injury was inflicted on any vital part of the body of the deceased goes to show in the circumstances of this case that the intention of the appellant was not to kill

the deceased outright. He inflicted the injuries not with the intention of murdering the deceased, but caused such bodily injuries as, he must have known, would likely cause death having regard to the number and nature of the injuries.

4. We, therefore, feel that, under the circumstances of the case, the proper section under which the appellant should have been convicted was Section 304(1) and not Section 302. We, accordingly, alter the conviction of the appellant from that under Section 302 to one under Section 304(1) and instead of the sentence of death which has been awarded to him which we hereby set aside, we award him the sentence of transportation for life

MANU/TN/0083/1912

Back to Section 301 of Indian Penal Code, 1860

IN THE HIGH COURT OF MADRAS

Decided On: 02.01.1912

Emperor Vs. Mushnooru Suryanarayana Murthy

JUDGMENT
Authored By: Benson, Sundara Aiyar, Benson, Rahim
Benson, J.

1. This is an appeal by the Public Prosecutor on behalf of Government against the acquittal of one Suryanarayana Murthi, on a charge of having murdered the girl, Rajalakshmi.

2. The facts of the case, so far as it is necessary to state them for the purposes of this appeal, are as follows:

The accused, with the intention of killing Appala Narasimhulu, (on whose life he had effected large insurances without Appala Narasimhulu's knowledge, and in order to obtain the sums for which he was insured), gave him some sweetmeat (halva) in which a poison containing arsenic and mercury in soluble form had been mixed. Appala Narasimhulu ate a portion of the sweetmeat, and threw the rest away. This occured at the house of the accused's brother-in-law where the accused had asked Appala Narasimhulu to meet him. Rajalakshmi, who was aged 8 or 9 years, and who was niece of the accused, being,the daughter of accused's brother-in-law, took some of the sweetmeat and ate it and gave some to another little child who also ate it. According it one account Rajalakshmi asked the accused for a portion of the sweetmeat, but according to the other account, which we accept as the true account, Appala Narasimhulu, after eating a portion of the sweetmeat threw away the remainder, and it was then picked up by Rajalakshmi without the knowledge of the accused. The two children who had eaten the poisoned sweetmeat, died from the effects of it, but Appala Narasimhulu, though the poison severely affected him, eventually recovered. The accused has been sentenced to transpiration for life for having attempted to murder Appala Narasimhulu. The question which we have to consider in this appeal is whether, on the facts stated above, the accused is guilty of the murder of Rajalakshmi.
3. I am of opinion that the accused did cause the death of Rajalakshmi and is guilty of her murder. The law on the subject is contained in Sections 299 to 301 of the Indian Penal Code and the whole question is whether it can properly be said that the accused "caused the death" of the girl, in the ordinary sense in which those words should be understood, or whether the accused was so indirectly or remotely connected with her death that he cannot properly be said to have "caused" it. It is not contended before us that the accused

intended to cause the death of the girl, and we may take it for the purpose of this appeal that he did not know that his act was even likely to cause her death. But it is clear that he did intend to cause the death of Appala Narasimhulu. In order to effect this he concealed poison in a sweetmeat and gave it to him eat. It was these acts of the accused which caused the death of the girl, though no doubt her own action, in ignorantly picking up and eating the poison, contributed to bring about the result. Section 299 of the Indian Penal Code says: " Whoever causes death by doing an act with the intention of causing death, or with the intention of Causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.'' It is to be observed that the section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he "causes the death" of any one by doing an act with the intention of "causing death" to any one, whether the person intended to be killed or any one else. This is clear from the first illustration to the section, "A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide."

4. Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person. That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration, viz., "A knows Z to. be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely t6 cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence ; but A has committed the offence of culpable homicide.

5. The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu in throwing away part of the sweetmeat, nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl's death. The Indian Law Commissioners in their report (1846) on the Indian Penal Code call attention to the unqualified use of the words "to cause death " in the definition of culpable homicide, and rightly point out that there is a great difference between acts which cause death immediately, and acts which cause death remotely, and they point out that the difference is a matter to be considered by the courts when estimating the effect of the evidence in each case. Almost all, perhaps all, results are caused by a combination of causes, yet we ordinarily speak of a result as caused by the most conspicuous or efficient cause, without specifying all the contributory causes. In Webster's Dictionary " cause " is defined as " that which produces or effects a result; that from which anything proceeds and without which it would not exist " and

again " the general idea of cause is that without which another thing, called the effect, cannot be; and it is divided by Aristotle into lour kinds known by the name of the material, the formal, the efficient and the final cause. The efficient cause is the agent that is prominent or conspicuous in producing a change or result."

6. In the present case 1 think that the accused's action was the efficient cause of the girl's death, though her own action in picking up and eating the poison was also necessary in order to effect her death ; just as in the illustration given in the Code the man who laid the turf and sticks over the pit with the intention of causing death was held to be the cause of the death of the man who ignorantly fell into the pit ; although the death would not have occurred if he had hot of his own free will walked to the spot where the pit was. The Code says that the man who made the pit is guilty of culpable homicide, and, in my opinion, the accused in the present case, who mixed the poison in sweetmeat and gave it to be eaten, is equally guilty of that offence. The mens rea which is essential to criminal responsibility existed with reference to the act done by the accused in attempting to kill Apala Narasimhulu, though not in regard to the girl whose death he, in fact, caused, and that is all that the section requires. It does not say " whoever voluntarily causes death," or require that the death actually caused should have been voluntarily caused. It is sufficient if death is actually, even though involuntarily, caused to one person by an act intended to cause the death of another. It is the criminality of the intention with regard to the latter that makes the act done and the consequence which follows from it an offence.

7. Turning now to Section 300, Indian Penal Code, we find that culpable homicide is murder if the act by which death ' is caused is done with the intention of causing death, and does not fall within certain specified exceptions, none of which are applicable to the present case.

8. It follows that the accused in the present case is guilty of murder, and this is rendered still more clear by Section 301 of the Code. The cases in which culpable homicide is murder under Section 300 are not confined to cases in which the act by which the death is caused is done with the intention of causing death. Section 300 specifies other degrees of intention or knowledge which may cause the act to amount to murder, and then Section 301 enacts that " if a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

9. The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to a section does. The rule could not well be stated as an

explanation to either Section 299 or Section 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section., The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of Section 299, yet is, as we have seen, deducible from the generality of the words '' causes death" and from the illustration to the section ; and the rule then goes on to state that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the Sections 299 and 300 though not, perhaps, lying on their very surface. The conclusion, then, at which I arrive is that the accused in this case is guilty of murder as defined in Sections 299 to 301, Indian Penal Code.

10. This conclusion is in accord with the view of Norman Offg., C.J., and Jackson, J., in the case reported in 13 W. R. 2 where it is said: "The prisoner gave some poisoned rice water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison. The offence of the prisoner, under Section 301 of the Indian Penal Code, is murder." That the present accused would be guilty of murder under English Law is clear from the case of Agnes Gore. In that case Agnes Gore mixed poison in some medicine sent by an Apothecary, Martin, to her husband, which he ate but which did not kill him, but afterwards killed the Apothecary, who to vindicate his reputation, tasted it himself, having first stirred it about. " It was resolved by all the Judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; i.e., the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause ; and the poisoning and death of the said Martin is the event, quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death." (King's Bench 77 ER 854.

11. A number of other English cases have been referred to, but it is unnecessary to discuss them as we must decide the case in accordance with the provisions of the Indian Penal Code, and these are not necessarily the same as the English Law.

12. In the result, I would allow the appeal by Government and convict the accused of the murder of Rajalakshmi.

13. The accused was originally sentenced to seven years' rigorous imprisonment for having attempted to murder Appala Narasimhulu. This sentence was enhanced to one of transportation for life by this court acting as a court of revision in December, 1910, when this appeal was not before them. Looking to these facts I am unwilling to now impose a

sentence of death, though it would have been appropriate if the accused had been convicted of murder at the original trial.

Sundara Aiyar, J.

14. In this case the accused Suryanarayana Murthi was charged by the Sessions Court of Ganjam with the murder of a young girl named Rajalakshmi and with attempt to murder one Appala Narasimhulu by administering poison to each of them on the 9th February 1910. He was convicted by the Sessions Court on the latter count but was acquitted on the former count and was sentenced to seven years' rigorous imprisonment. He appealed against the conviction and sentence in Criminal Appeal No. 522 of 1910, and this court confirmed the conviction and enhanced the sentence to transportation for life. The present appeal is by the Government against his acquittal on the charge of murdering Rajalakshmi.

15. The facts as found by the lower court are that the accused, who was a clerk in the Settlement Office at Chicacole, got the life of Appala Narasimhulu, the prosecution 1st witness, insured in two Insurance Companies for the sum of Rs. 4,000 in all, having paid the premia himself; that the 2nd premium for one of the insurances fell due on the 12th January, 1910, and the grace period for its payment would elapse on the 12th February, 1910; that the prosecution 1st witness being at the same time badly pressed for means of subsistence asked the accused for money on the morning of 9th February ; that the latter asked him to meet him in the evening at the house of his (the accused's) brother-in-law, the prosecution 8th witness; that at the house the accused gave the prosecution 1st witness a while substance which he called ' halva' but which really contained arsenic and mercury in soluble form ; that the prosecution 1st witness having eaten a portion of the halva threw aside the rest; that it was picked up by the daughter of the prosecution 8th witness, the deceased Rajalakshmi, who ate a portion of it herself and gave another portion to a child of a neighbour ; and that both Rajalakshmi and the other child were seized with vomiting and purging and finally died, Rajalakshmi some four days after she ate the halva and the child two days earlier. After the prosecution 1st witness had thrown away the halva both he and the accused went to the bazaar and the accused gave prosecution 1st witness some more halva. The prosecution 1st witness suffered in consequence for a number of days but survived. The accused, as already stated, has been sentenced to transportation for life for attempting to murder the prosecution 1st witness.

16. The case for the prosecution with reference to the poisoning of Rajalakshmi was, as sworn to by the prosecution 1st witness, that, when the accused gave him the halva, the girl asked for a piece of it and that the accused, though he reprimanded her at first, gave her a small portion. But I agree with the learned Sessions Judge that this story is improbable. The girl was the accused's own niece being his sister's daughter. He and her father (the prosecution 8th witness) were on good terms. He had absolutely no motive to kill her, and there was no necessity for giving her the halva. The accused, in his statement

to the Magistrate (the prosecution 22nd witness) soon after the occurrence, said that the girl had picked up the halva and eaten it. He had made a similar statement to the prosecution 8th witness when the latter returned to his house on the evening of the 9th immediately after the girl had eaten it. This statement is in accordance with the probabilities of the case, and I accept the Sessions Judge's finding that the halva was not given to the girl by the accused but picked up by her after the prosecution 1st witness had thrown it way. The question we have to decide is whether, on these facts, the accused is guilty of the murder of the girl. At the conclusion of the arguments we took time to consider our judgment, as the point appeared to us to be one of considerable importance, but we intimated that, even if the accused should be held to be guilty of murder, we would not consider it necessary, in the circumstances, to inflict on him the extreme penalty of the law.

17. It is clear that the accused had no intention of causing the death of the girl Rajalakshmi. But it is contended that the accused is guilty of murder as he had the intention of causing the death of the prosecution 1st witness, and it is immaterial that he had not the intention of causing the death of the girl herself. Section 299, Indian Penal Code, enacts that whoever causes death by doing an act with the intention of causing death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." Section 300 says "culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death." Section 301 lays down that " if a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause." The contention of the learned Public Prosecutor, to put it very shortly, is (1) that it was the accused's act that caused the death of the girl and (2) that the accused had the intention of causing death when he gave the poison to the prosecution 1st witness and was, therefore, guilty of any death that resulted from his act. He urges that the sections of the Penal Code practically reproduce the English Law according to which the causing of death with malice aforethought, though the malice may not be directed against a particular individual whose death ensues, would amount to murder. Before referring to the English Law, I shall consider the provisions of the Penal Code bearing on the subject. If Mr. Napier's contention be sound it would make no difference whether Appala Narasimhulu, the prosecution 1st witness, also died in consequence of the poison or not; nor would it make any difference if, instead of the poison being picked up by the girl and eaten by herself, she gave it to some one else and that one to another again and so on if it changed any number of hands. The accused would be guilty of the murder of one and all of the persons who might take the poison, though it might' have been impossible for him to imagine that it would change hands in the manner that it did. The contention practically amounts to saying that the intervention of other agencies, and of any number of them, before death results, would make no difference in the guilt of the accused, that

causing death does not mean being the proximate cause of death, but merely being a link in the chain of the cause or events leading to the death and that further any knowledge on the part of the accused that such a chain of events might result from his act is quite immaterial. It is, prima facie, difficult to uphold such an argument. Now is there anything in the sections of the Penal Code to support it? Section 39 provides that " a person is said to cause an effect' voluntarily ' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." The illustration to the section is that if a person sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery, and thus causes the death of a person, he would be taken to have caused the death voluntarily if he knew that he was likely to cause it even though he may not have intended to cause death and may even be sorry that death had been caused by his act. The section and the illustration both show that causation with respect to any event involves that the person should have knowledge that the event was likely to result from his act. Section 299, Indian Penal Code, in my opinion, does not lead to a different conclusion. But before dealing with it, I must turn to Section 301, Indian Penal Code. That section apparently applies to a cause where the death of the person whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact, occur but the death of some one else occurs as the result of the act done by him. It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, had occurred. Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination? Such a proposition it is impossible to maintain in criminal law. Section 301 of the Indian Penal Code has reference to a case where a person intending to cause the death of A, say by striking or shooting him, kills B because B is in the place where he imagined A to be, or B rushes in to save A and receives the injury intended for A. The reason for not exculpating the wrong-doer in such cases is that he must take the risk of some other person being in the place where he expected to find A, or, of some one else intervening between him and A. The section is a qualification of the rule laid down in Section 299 and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result. If the Public Prosecutor's general proposition were right, Section 301 of the Indian Penal Code would seem to be unnecessary, as Section 299 would be quite enough. If a person is intended by Section 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and what is more important, Section 301 of the Indian Penal Code would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect " voluntarily," and a person is not responsible for the involuntary effects of his

acts. Illustrations A and B, in my opinion, support this view. Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily ; and Section 321 shows that hurt to the particular person in question must have been intended or foreseen. In the eye of the law, no doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might, in some cases, be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring ; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary causes with the original act to lead to the result, it is more difficult to decide whether the act in question can be said to be the cause of the effect finally produced. The Code throws very little light on the question, Ordinarily, a man is not criminally responsible for the acts of another person, and ordinarily his act should not be held to be the cause of a consequence which would not result without the intervention of another human agency. Sir J. Fitz James Stephen in his 'History of the Criminal Law of England,' Vol. III, p. 8, says: " A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, A tells B of facts which operate as a motive to B for the murder of C. It would be an abuse of language to say that A had killed C, though no doubt he has been the remote cause of C's death." The learned author proceeds to point out that, even when a person counsels, procures or commands another to do an act, he would be only guilty as an abettor but not as a principal offender whose act caused the result, say murder. This is the well settled principle of the English Law, though there appear to be one or two exceptions, to be hereafter pointed out. No such exceptions are mentioned in the Indian Code. They may perhaps be recognised where the doer of the act knew that it would be likely that his own act would lead other persons, not acting wrongfully, to act in such a manner as to cause the effect actually produced. But the scope of the exceptions cannot cover those cases where the doer could not foresee that other persons would act in the manner indicated above. This is the principle adopted in determining civil liability for wrongs. See the discussion of the question in Baker v. Snell (1908) 2 K.B. 825. A stricter rule cannot be applied in cases of criminal liability.

18. Now, can it be said that the accused, in this case, knew it to be likely that the prosecution 1st witness would give a portion of the halva to the girl Rajalakshmi? According to Section 26 of the Indian Penal Code " a person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise." A trader who sells a basket of poisoned oranges may be said to have sufficient ' reason to believe' that the buyer would give them to various persons to eat; but one who gives a slice of an orange to another to eat on the spot could not be said to have sufficient ' reason to believe' that he would give half of that slice to another person to eat or that he would throw away

a portion and that another would eat it. The poison was thrown aside here not by the accused but by the prosecution 1st witness. The girl's death could not have been caused but for the intervention of the prosecution 1st witness's agency. The case, in my opinion, is not one covered by Section 301 of the Indian Penal Code. The conclusion, therefore, appears to follow that the accused is not guilty of culpable homicide by doing an act which caused the death of the girl. Mr. Napier, as already mentioned, has contended that the law in this country on the question is really the same as in England; and he relies on two English cases in support of his contention, viz., Saunder's case and Agnes Gore's case. I may preface my observations on the English Law by citing Mr. Mayne's remark that "culpable homicide is perhaps the one branch of criminal law in which an Indian student must be most careful in accepting the guidance of English authorities." According to the English Law " murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought, either express or implied by law. This malice aforethought which distinguishes murder from other species of homicide is not limited to particular ill-will against the persons slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit ; a heart regardless of social duty, and deliberately bent upon mischief. Any formed design of doing mischief may be called malice ; and therefore, not only killing from premeditated hatred or revenge against the person killed, but also, in many other cases, killing accompanied with circumstances that show the heart to be previously wicked is adjudged to be killing of malice aforethought and, consequently, murder."-RUSSELL on Crimes and Misdemeanors, 7th Edition, Volume I, page 655. It will be observed that, in this definition, malice is made an essential requisite, and all cases have to be brought under it. Knowledge that the act is likely to cause death is not part of the definition Nor have we any words to import what is contained in the explanations to Section 299 of the Indian Penal Code or in Cls. 2, 3 and 4 of Section 300. The law was worked out of England to its present condition by a series of judicial decisions. This accounts for the statement that general malice is enough and that it need not be directed against the particular individual killed. Hence also the proposition that wicked intention to injure is enough and intention to kill that individual is not necessary. See ROSCOE'S Criminal Evidence, 13th Edition, pages 617 to 619. Malice again is explained to mean malice implied by law as well as malice in fact. The result is, the law in England is not as different from that in India as a comparison of the definitions might, at first sight, indicate. This is apparent from the statement of the English Law at pp. 20-22, Vol. III of Stephen's History of the Criminal Law. The statement, however, shows that the law is not identical in both countries. In England an intention to commit any felony will make the act murder if death results. Again " if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a crime, the inciter is the principal ex necessitate, though absent when the thing was done. In point of law, the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself." See RUSSELL on Crimes, Vol. I, page 104. The Indian law does not make the abettor guilty of the principal offence in such circumstances. There is also a presumption in the English Law that " all homicide is malicious and murder, until the

contrary appears from circumstances of alleviation, excuse, or justification ; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they arise out of the evidence produced against him." See Russell on Crimes, Vol. I, page 657. There is no such presumption here. In Saunder's case as stated in Roscoe's Criminal Evidence, p. 154, the prisoner intending to poison his wife gave her a poisoned apple which she, ignorant of its nature, gave to a child who took it and died. This was held murder in the husband, although being present he endeavoured to dissuade his wife from giving it to the child. In Hale'S Pleas of the Crown, Vol. I, p. 436, it is not stated that the prisoner endeavoured, to dissuade his wife from giving the apple to the child. On the other hand, the author says: '' If A commands or counsels B to kill C and before the fact is dose A repents and comes to B and expressly discharges him from the fact and countermands it, if after this countermand B does it, it is murder in B; but A is not accessory." The decision apparently proceeded on the English rule that the innocence of the intervening agent had the effect of holding the prisoner liable as the principal offender. In Agnes Gore's case (1614) 77 E.R. 853 the wife who mixed ratsbane in a potion sent by the apothecary to her husband which did not kill him but killed the apothecary who, to vindicate his reputation, tasted it himself, having first stirred it up, was held guilty of murder because the wife had the intention of killing the husband though not of killing the apothecary. It is possible that an Indian court may hold in such a case that it was the duty of the wife to warn and prevent the apothecary from tasting the potion and that she was guilty of an illegal omission in not doing so. Whether the case might not come under Section 301, Indian Penal Code, also it is unnecessary to consider. In The Queen v. Latimer (1886) 17 Q.B.D.359 " the prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 and 25 Vic. C 100, Section 20, for unlawfully and maliciously wounding her, the Jury found that the blow ' was unlawful and malicious and did in fact wound her, but that the striking of her was purely accidental and not such a consequence of the blow as the prisoner ought to have expected.' The Court of Crown Cases Reserved held that the prisoner was guilty. The decision proceeded upon the words of the statute. Section 18 enacted that "whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person with malicious intent shall be guilty of felony." Then Section 20, leaving out the intent, provided that whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person shall be guilty of misdemeanour. Lord Coleridge, C.J., pointed out that the language of Sections 18 and 20 was different and that the earlier statute had been altered which provided that the intention should be against the person injured. In Regina v. Michael, where a bottle containing poison was put on the mantel-piece where a little child found it and gave part of the contents to the prisoner' child who soon after died, the Judges were of opinion that " the administering of the poison by the child was under the circumstances of the case as much in point of law an administering by the prisoner as if the prisoner had actually administered it with her own hand." This decision also, no doubt, proceeded on the ground of want of discretion in the intervenor, the child. The Indian courts may hold that a person who keeps poison at a place where others might have access to it must be taken

to know that death is likely to result from the act. It is clear that English decisions are not always a safe guide in deciding cases in this country where the provisions of the Penal Code must be applied. In Shankar Balkrishna v. King-Emperor I.L.R. (1904) Cal. 73 the Calcutta High Court held that the prisoner in the case, an Assistant Railway Station Master, was not liable where death would not have resulted if the guard had not acted carelessly, as the prisoner could not be taken to know that the accident to the train which resulted in the loss of human life was likely to lead to death. In In re The Empress v. Sahae Rae I.L.R. (1877) Cal. 623 which may be usefully compared with The Queen v. Latimer (1886) 17 Q.B.D.359 and where also the prisoner was held guilty, the decision was put on the ground that the prisoner knew it to be likely that the blow would fall on a person for whom he had not intended it. Holding, as I do, that, in the circumstances of this case, the prisoner could not be said to have known that it was likely that the prosecution 1st witness would throw aside the halva so as to be picked up and eaten by some one else and that the prisoner was not responsible, in the circumstances, for the voluntary act of prosecution 1st witness, I must come to the conclusion that the prisoner is not guilty of the murder of the girl Rajalakshmi. It is not contended that there was a legal duty on the part of the accused to prevent the girl from eating the halva and that he was guilty of murder by an illegal omission.

19. I would uphold the finding of acquittal of the lower court and dismiss the appeal.

Benson, J.

20. As we differ in our opinion as to the guilt of the accused, the case will be laid before another Judge of this court, with our opinions under Section 429, Criminal Procedure Code.

21. This appeal coming on for hearing under the provisions of Section 429 of the Code Criminal Procedure

The Court delivered the following

Rahim, J.

22. The question for decision is whether the accused Suryanarayanamurti is guilty of an offence under Section 302, Indian Penal Code, in the following circumstances He wanted to kill one Appala Narasimhulu on whose life he had effected rather large insurances and for that purpose gave him some halva (a sort of sweet meat), in which he had mixed arsenic and mercury in a soluble form, to eat. This was at the house of the accused's brother in-law, where Appala Narasimhulu had called by appointment. The man ate a portion of the halva, but not liking its taste threw away the remainder on the spot. Then, according to the view of the evidence accepted by my learned brothers Benson and Sundara Aiyar JJ., as well as by the Sessions Judge, a girl of 8 or 9 years named

Rajalakshmi, the daughter of the accused's brother-in-law, picked up the poisoned halva, ate a portion of it herself, and gave some to another child of the house. Both the children died of the effects of the poison, but Appala Narasimhulu, the intended victim, survived though after considerable suffering. It is also found as a fact, and I agree with the finding, that Rajalakshmi and the other girl ate the halva without the knowledge of the accused, who did not intend to cause their deaths. Upon these facts Benson J. would find the accused guilty of the murder of Rajalakshmi, while Sundara Aiyar J., agreeing with the Sessions Judge, holds a contrary view.

23. The question depends upon the provisions of the Indian Penal Code on the subject as contained in Section 299 to 301. The first point for enquiry is whether the definition of culpable homicide as given in Section 299 requires that the accused's intention to cause death or his knowledge that death is likely to be caused by his act in question must be found to exist with reference to the particular person whose death has actually been caused by such act, or is it sufficient for the purposes of the section if criminal intention or knowledge on the part of the accused existed with reference to any human being, though the death oi the person who actually fell a victim to the accused's act was never compassed by him. I find nothing in the words of the section which would justify the limited construction. Section 299 says: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." The language is perfectly general; all that it requires is that there should be an intention to cause death or a knowledge that death is likely to be the result, and there is nothing in reason which, in my opinion, would warrant us in saying that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. The law affords protection equally to the lives of all persons, and once the criminal intention, that is, an intention to destroy human life, is found, I do not see why it should make any difference whether the act done with such intention causes the death of the person aimed at or of some one else. Illustration (a) to Section 299 makes it quite clear that the legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused by the act of the accused was not the person intended to be killed by him but some other person. Section 301 also supports this construction as it assumes that the accused in such cases would be guilty of culpable homicide; and I may here point out that the object of this section is to lay down that the nature of culpable homicide of which the accused in these cases would be guilty, namely whether murder or not, would be the same as he would have been guilty of, if the person whose death was intended to be brought about had been killed. Now the first paragraph of Section 300 declares that culpable homicide shall be deemed to be murder if the act by which death is caused is done with the intention of causing death, using so far the very words of Section 299. In the 2nd and 3rd paragraphs of Section 300 the language is not quite identical with that of the corresponding provisions in Section 299, and questions may possibly arise whether where the fatal act was done not with the intention of causing death but with the intention

of causing such bodily injury as as likely to cause death, or with the knowledge that the accused is likely by such act to cause death, the offence would be one of murder or culpable homicide not amounting to murder. But it is not necessary for me to express any opinion on these matters as in the present case the prisoner undoubtedly intended to cause death.

24. The next point for consideration is whether the death of Rajalakshmi was caused by the accused's act within the meaning of Section 299. The question is really one of fact or of proper inference to be drawn from the facts. That girl's death was caused by eating the sweetmeat in which the accused had mixed poison and which he brought to the house where the girl lived in order to give it to the man for whom it was intended. It was given to him, but he, not relishing the taste of it, threw it down. The deceased girl soon afterwards picked it up and ate it, But the accused was not present when Rajalakshmi ate it, and we may even take it that, if the accused had been present, he would have prevented the girl from eating the sweetmeat. These being the facts, there can be, however, no doubt, that the act of the accused in mixing arsenic in the halva and giving it to Appala Narasimhalu in Rajalakshmi's house was one cause in the chain of causes which brought about the girl's death. The question then is whether this act of the accused was such a cause of Rajalakshmi's death as to justify us in imputing it to such act. In my opinion it was. Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause. Now, suppose, in this case Appala Narasimhulu had discovered that the sweetmeat was poisoned and then gave it to Rajalakshmi to eat, it is to his act that Rajalakshmi's death would be imputed and not to the accused's. Or suppose Appala Narasimhulu, either suspecting that the sweetmeat was poisoned or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so as to put it out of harm's way and Rajalakshmi happening afterwards to pass that way, picked it up, and ate it and was killed, the act of the accused in mixing the poison in the sweetmeat could

in that case hardly be said to have caused her death within the meaning of Section 299. On the other hand, suppose Appala Narasimhulu, finding Rajalakshmi standing near him and without suspecting that there was anything wrong with the sweetmeat, gives a portion of it to her and she ate it and was killed, could it be said that the accused who had given the poisoned sweetmeat to Appala Narsimhulu was not responsible for the death of Rajalakshmi? I think not. And there is really no difference between such a case and the present case. The ruling reported in 13 W.R. 2 also supports the view of the law which I have tried to express.

25. Reference has been made to the English law on the point and though the case must be decided solely upon the provisions of the Indian Penal Code, I may observe that there can be no doubt that under the English Law as well the accused would be guilty of murder. In English Law it is sufficient to show that the act by which death was caused was done with malice aforethought, and it is not necessary that malice should be towards the person whose death has been actually caused. This is well illustrated in the well-known case of Agnes Gore (1614) 77 E.R. 853 and in Saunder's case I. Hale P.C. 431 and also in Regina V. Michael 9 C & P. 356. No doubt" malice aforethought," at least according to the old interpretation of it as including an intention to commit any felony, covers a wider ground in the English Law than the criminal intention or knowledge required by Sections 299 and 300, Indian Penal Code, but the law in India on the point in question in this case is undoubtedly, in my opinion, the same as in England.

26. Agreeing therefore with Benson J., I set aside the order of the Sessions Judge acquitting the accused of the charge of murder and convict him of an offence under Section 302, Indian Penal Code. I also agree with him that, in the circumstances of the case, it is not necessary to impose upon the accused the extreme penalty of the law, and I sentence the accused under Section 303, Indian Penal Code, to transportation for life.

MANU/SC/0356/1982

Back to Section 302 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 273 of 1979 and Writ Petn. Nos. 89, 165, 168, 179, 434, 564, 754, 756 and 976 of 1979 and SLP (Crl.) No. 1732 of 1979

Decided On: 16.08.1982

Bachan Singh and Ors. Vs. State of Punjab and Ors.

Hon'ble Judges/Coram:
P.N. Bhagwati, J.

JUDGMENT

1. These writ petitions challenge the constitutional validity of Section 302 of the Indian Penal Code read with Section 354, Sub-section (3) of the CrPC in so far as it provides death sentence as an alternative punishment for the offence of murder. There are several grounds on which the constitutional validity of the death penalty provided in Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC is assailed before us, but it is not necessary to set them out at this stage, for I propose to deal with them when I examine the arguments advanced on behalf of the parties. Suffice it to state for the present that I find, considerable force in some of these grounds and in my view, the constitutional validity of the death penalty provided as an alternative punishment in Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC cannot be sustained. I am conscious that my learned brethren on the Bench who constitute the majority have taken a different view and upheld the constitutional validity of the death penalty but, with the greatest respect to them and in all humility, I cannot persuade myself to concur with the view taken by them. Mine is unfortunately a solitary dissent and it is therefore with a certain amount of hesitation that I speak but my initial diffidence is overcome by my deep and abiding faith in the dignity of man and worth of the human person and passionate conviction about the true spiritual nature and dimension of man. I agree with Bernad Shaw that "Criminals do not die by the hands of the law. They die by the hands of other men. Assassination on the scaffold is the worst form of assassination because there it is invested with the approval of the society.... Murder and capital punishment are not opposites that cancel one another but similar that breed their kind." It was the Father of the nation who said years ago, reaffirming what Prince Satyavan said on capital punishment in Shanti Parva 10 of Mahabarata that "Destruction of individuals can never be a virtuous act" and this sentiment has been echoed by many eminent men such as Leonardo Da Vinci, John Bright, Victor Hugo and Berdyaev. To quote again from Bernard Shaw from Act IV of his play "Caesar and Cleopatra:

And so to the end of history, murder
shall breed murder, always in the name
of right and honour and peace, until
the Gods are tired of blood and create
a race that can understand.

I share this sentiment because I regard men as an embodiment of divinity and I am therefore morally against death penalty. But my dissent is based not upon any ground of morality or ethics but is founded on constitutional issues, for as I shall presently show, death penalty does not serve any social purpose or advance any constitutional value and is totally arbitrary and unreasonable so as to be violative of Articles 14, 19, 21 of the Constitution.

2. Before I proceed to consider the various constitutional issues arising out of the challenge to the validity of the death penalty, I must deal with a preliminary objection raised on behalf of the respondents against our competence to entertain this challenge. The learned Counsel appearing on behalf of the respondents urged that the question of constitutional validity of the death penalty stood concluded against the petitioners by the decision of a Constitution bench of five Judges of this Court in Jagmohan v. State of U.P. MANU/SC/0139/1972: 1973CriLJ370 and it could not therefore be allowed to be reagitated before this Bench consisting of the same number of Judges. This Bench, contended the respondents, was bound by the decision in Jagmohan's case (supra) and the same issue, once decided in Jagmohan's case (supra), could not be raised again and reconsidered by this Bench. Now it is true that the question of constitutional validity of death penalty was raised in Jagmohan's case (supra) and this Court by a unanimous judgment held it to be constitutionally valid and therefore, ordinarily, on the principle of stare decisis, we would hold ourselves bound by the view taken in that case and resist any attempt at reconsideration of the same issue. But there are several weighty considerations which compel us to depart from this presidential rule in the present case. It may be pointed out that the rule of adherence to precedence is not a rigid and inflexible rule of law but it is a rule of practice adopted by the courts for the purpose of ensuring uniformity and stability in the law. Otherwise, every Judge will decide an issue according to his own view and lay down a rule according to his own perception and there will be no certainty and predictability in the law, leading to chaos and confusion and in the process, destroying the rule of law. The labour of the judges would also, as pointed out by Cardozo J. in his lectures on "Nature of Judicial Process" increase "almost to the breaking point if every past decision could be reopened in every case and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." But this rule of adherence to precedents, though a necessary tool in what Maitland called the legal smithy," is only a useful servant and cannot be allowed to turn into a tyrannous master. We would do well to recall what Brandies J. said in his dissenting judgment in State of Washington v. Dawson and company, 264 US 646: 68 L E. 219 namely; "Stare decisis is ordinarily a wise rule of action. But it is not a universal and inexorable command." If the rule of stare decisis were followed blindly and

mechanically, it would dwarf and stultify the growth of the law and affect its capacity to adjust itself to the changing needs of the society. That is why Cardozo painted out in his New York State Bar Address:

That was very well for a time, but now at last the precedents have turned upon us and are engulfing and annihilating us-engulfing and annihilating the very devotees that Worshiped at their shrine. So the air is full of new cults that disavow the ancient faiths. Some of them tell us that instead of seeking certainty in the word, the outward sign, we are to seek for something deeper, a certainty of ends and aims. Some of them tell us that certainty is merely relative and temporary, a writing on the sands to be effaced by the advancing tides. Some of them even go so far as to adjure us to give over the vain guest, to purge ourselves of these yearnings for an unattainable idea), and to be content with an empiricism that is untroubled by strivings for the absolute. With all their diversities of form and doctrine, they are at one at least in their emphasis upon those aspects of truth that are fundamental and ultimate. They exemplify the method approach, the attitude and outlook, the concern about the substance of things, which in all its phases and disguises is the essence of philosophy.

We must therefore rid stare decisis of something of its petrifying rigidity and warn ourselves with Cardozo that in many instances the principles and rules and concepts of our own creation are merely apercus and glimpses of reality" and remind ourselves of the need of reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour,...the social consciousness which it is our business as Judges to interpret as best as we can." The question at issue in the present writ petitions is one of momentous significance namely, whether the State can take the life of an individual under the cover of judicial process and whether such an act of killing by the State is in accord with the constitutional norms and values and if, on an issue like this, a Judge feels strongly that it is not competent to the State to extinguish the flame of life in an individual by employing the instrumentality of the judicial process, it is his bounden duty, in all conscience, to express his dissent, even if such killing by the State is legitimized by a previous decision of the court. There are certain issues which transcend technical considerations of stare decisis and if such an issue is brought before the court, it would be nothing short of abdication of its constitutional duty for the court to refuse to consider such issue by taking refuge under the doctrine of stare decisis. The court may refuse to entertain such an issue like the constitutional validity of death penalty because it is satisfied that the previous decision is correct but it cannot decline to consider it on the ground that it is barred by the rule of adherence to precedents. Moreover, in the present case, there are two other supervening circumstances which justify, and compel, reconsideration of the decision in Jagmohan's case (supra). The first is the introduction of the new CrPC in 1973 which by Section 354 Sub-section (3) has made life sentence the rule in case of offences punishable with death or in the 5 alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons. I shall presently refer to this section enacted in the new CrPC and show how, in view of that provision, the imposition of

death penalty has, become still more indefensible from the constitutional point of view. But the more important circumstance which has supervened since the decision in Jagmohan's case (supra)'is the new dimension of Articles 14 and 21 unfolded by this Court in Maneka Gandhi v. Union of India 1978 (2) SCR 663. This new dimension of Articles 14 and 21 renders the death penalty provided in Section 302 of the Indian Penal Code read with Section 354(3) of the CrPC vulnerable to attack on a ground not available at the time when Jagmohan's case (supra) was decided. Furthermore, it may also be noted, and this too is a circumstance not entirely without significance, that since Jagmohan's case (supra) was decided, India has ratified two international instruments on Human rights and particularly the International Covenant on Civil and Political Rights. We cannot therefore consider ourselves bound by the view taken in Jagmohan's case (supra) and I must proceed to consider the issue as regards the constitutional validity of death penalty afresh, without being in any manner inhibited by the decision in Jagmohan's case (supra).

3. It must be realised that the question of constitutional validity of death penalty, is not just a simple question of application of constitutional standards by adopting a mechanistic approach. It is a difficult problem of constitutional interpretation to which it is not possible to give an objectively correct legal answer. It is not a mere legalistic problem which can be answered definitively by the application of logical reasoning but it is a problem which raises profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the Judge, This would be so in case of any problem of constitutional interpretation but much more so would it be in a case like the present where the constitutional conundrum is enmeshed in complex social and moral issues defying a formalistic judicial attitude. That is the reason why in some countries like the United States and Canada where there is power of judicial review, there has been judicial disagreement on the constitutionality of death penalty. On an issue like this, as pointed out by David Pannick in his book on "Judicial Review of the Death Penalty" judicial conclusions emanate from the judicial philosophy of those who sit in judgment and not from the language of the Constitution." But even so, in their effort to resolve such an issue of great constitutional significance, the Judges must take care to see that they are guided by "objective factors to the maximum possible extent." The culture and ethos of the nation as ' gathered from its history, its tradition and its literature would clearly be relevant factors in adjudging the constitutionality of death penalty 50 and so would the ideals and values embodied in the Constitution which lays down the basic frame-work of the social and political structure of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. So also standards or, norms set by International organisations and bodies have relevance in determining the constitutional validity of death penalty and equally important in construing and applying the equivocal formulae of the Constitution would be the "wealth of non-legal learning and experience that encircles and illuminates" the topic of death penalty. "Judicial dispensers," said Krishna Iyer, J. in Dalbir Singh and Ors. v. State of Punjab 1979 (3) SCR 1959 "do not

behave like cavemen but breathe the fresh air of finer culture." There is no reason why, in adjudicating upon the constitutional validity of death penalty, Judges should not obtain assistance from the writings of men like Dickens, Tolstoy, Dostoyevsky, Koestter and Camus or from the investigations of social scientists or moral philosophers in deciding the circumstances in which and the reasons why the death penalty could be seen as arbitrary or a denial of equal protection. It is necessary to bear in mind the wise and felicitous words of Judge Learned Hand in his "Spirit of Liberty" that while passing on a question of constitutional interpretation, it is as important to a Judge:

...to have at least a bowing acquaintance with Acton and Maitland. With Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalisations of universal applicability.
Constitutional law raises, in a legal context, problems of economic, social, moral and political theory and practice to which non-lawyers have much to contribute. Non-lawyers have not reached unanimity on the answers to the problems posed; nor will they ever do so. But when judges are confronted by issues to which there is no legal answer, there is no reason (other than a desire to maintain a fiction that the law provides the answer) for judicial discretion to be exercised in a vacuum, immune from non-legal learning and extra-legal dispute. 'Quotations from noble minds are not for decoration (in hard constitutional cases) but for adaptation within the framework of the law. "Vide: David Pannick on 'Judicial Review of the Death Penalty.' The Judges must also consider while deciding an issue of constitutional adjudication as to what would be the moral, social and economic consequences of a decision either way. The consequences of course do not alter the meaning of a constitutional or statutory provision but they certainly help to fix its meaning. With these prefatory observations I shall now proceed to consider the question of constitutional validity of death penalty.

4. I shall presently refer to the constitutional provisions which bear on the question of constitutionality of death penalty, but before I do so, it would be more logical if I first examine what is the international trend of opinion in regard to death penalty. There are quite a large number of countries which have abolished death penalty de jure or in any event, de facto. The Addendum to the Report of the Amnesty International on "The Death Penalty" points out that as of 30th May 1979, the following countries have abolished death penalty for all offences: Australia, Brazil, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Finland, Federal Republic of Germany, Honduras, Iceland, Luxembourg, Norway, Portugal, Sweden, Uruguay and Venezuela, and according to this Report, Canada, Italy, Malta, Netherlands, Panama, Peru, Spain and Switzerland have

abolished death penalty in time of peace, but retained it for specific offences committed in time of war. The Report also states that Algeria, Belgium, Greece, Guyana, Ivory Coast, Seychelles and Upper Volta have retained the death penalty on their statute book but they did not conduct any executions for the period from 1973 to 30th May 1979. Even in the United States of America there are several States which have abolished death penalty and so also in the United Kingdom, death penalty stands abolished from the year 1965 save and except for offences of treason and certain forms of piracy and offences committed by members of the armed forces during war time. It may be pointed out that an attempt was made in the United Kingdom in December 1975 to reintroduce death penalty for terrorist offences involving murder but it was defeated in the House of Commons and once again a similar motion moved by a conservative member of Parliament that "the sentence of capital punishment should again be available to the courts" was defeated in the House of Commons in a free vote on 19th July 1978. So also death penalty has been abolished either formally or in practice in several other countries such as Argentina, Bolivia, most of the federal States of Mexico and Nicaragua. Israel, Turkey and Australia do not use the death penalty in practice. It will thus be seen that there is a definite trend in most of the countries of Europe and America towards abolition of death penalty.

5. It is significant to note that the United Nations has also taken great interest in the abolition of capital punishment. In the Charter of the United Nations signed in 1945, the founding States emphasized the value of individual's life, stating their will to "achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". Though the San Francisco Conference did not address itself to the issue of death penalty specifically, the provisions of the charter paved the way for further action by United Nations bodies in the field of human rights, by establishing a Commission on Human Rights and, in effect, charged that body with formulating an International Bill of Human Rights. Meanwhile the 40 Universal Declaration of Human Rights was adopted by the General Assembly in its Resolution 217 A (III) of 10 December 1948. Articles 3 and 5 of the Declaration provided:

3. Everyone has the right to life, liberty and security of person

5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The United Nations position on the question of death penalty was expected to be stated more specifically in the International Covenant on Civil and Political Rights, the drafting of which had been under way since the first session of the Commission on Human Rights in 1947. But during the 11-year period of drafting of the relevant provision of the Covenant, two main approaches to the issue of capital punishment became evident: one stressed the need for barring the death penalty and the second placed emphasis on

restricting its apply to certain cases. The proponents of the first position suggested either the total abolition of the death penalty or its abolition in time of peace or for political offences. This approach was however regarded as unfeasible, since many countries, including abolitionist ones, felt that the provision for an outright ban on the death penalty would prevent some States from ratifying the Covenant, but at the same time, it was insisted by many countries that the Covenant should not create the impression of supporting or perpetuating death penalty and hence a provision to this effect should be included. The result was that the second approach stressing everyone's right to life and emphasizing the need for restricting the application of capital punishment with a view to eventual abolition of the death penalty, won greater support and Article 6 of the Covenant as finally adopted by the General Assembly in its resolution 2200 (XXI) of 16 December 1966 provided as follows:

1. 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.

2. In 'countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provision of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7 of the Covenant corresponding to Article 5 of the Universal Declaration of Human Rights reaffirmed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

6. So deep and profound was the United Nation's concern with the issue of death penalty that the General Assembly in its resolution 1396 (XIV) of 20th November, 1959 invited the Economic and Social Council to initiate study of the question of capital punishment, of the laws and practices relating thereto, and of the effects of capital punishment and the abolition thereof on the rate of criminality. Pursuant to this resolution, the Economic and Social Council activised itself on this issue and at its instance a substantive report was prepared by the noted French Jurist Marc Ancel. The report entitled "Capital Punishment" was the first major survey of the problem from 50 an international standpoint on the deterrent aspect of the death penalty and in its third chapter, it contained a cautious statement "that the deterrent effect of the death penalty is, to say the least, not demonstrated." This view had been expressed not only by abolitionists countries in their replies to the questionnaires but also by some retentions countries. The Ancel report along with the Report of the ad hoc Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders which examined it in January 1963 was presented to the Economic and Social Council at its 35th Session when its Resolution 934 (XXXV) of 9th April 1963 it was adopted. By this Resolution the Economic and Social Council urged member governments inter alia to keep under review the efficacy of capital punishment as a deterrent to crime in their countries and to conduct research into the subject and to remove this punishment from the criminal law concerning any crime to which it is, in fact, not applied or to which there is no intention to apply it. This Resolution clearly shows that there was no evidence supporting the supposed deterrent effect of the death penalty and that is why the Economic and Social Council suggested further research on the topic. Moreover, the urging of the de facto abolitionist countries by this Resolution to translate the position into de jure terms constituted an implicit acceptance of the principle of abolition. The same year, by Resolution 1918 (XVIII) of 5th December, 1963, the General Assembly endorsed this action of the Economic and Social Council and requested the Economic and Social Council to invite the Commission on Human Rights to study and make recommendations on the Ancel Report and the comments of the ad hoc Advisory Committee of Experts. The General Assembly also requested the Secretary General to present a report on new developments through the Economic and Social Council. Norval Morris, an American Professor of criminal law and criminology, accordingly prepared a Report entitled "Capital Punishment; Developments 1961-1965" and amongst other things, this Report pointed out that there was a steady movement towards legislative abolition of capital punishment and observed with regard to the deterrent effect of death penalty, that:

with respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing abolition does not appear to interrupt the decrease; where the rate is stable, the presence or absence of capital punishment does not appear to affect it.

The Commission on Human Rights considered this report and adopted a draft General Assembly Resolution which was submitted by the Economic and Social Council to the

General Assembly and on, 26th November 1968, the General Assembly adopted this draft with 40 certain modifications as its Resolution 2393 (XXIII) inviting member governments to take various measures and requesting the Secretary General to invite member governments "to inform him of their present attitude to possible further restricting the use of the death penalty or to its total abolition" and to submit a report to the Economic and Social Council. The Secretary General accordingly submitted his report to the Economic and Social Council at its 50th session in 1971. This report contained a finding that "most countries are gradually restricting the number of offences for which the death penalty is to be applied and a few have totally abolished capital offences even in war times". The discussion in the Economic and Social Council led to the adoption of Resolution 1574 (L) of 20th May 1971 which was reaffirmed by General Assembly Resolution 2857 (XXVI) of 20th December 1971. This latter resolution clearly affirmed that:

In order to guarantee fully the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries".

(Emphasis supplied.)

7. In 1973 the Secretary-General submitted to the Economic and Social Council at its 54th session his third report on capital punishment as requested by the Council and at this session, the Council adopted Resolution 1745 (LIV) in which, inter alia, it invited the Secretary General to submit to it periodic updated reports on capital punishment at five-year intervals starting from 1975. A fourth report on capital punishment was accordingly submitted in 1975 and a fifth one in 1980. Meanwhile the General Assembly at its 32nd Session adopted Resolution 32/61 on 8th December 1977, and this Resolution reaffirmed "the desirability of abolishing this" that is capital "punishment" in all countries.

8. It will thus be seen that the United Nations has gradually shifted from the position of a neutral observer concerned about but not committed on the question of death penalty, to a position favouring the eventual abolition of the death penalty. The objective of the United Nations has been and that is the standard set by the world body that capital punishment should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.

9. I will now proceed to consider the relevant provisions of the Constitution bearing on the question of constitutional validity of death penalty. It may be pointed out that our Constitution is a unique document. It is not a mere pedantic legal text but it embodies certain human values cherished principles and spiritual norms and recognises and

upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the center of the constitutional scheme and focuses on the fullest development of his personality. The Preamble makes it clear that the Constitution is intended to secure to every citizen social, economic and political justice and equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The Fundamental Rights lay down limitations on the power of the legislature and the executive with a view to protecting the citizen and confer certain basic human rights which are enforceable against the State in a court of law. The Directive Principles of State Policy also emphasise the dignity of the individual and the worth of the human person by obligating the State to take various measures for the purpose of securing and protecting a social order in which justice, social, economic and political, shall inform all the institutions of national life. What is the concept of social and economic justice which the founding fathers had in mind is also elaborated in the various Articles setting out the Directive Principles of State Policy. But all these provisions enacted for the purpose of ensuring the dignity of the individual and providing for his material, moral and spiritual development would be meaningless and ineffectual unless there is rule of law to invest them with life and force.

10. Now if we look at the various constitutional provisions including the Chapters on Fundamental Rights and Directive Principles of State Policy, it is clear that the rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire'. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. That is why Aristotle preferred a government of law rather than of men. 'Law', in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever arbitrary or despotic it may be. Otherwise even under a dictatorship it would be possible to say that there is rule of law, because every law made by the dictator howsoever arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even 10 where the political set up is dictatorial, it is law that governs the relationship between men and men and between men and the State. But still it is not rule, of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator it is in effect and substance the rule of man and not of law which prevails in such a situation. What is a necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of polity seeks to ensure this element by making the framers of the law accountable to the people. Of course, in a country like the United Kingdom, where there is no written Constitution imposing fetters on legislative power and providing for judicial review of legislation, it may be difficult to hold a law to be invalid on the ground that it is arbitrary and irrational and hence violative of an essential element of the rule of law and the only remedy if at all would be an appeal to the

electorate at the time when a fresh mandate is sought at the election. But the situation is totally different in a country like India which has a written Constitution enacting Fundamental Rights and conferring power on the courts to enforce them not only against the executive but also against the legislature. The Fundamental Rights erect a protective armour for the individual against arbitrary or unreasonable executive or legislative action.

11. There are three Fundamental Rights in the Constitution which are of prime importance and which breathe vitality in the concept of the rule of law. They are Articles 14, 19 and 21 which in the words of Chandrachud, C.J. in Minerva Mills case MANU/SC/0075/1980: [1981]1SCR206 constitute a golden triangle. It is now settled law as a result of the decision of this Court in Maneka Gandhi's case (supra) that Article 14 enacts primarily a guarantee against arbitrariness and inhibits State action, whether legislative or executive, which suffers from the vice of arbitrariness. This interpretation placed on Article 14 by the Court in Maneka Gandhi's case has opened up a new dimension of that Article which transcends the classificatory principle. For a long time in the evolution of the constitutional law of our country, the courts had construed Article 14 to mean only this, namely, that you can classify persons 45 and things for the application of a law but such classification must be based on intelligible differentia having rational relationship to the object sought to be achieved by the law. But the court pointed out in Maneka Gandhi's case that Article 14 was not to be equated with the principle of classification. It was primarily a guarantee against arbitrariness in State action and the doctrine of classification was evolved only as a subsidiary rule for testing or determining whether a particular State action was arbitrary or not. The Court said "Equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies. One belongs to the rule of law while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." The Court thus laid down that every State action must be non-arbitrary and reasonable; if it is not, the court would strike it down as invalid.

12. This view was reaffirmed by the Court in another outstanding decision in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 CSR 1014 There, tenders were invited by the Airport Authority for giving a contract for running a canteen at they Bombay Airport. The invitation for tender included a condition that the applicant must have at least 5 years' experience as a registered 2nd class hotelier. Several persons tendered. One was a person who had considerable experience in the catering business but he was not a registered 2nd class hotelier as required by the condition in the invitation to tender. Yet his tender was accepted because it was the highest. The contract given to him was challenged and court held that the action of the Airport Authority was illegal. The court pointed out that a new form of property consisting of government largesse in the shape of jobs, contracts, licences, quotas, mineral rights and other benefits and services was emerging in the social welfare State that India was and it was necessary

to develop new forms of protection in regard to this new kind of property. The court held that in regard to government largesse, the discretion of the government is not unlimited in that the government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. The government action must be based on standards that are not arbitrary or irrational. This requirement was spelt out from the application of Article 14 as a constitutional requirement and it was held that having regard to the constitutional mandate of Article 14, the Airport Authority was not entitled to act arbitrarily in accepting the tender but was bound to conform to the standards or norms laid down by it. The Court thus reiterated and reaffirmed its commitment against arbitrariness in State action.

13. It can therefore now be taken to be well-settled that if a law is arbitrary or irrational, it would fall foul of Article 14 and would be liable to be struck down as invalid. Now a law may contravene Article 14 because it enacts provisions which are arbitrary: as for example, they make discriminatory classification which is not founded on intelligible differentia having rational relation to the object sought to be achieved by the law or they arbitrarily select persons or things for discriminatory treatment. But there is also another category of cases where without enactment of specific provisions which are arbitrary, a law may still offend Article 14 because it confers discretion on an authority to select person or things for application of the law without laying down any policy or principle to guide the exercise of such discretion. Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason. Unfettered and uncharted discretion conferred on any authority, even if it be the judiciary, throws the door open for arbitrariness, for after all a judge does not cease to be a human being subject to human limitations when he puts on the judicial rove and the nature of the judicial process being what it is, it cannot be entirely free from judicial subjectivism. Cardozo, J. has frankly pointed this out in his lectures on "Nature of the Judicial Process":

There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations...if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.
This facet of the judicial process has also been emphasized by Richard B. Brandt in his book on "Judicial Discretion" where he has said:

Much of law is designed to avoid the necessity for the judge to reach what Holmes called his 'can't helps,' his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of

limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may, therefore, be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.
That is why Lord Camden described the discretion of a judge to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends on Constitution, Temper, and Passion.' In the best it is often times Caprice, in the worst it is every Vice, Folly and Passion to which human Nature is liable." Doe d. Hindson v. Kersey (1765) at p. 53 of the pamphlet published in London by J. Wilkes in 1971 entitled "Lord Camden's Genuine Argument in giving Judgment on the Ejectment between Hindson, and others against Kersey." Megarry J. also points out in his delightful book "Miscellany at Law" that "discretion is indeed a poor substitute, for principles, however great the Judge." Therefore, where discretion is conferred on an authority by a statute, the court always strains to find in the statute the policy or principle laid down by the legislature for the purpose of guiding the exercise of such discretion and, as pointed out by Subba Rao, J. as he then was, the court some times even tries to discover the policy of principle in the crevices of the statute in order to save the law from the challenge of Article 14 which would inevitably result in striking down of the law if the discretion conferred were unguided and unfettered. But where after the utmost effort and intense search, no policy or principle to guide the exercise of discretion can be found, the discretion conferred by the law would be unguided 45 and unstructured, like a tumultuous river overflowing its banks and that would render the law open to attack on ground of arbitrariness under Article 14.

14. So also Article 19 strikes against arbitrary legislation in so far as such legislation is violative of one or the other provision of Clause (1) of that Article. Sub-clauses (a) to (g) of Clause (1) of Article 19 enact various Fundamental freedoms: Sub-clause (1) guarantees freedom of speech and expression, Sub-clause (b), freedom to assemble peacefully and without arms; Sub-clause (c), freedom to form associations or unions; Sub-clause (d), freedom to move freely throughout the territory of India; Sub-clause (e), to reside and settle in any part of the territory of India and Sub-clause (g), freedom to practise any profession or to carry on any occupation, trade or business. There was originally Sub-clause (f) in Clause (1) of Article 19 which guaranteed freedom to acquire, hold, and dispose of property but that sub-clause was deleted by the Constitution (Forty fourth Amendment) Act 1978. Now the freedoms guaranteed under these various sub-clauses of Clause (1) of Article 19 are not absolute freedoms but they can be restricted by law, provided such law satisfies the requirement of the applicable provision in one or the other of Clauses (2) to (6) of that Article. The common basic requirement of the saving provision enacted in Clauses (2) to (6) of Article 19 is that the restriction imposed by the law must

be reasonable. If, therefore, any law is enacted by the legislature which violates one or the other provision of Clauses (1) of Article 19, it would not be protected by the saving provision enacted in Clauses (2) to (6) of that Article, if it is arbitrary or irrational, because in that event the restriction imposed by it would a fortiori be unreasonable.

15. The third Fundamental Right which strikes against arbitrariness in State action is that embodied in Article 21. This Article is worded in simple language and it guarantees the right to life and personal liberty in the following terms.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.
This Article also came up for interpretation in Maneka Gandhi's case (supra). Two questions arose before the Court in that case: one was as to what is the content of the expression "personal liberty" and the other was as to what is the meaning of the expression "except according to procedure established by law." We are not concerned here with) the first question and hence I shall not dwell upon it. But so far as second question is concerned? it provoked a decision from the Court which was to mark the beginning of a most astonishing development of the law. It is with this decision that the Court burst forth into unprecedented creative activity and gave to the law a new dimension and a new vitality. Until this decision was given, the view held by this Court was that Article 21 merely embodied a facet of the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by executive action unsupported by law. It was 35 intended to be no more than a protection against executive action which had no authority of law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life or personal liberty. Even if, to take an example cited by S.R. Das, J. in his Judgment in A.K. Gopalan v. State of Madras MANU/SC/0012/1950: 1950CriLJ1383 the law provided that the Bishop of Rochester be boiled in oil, it would be valid under Article 21. But in Maneka Gandhi's case (supra) which marks a watershed in the history of development of constitutional law in our country, this Court for the first time took the view that Article 21 affords protection not only against executive action but also against legislation and any law which deprives a person of his life or personal liberty would be invalid unless it prescribes a procedure for such deprivation which is reasonable fair and just. The concept of reasonableness, it was held, runs through the entire fabric of the Constitution and it is not enough for the law merely to provide some semblance of a procedure but the procedure for depriving a person of his" life or personal liberty must be reasonable, fair and just. It is for the court to determine whether in a particular case the procedure is reasonable, fair and just and if it is not, the court will strike down the law as invalid. If therefore a law is enacted by the legislature which deprives a person of his life-and 'life' according to the decision of this Court in Francis Coralie Mullen's v. Administrator, Union Territory of Delhi and Ors. MANU/SC/0517/1981: 1981CriLJ306 would include not merely physical existence but also/the use of any faculty or limb as also the right to live with human dignity-or any aspect of his personal liberty, it would offend against Article 21 if the procedure

prescribed for such deprivation is arbitrary and unreasonable. The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law. Take for example, a law of preventive detention which sets out the grounds, on which a person may be preventively detained. If a person is preventively detained on a ground other than those set out in the law, the preventive detention would obviously not be according to the procedure prescribed by the law, because the procedure set out in the law for preventively detaining a person prescribes certain specific grounds on which alone a person can be preventively detained, and if he is detained on any other ground, it would be violative of Article 21. Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21.

16. It will thus be seen that the rule of law has much greater vitality under our Constitution than it has in other countries like the United Kingdom which has no constitutionally enacted Fundamental Rights. The rule of law has really three basic and fundamental assumptions; one is that law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinances effective for a short duration while the legislature is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature; the other is that, even in the hands of a democratically elected legislature, there should not be unfettered legislative power, for, as Jefferson said: "Let no man be trusted with power but tie him down from making mischief by the chains of the Constitution; and lastly there must be an independent judiciary to protect the citizen against excesses of executive and legislative power. Fortunately, whatever uncharitable and irresponsible critics might say when they find a decision of the court going against the view held by them, we can confidently assert that we have in our country all these three elements essential to the rule of law. It is plain and indisputable that under our Constitution law cannot be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14 or Article 19, 40 or Article 21, whichever be applicable.

17. It is in the light of these constitutional provisions that I must consider whether death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC is constitutionally valid. Now one thing is certain that the Constitution does not in so many terms prohibit capital punishment. In fact, it recognises death sentence as one of the penalties which may be imposed by law. Article 21 provides inter alia that no one shall be deprived of his life except according to procedure established by law and this clearly postulates that a person may be deprived of his life in accordance with the procedure, which, of course, according to the decision of this Court in Maneka Gandhi's case (supra) must be reasonable, fair and just procedure, for inflicting death penalty on a person depriving him of his life. Clause (c) of Article 72 also recognises the possibility of a sentence of death being imposed on person convicted of an

offence inasmuch as it provides that the President shall have the power to suspend, remit or commute the sentence of any person who is convicted of an offence and sentenced to death. It is therefore not possible to contend that the imposition of death sentence for conviction of an offence is in all cases forbidden by the Constitution. But that does not mean that the infliction of death penalty is blessed by the Constitution or that it has the imprimatur or seal of approval of the Constitution. The Constitution is not a transient document but it is meant to endure for a long time to come and during its life, situations may arise where death penalty may be found to serve a social purpose and its prescription may not be liable to be regarded as arbitrary or unreasonable and therefore to meet such situations, the Constitution had to make a provision and this it did in Article 21 and Clause (c) of Article 72 so that, even where death penalty is prescribed by any law and it is otherwise not unconstitutional, it must still comply with the requirement of Article 21 and it would be subject to the clemency power of the President under Clause (c) of Article 72. The question would however still remain whether the prescription of death penalty by any particular law is violative of any provision of the Constitution and is therefore rendered unconstitutional. This question has to be answered in the present case with reference to Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC.

18. Now in order to answer this question it is necessary first of all to examine the legislative trend in our country so far as the imposition of death penalty is concerned. A "brief survey of the trend of legislative endeavors will, as pointed out by Krishna Iyer, J. in Rajendra Prasad v. State of U.P. (1979) 3 SCR 646 "serve to indicate whether! the people's consciousness has been projected towards narrowing or widening the scope for infliction of death penalty." If we look at the legislative history of the relevant provisions of the Indian Penal 30 Code and the CrPC, we find that in our country there has been a gradual shift against the imposition of death penalty. The legislative development, through several successive amendments has shifted the punitive center of gravity from life taking to life sentence. Sub-section (5) of Section 367 of the CrPC 1898 as it stood prior to its amendment by Act 26 of 1955 provided:

If the accused is convicted of an offence punishable with death, and the court sentences to any punishment other than death, the court shall in its judgment state the reasons why sentence of death. was not passed.
This provision laid down that if an accused was convicted of an offence punishable with death, the imposition of death sentence was the rule and the awarding of a lesser sentence was an exception and the court had to state the reasons for not passing the sentence of death. In other words, the discretion was directed positively towards death penalty. But, by the Amending Act 26 of 1955 which came into force with effect from 1st January 1956, this provision was deleted with the result that from and after that date, it was left to the discretion of the court on the facts of each case to pass a sentence of death or to award a lesser sentence. Where the court found in a given case that, on the facts and circumstances of the case, the death was not called for or there were extenuating circumstances to justify

the passing of the lesser sentence, the court would award the lesser sentence and not impose the death penalty. Neither death penalty nor life sentence was the rule under the law as it stood after the abolition of Sub-section (5) of Section 367 by the Amending Act 26 of 1955 and the court was left "equally free to award either sentence." But then again, there was a further shift against death penalty by reason of the abolitionist pressure and when the new CrPC 1973, was enacted, Section 354 Sub-section (3) provided:

When the conviction is for a sentence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and. in the case of sentence of death special reasons for such sentence.
The court is now required under this provision to state the reasons for the sentence awarded and in case of sentence of death, special reasons are required to be stated. It will thus be seen that life sentence is now the rule and it is only in exceptional cases, for special reasons,, that death sentence can be imposed. The legislature has however not indicated what are the special reasons for which departure can be made from the normal rule and death penalty may be inflicted. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, death sentence may be imposed. This is left entirely to the unguided discretion of the court, a feature, which, in my opinion, has lethal consequences so far as the constitutionality of death penalty is concerned. But one thing is clear that through these legislative changes the disturbed conscience of the State on the question of legal threat to life by way of death sentence has sought to express itself legislatively," the stream of tendency being towards cautious abolition.

19. It is also interesting to note that a further legislative attempt towards restricting and rationalising death penalty was made in the late seventies. A Bill called Indian Penal Code (Amendment) Bill 1972 for amending Section 302 was passed by the Rajya Sabha in 1978 and it was pending in the Lok Sabha at the time when Rajendra Prasad's case was decided and though it ultimately lapsed with the dissolution of the Lok Sabha, it shows how strongly were the minds of the elected representatives of the people agitated against "homicidal exercise of discretion" which is often an '"obsession with retributive justice in disguise." This Bill sought to narrow drastically the judicial discretion to imposing death penalty and tried to formulate the guidelines which should control the exercise of judicial exercise in this punitive area. But unfortunately the Bill though passed by the Rajya Sabha could not see its way through the Lok Sabha and was not enacted into law. Otherwise perhaps the charge against the present section of 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC that it does not indicate any policy or principle to guide the exercise of judicial discretion in awarding death penalty, would have been considerably diluted, though even then, I doubt very much whether that section could have survived the attack against its constitutionality on the ground that it still leaves the door open for arbitrary exercise of discretion in imposing death penalty.

20. Having traced the legislative history of the relevant provisions in regard to death penalty, I will now turn my attention to what great and eminent man have said in regard to death penalty, for their words serve to bring out in bold relief the utter barbarity and futility of the death penalty. Jaiprakash Narain, the great humanist, said, while speaking on abolition of death penalty:

To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition sufficiently improved to become useful citizens. In a minority of cases, this may not be possible. They may be kept in prison houses till they die a natural death. This may cast a heavier economic burden on society than hanging. But I have no doubt that a humane treatment even of a murderer will enhance man's dignity and make society more human,
Andrei Sakharov in a message to the Stockholm Conference on Abolition of Death Penalty organised by Amnesty International in 1978 expressed himself firmly against death penalty:

I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of a society. A State, in the person of its functionaries, who like all people are inclined to making superficial conclusions, who like all people are subject to influence, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act-the deprivation of life. Such a State cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true-that savagery begets only savagery.... I am convinced that society as a whole and each of its members individually, not just the person who comes before the courts, bears a responsibility for the occurrence of a crime.... I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Bloodthirsty and calculated revenge with no temporary insanity on the part of the judges, and therefore, shameful and disgusting.
Tolstoy also protested against death sentences in an article "I Cannot be Silent."

Twelve of those by whose labour we live the very men whom we have depraved and are still depraving by every means in our power from the poison of vodka to the terrible falsehood of a creed we impose on them with all our might, but do not ourselves believe in-twelve of those men strangled with cords by those whom the feed and clothe and house, and who have depraved and still continue to deprave them. Twelve husbands, fathers, and sons, from among those upon whose kindness, industry, and simplicity alone rests the whole of Russian life, are seized, imprisoned, and shackled. Then their hands

are tied behind their backs lest they should seize the ropes by which they are to be hung, and they are led to the gallows.
So also said Victor Hugo in the spirit of the Bishop created by him in his 'Les Miserables':

We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold, reason is on our side, feeling is on our side, and experience is on our side.
Mahatma Gandhi also wrote to the same effect in his simple but inimitable style:

Destruction of individuals can never be a virtuous act. The evildoers cannot be done to death. Today there is a movement afoot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease.
This Gandhian concept was translated into action with commendable success in the case of Chambal dacoits who laid down their arms in response to the call of Vinobha Bhave and Jaiprakash Narayan. See "Crime and Non-violence" by Vasant Nargolkar. There is also the recent instance of surrender of Malkhan Singh, a notorious dacoit of Madhya Pradesh., Have these dacoits not been reformed? Have they not been redeemed and saved? What social purpose would have been served by killing them?

21. I may also at this stage make a few observations in regard to the barbarity and cruelty of death penalty, for the problem of constitutional validity of death penalty cannot be appreciated in its proper perspective without an adequate understanding of the true nature of death penalty and what it involves in terms of human anguish and suffering. In the first place, death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life for ever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible. It silences for ever a living being and dispatches him to that 'undiscovered country from whose bourn no traveller returns' nor, once executed, 'can storied urn or animated bust back to its mansion call the fleeting breath.' It is by reasons of its cold and cruel finality that death penalty is qualitatively different from all other forms of punishment. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. Of course, the imprisonment that he has suffered till then cannot be undone and the time he has spent in the prison cannot be given back to him in specie but he can come back and be restored to normal life with his honour vindicated, if he is found innocent. But that is not possible where a person has been wrongly convicted and sentenced to death and put out of existence In pursuance of the sentence of death. In his case, even if any mistake is subsequently discovered, it will be too late; in every way and for every purpose it will be too late, for he cannot be brought back to life. The execution of the sentence of death in such a case makes miscarriage of justice irrevocable. On whose conscience will this death of an innocent man lie? The State through its judicial instrumentality would have killed an innocent man. How is it

different from a private murder? That is why Lafavatte said: "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated me."

22. It is argued on behalf of the retentions that having regard to the elaborate procedural safeguards enacted by the law in cases involving capital punishment, the possibility of mistake is more imaginary than real and these procedural safeguards virtually make conviction of an innocent person impossible. But I do not think this argument is well founded. It is not supported by factual data. Hugo Bedau in his well known book, "The Death Penalty in America" has individually documented seventy four cases since 1893 in which it has been responsibly charged and in most of them proved "beyond doubt, that persons were wrongly convicted of criminal homicide in America. Eight out of these seventy four, though innocent, were executed. Redin, Gardener, Frank and others have specifically identified many more additional cases. These are cases in which it has been possible to show discovery of subsequent facts that the convictions were erroneous and innocent persons were put to death, but there may be many more cases where by reason of the difficulty of uncovering the facts after conviction, let alone after execution, it may not be possible to establish that there was miscarriage of justice. The jurist Olivecroix, applying a calculus of probabilities to the chance of judicial error, concluded as far back as in 1860 that approximately one innocent man was condemned out of every 257 cases. The proportion seems low but only in relation to moderate punishment. In relation to capital punishment, the proportion is infinitively high. When Huge wrote that he preferred to call the guillotine Lesurques (the name of an innocent man guillotined in the Carrier de Lyon case) he did not mean that every man who was decapitated was a Lesurques, but that one Lesurques was enough to wipe out the value of capital punishment forever. It is interesting to note that where cases of wrongful execution have come to public attention, they have been a major force responsible for bringing about abolition of death penalty. The Evans case in England in which an innocent man was hanged in 1949 played a large role in the abolition of capital punishment in that country. Belgium also abjured capital punishment on account of one such judicial error and so did Wisconsin,, Rhode Island and Maine in the United States of America.

23. Howsoever careful may be the procedural safeguards erected by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguards can prevent conviction of the innocent. Students of the criminal process have identified several reasons why innocent men may be convicted of crime. In the first place, our methods of investigation are crude and archaic. We are, by and large, ignorant of modern methods of investigation based on scientific and technological advances. Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Some times they are even got up by the police to prove what the police believes to be a true case. Sometimes there is also-mistaken eye witness identification, and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There

are also cases where an over zealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man.

24. Then again it is sometimes argued that, on this reasoning, every criminal trial must necessarily raise the possibility of wrongful conviction and if that be so, are we going to invalidate every form of punishment? But this argument, I am afraid, is an argument of despair. There is a qualitative difference between death penalty and other forms of punishment. I have already pointed out that the former extinguishes the flame of life altogether and is irrevocable and beyond recall while the latter can, at least to some extent beset right, if found mistaken. This vital difference between death penalty and imprisonment was emphasized by Mahatma Gandhi when he said, in reply to a German writer:

I would draw distinction between killing and detention and even corporal punishment. I think there is a difference not merely in quantity but also in quality. I can recall the punishment of detention. I can make reparation to the man upon whom J inflict corporal punishment. But once a man is killed, the punishment is beyond recall or reparation.
The same point was made by the distinguished criminologist Leon Radzinowicz when he said: "The likelihood of error in a capital sentence case stands on a different footing altogether." Judicial error in imposition of death penalty would indeed be a crime beyond punishment. This is the drastic nature of death penalty, terrifying in its consequences, which has to be taken into account in determining its constitutional validity.

25. It is also necessary to point out that death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. One Psychiatrist has described Death Row as a "grisly laboratory" "the ultimate experimental stress in which the condemned prisoner's personality is incredibly brutalised." He points out that "the strain of existence on Death Row is very likely to produce...acute psychotic breaks." Vide the article of West on Medicine and Capital Punishment." Some inmates are driven to ravings or delusions but the majority sink into a sort of catatonic numbness under the over-whelming stress." Vide "The case against Capital Punishment" by the Washington Research Project. Intense mental suffering is inevitably associated with confinement, under sentence of death. Anticipation of approaching death can and does produce stark terror. Vide article on "Mental Suffering under Sentence of Death." 57 Iowa Law Review 814. \Justice Brennan in his opinion in Furman v. Georgia 408 US 238 gave it as a reason for holding the capital punishment to be unconstitutional that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll 35 during the inevitable long wait between the

imposition of sentence and the actual infliction of death." Krishna Iyer, J. also pointed out in Rajendra Prasad's case (supra) that because the condemned prisoner had "the hanging agony hanging over his head since 1973 (i.e. for six years) "he must by now be more a vegetable than a person." He added that "the excruciation of long pendency of the death sentence with the prisoner languishing near-solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonising." The California Supreme Court also, in finding the death penalty per se unconstitutional remarked with a sense of poignancy:

The cruelty of capital punishment lies not only in the execution It self and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.
In Re Kemmler 136 us 436 the Supreme Court of the United States accepted that "punishments are cruel when they involve a lingering death, something more than the mere extinguishment of life." Now a death would be as lingering if a man spends several years in a death cell awaiting execution as it would be if the method of execution takes an unacceptably long time to kill the victim. The pain of mental lingering can be as intense as the agony of physical lingering. See David Pannick on "Judicial Review of the Death Penalty." Justice Miller also pointed out in Re Medley 134 US 160 that "when a prisoner sentenced by a court to death is confined to the penitentiary awaiting the execution of the, sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it...as to the precise time when his execution shall take place." He acknowledged that such uncertainty is inevitably 'accompanied by an immense mental anxiety amounting to a great increase of the oflender's punishment.'

26. But quite apart from this excruciating mental anguish and severe psychological strain which the condemned prisoner has to undergo on account of the long wait from the date when the sentence of death is initially passed by the sessions court until it is confirmed by the High Court and then the appeal against the death sentence is disposed of by the Supreme Court and if the appeal is dismissed, then until the clemency petition is considered by the President and if it is turned down, then until the time appointed for the actual execution of the sentence of death arrives, the worst time for most of the condemned prisoners would be the last few hours when all certainty is gone and the moment of death is known. Dostoyevsky who actually faced a firing squad only to be reprieved at the last instant, described this experience in the following words:

...the chief and the worst pain is perhaps not inflicted by wounds, but by your certain knowledge that in an hour, in ten minutes, in half a minute, now this moment your soul will fly out of your body, and that you will be a human being no longer, and that that's certain-the main thing is that it is certain.... Take a soldier and put him in front of a cannon

in battle and fire at him and he will still hope, but read the same soldier his death sentence for certain, and he will go mad or burst out crying. Who says that human nature is capable of bearing this without madness? Why this cruel, hideous, unnecessary and useless mockery? Possibly there are men who have sentences of death read out to them and have been given time to go through this torture, and have then been told, You can go now, you've been reprieved. Such men could perhaps tell us. It was of agony like this and of such horror that Christ spoke. No. you can't treat a man like that !
We have also accounts of execution of several prisoners in the United States which show how in these last moment condemned prisoners often simply disintegrate. Canns has in frank and brutal language bared the terrible psychological cruelly of capital punishment:

Execution is not simply death. It is just as different in essence, from the privation of life as a concentration camp is from prison.... It adds to death a rule, a public premeditation known to the future victim, an organisation, in short, which is in itself a source of moral sufferings more terrible than death. For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.
There can be no stronger words to describe the utter depravity and inhumanity of death sentence.

27. The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan, 13 the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security prison in the United States of America, describes the hanging process with brutal frankness in lurid details:

The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from

the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe.
If the drop is too short, there will be a slow and agonising death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote:

The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer.... Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxin.
These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas.

28. If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilised society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong doer. That is not a permissible penological goal.

29. It is in the context of this background that the question has to be considered whether death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC is arbitrary and irrational, for if it is, it would be clearly violative of Articles 14 and 21. I am leaving aside for the moment challenge to death penalty under Article 19 and confining myself only to the challenge under Article 14 and 21. So far as this challenge is concerned, the learned Counsel appearing on behalf of the petitioners contended that the imposition of death penalty under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC was arbitrary and

unreasonable, firstly because it was cruel and inhuman, disproportionate and excessive, secondly because it was totally unnecessary and did not serve any social purpose or advance any constitutional value and lastly because the discretion conferred on the court to award death penalty was not guided by any policy or principle laid down by the legislature but was wholly arbitrary. The Union of India as also the States supporting it sought to counter this argument of the petitioners by submitting first that death penalty is neither cruel nor inhuman, neither disproportionate nor excessive, secondly, that it does serve a social purpose inasmuch as it fulfils two penological goals namely, denunciation the community and deterrence and lastly, that the judicial discretion in awarding death penalty is not arbitrary and the court can always evolve standards or norms for the purpose of guiding the exercise of its discretion in this punitive area. These were broadly the rival contentions urged on behalf of the parties and I shall now proceed to examine them in the light of the observations made in the preceding paragraph.

30. The first question that arises for consideration on these contentions is and that is a vital question which may well determine the fate of this challenge to the constitutional validity of death penalty-on whom does the burden of proof lie in a case like this? Does it lie on the petitioners to show that death penalty is arbitrary and unreasonable on the various grounds urged by them or does it rest on the State to show that death penalty is not arbitrary or unreasonable and serves a legitimate social purpose. This question was debated before us at great length and various decisions were cited supporting one view or the other. The earliest decision relied on was that of Saghir Ahmed v. State of Uttar Pradesh MANU/SC/0110/1954: [1955]1SCR707 where it was held by this Court that if the petitioner succeeds in showing that the impugned law ex facie abridges or transgresses the rights coming under any of the sub-clauses of Clause (1) of Article 19, the onus shifts on the respondent State to show that the legislation comes within the permissible limits authorised by any of Clauses (2) to (6) as may be applicable to the case, and also to place material before the court in support of that contention. If the State fails to discharge this burden, there is no obligation on the petitioner to prove negatively that the impugned law is 10 not covered by any of the permissive clauses. This view as to the onus of proof was reiterated by this Court in Khyerbari Tea Co. v. State of Assam MANU/SC/0048/1963: [1964]5SCR975. But, contended the respondents, a contrary trend was noticeable in some of the subsequent decisions of this Court and the respondents relied principally on the decision in B. Banerjee v. Anita Pan MANU/SC/0449/1974: [1975]2SCR774 where Krishna Iyer, J. speaking on behalf of himself and Beg, J. as he then was, recalled the following statement of the law from the judgment of this Court in Ram Krishna Dalmia v. S.R. Tendolkar and Ors.: 1959 SCR 297

there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;" and

that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

and added that "if nothing is placed on record by the challengers, the verdict ordinarily goes against them." Relying inter alia on the decision of this Court in State of Bombay v. R.M.D. Chamarbaugwala MANU/SC/0019/1957: [1957]1SCR874 the learned Judge again emphasized:

Some courts have gone to the extent of holding that their is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt.
These observations of Krishna Iyer, J. undoubtedly seem to support the contention of the respondents, but it may be pointed out that what was said by this Court in the passage quoted above from the judgment in Ram Krishna Dalmia's case (supra) on which reliance was placed by Krishna Iyer, J. was only with reference to the challenge under Article 14 and the Court was not considering there the challenge under Article 19 or 21. This statement of the law contained in Ram Krishna Dalmia's case (supra) could not therefore be applied straightaway without anything more in a case where a law was challenged under Articles 19 or 21. The fact, however, remains that Krishna Iyer, T. relied on this statement of the law even though the case before him involved a challenge under Article 19(1)(f) and not under Article 14. Unfortunately, it seems that the attention of the learned Judge was not invited to the decisions of this Court in Sagir Ahmed's case and Khyerbari Tea Company's case (supra) which were cases directly involving challenge under Article 19. These decisions were binding on the learned Judge and if his attention had been drawn to them, I am sure that he would not have made the observations that he did casting on the petitioners the onus of establishing "excessive ness or perversity in the restrictions imposed by the statute" in a case alleging violation of Article 19. These observations are clearly contrary to the law laid down in Saghir Ahmed and Khyerbari Tea Company cases (supra).

31. The respondents also relied on the observations of Fazal Ali, J. in Pathumma v. State of Kerala (1970) 2 SCR 537. There the constitutional validity of the Kerala Agriculturists' Debt Relief Act 1970 was challenged on the ground of violation of both Articles 14 and 19(1)(f) Before entering upon a discussion of the arguments bearing on the validity of this challenge, Fazal Ali, J. speaking on behalf of himself, Beg, C.J. Krishna Iyer and Jaswant Singh, JJ. observed that the court will interfere with a statute only "when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution" and proceeded to add that it is on account of this reason "that courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same." The learned Judge then quoted with approval the following passage from the Judgment of S.R. Das, C.J., in Mohd. Hanif v. State of Bihar MANU/SC/0027/1958: [1959]1SCR629:

The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

It is difficult to see how these observations can be pressed into service on behalf of the respondents. The passage from the judgment of S.R. Das, C.J. in Mohd. Hanif's case (supra) relied upon by Fazal Ali, J. occurs in the discussion relating to the challenge under Article 14 and obviously it was not intended to have any application in a case involving challenge under Article 19 or 21. In fact, while discussing the challenge to the prevention of cow slaughter statutes under Article 19(1)(g), S.R. Das, C.J. proceeded to consider whether the restrictions imposed by the impugned statutes on the Fundamental Rights of the petitioners under Article 19(1)(g) were reasonable in the interest of the general public so as to be saved by Clause (6) of Article 19. Moreover, the observations made by Fazal Ali, J. were general in nature and they were not directed towards consideration of the question as to the burden of proof in cases involving violation of Article 19. What the learned Judge said was that there is always a presumption in favour of the constitutionality of a statute and the court will not interfere unless the statute is clearly violative of the Fundamental Rights conferred by Part III of the Constitution. This is a perfectly valid statement of the law and no exception can be taken to it. There must obviously be a presumption in favour of the constitutionality of a statute and initially it would be for the petitioners to show that it violates a Fundamental Right conferred under one or the other sub-clauses of Clause (1) of Article 19 and is therefore unconstitutional, but when that is done, the question arises, on whom does the burden of showing whether the restrictions are permissible or not, lie? That was not a question dealt with by Fazal Ali, J. and I cannot therefore read the observations of the learned Judge as, in any manner, casting doubt on the validity of the statement of law contained in Sagir Ahmed and Khyerbari Tea Company's cases (supra), It is clear on first principle that Sub-clauses (a) to (g) of Clause (1) of Article 19 enact certain fundamental freedoms and if Sub-clauses (2) to (6) were not there, any law contravening one or more of these fundamental freedoms would have been unconstitutional. But Clauses (2) to (6) of Article 19 save laws restricting these fundamental freedoms, provided the restrictions imposed by them fall within certain permissible categories. Obviously, therefore, when a law is challenged on the ground that it imposes restrictions on the freedom guaranteed by one or the other sub-clause of Clause (1) of Article 19 and the restrictions are shown to exist by the petitioner, the burden of establishing that the restrictions fall within any of the permissive Clauses (2) to (6) which may be applicable, must rest upon the State. The State would have to produce material for satisfying the court that the restrictions imposed by the impugned law fall within the appropriate permissive clause from out of Clauses (2) to (6) of Article 19. Of course there may be cases where the nature of the legislation and the

restrictions imposed by it may be such that the court may, without more, even in the absence of any positive material produced by the State, 20 conclude that the restrictions fall within the permissible category, as for example, where a law is enacted by the legislature for giving effect to one of the Directive Principles of State policy and prima facie, the restrictions imposed by it do not appear to be arbitrary or excessive. Where such is the position, the burden would again shift and it would be for the petitioner to show that the restrictions are arbitrary or excessive and go beyond what is required in public interest. But, once it is shown by the petitioner that the impugned law imposes restrictions which infringe one or the other sub-clause of Clause (1) of Article 19, the burden of showing that such restrictions are reasonable and fall within the permissible category must be on the State and this burden the State may discharge either by producing socio-economic data before the court or on consideration of the provisions in the impugned law read in the light of the constitutional goals set out in the Directive Principles of State policy. The test to be applied 35 for the purpose of determining whether the restrictions imposed by the impugned law are reasonable or not cannot be cast in a rigid formula of universal application, for, as pointed out by Patanjali Shastri, J. in State of Madras v. V.J. Row MANU/SC/0013/1952: 1952CriLJ966 no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases". The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, the value of human life, the disproportion of the imposition, the social philosophy of the Constitution and the prevailing conditions at the time would all enter into the judicial verdict. And we would do well to bear in mind that in evaluating such elusive factors and forming his own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play a very important part.

32. Before I proceed to consider the question of burden of proof in case of challenge under Article 14, it would be convenient first, to deal with the question as to where does the burden of proof lie when the challenge to a law enacted by the legislature is based on violation of Article 21. The position in regard to onus of proof in a case where the challenge is under Article 21 is in my opinion much clearer and much more free from doubt or debate than in a case where the complaint is of violation of Clause (1) of Article 19. Wherever there is deprivation of life, and by life I mean not only physical existence, but also use of any faculty or limb through which life is enjoyed and basic human dignity, or of any aspect of personal liberty, the burden must rest on the State to establish by producing adequate material or otherwise that the procedure prescribed for such deprivation is not arbitrary but is reasonable, fair and just. I have already discussed various circumstances bearing upon the true nature and character of death penalty and these circumstances clearly indicate that it is reasonable to place on the State the onus to prove that death penalty is not arbitrary or unreasonable and serves a compelling State interest. In the first place, death penalty destroys the most fundamental right of all, namely, the right to life which is the foundation of all other fundamental rights. he right

to life stands on a higher footing than even personal liberty, because personal liberty too postulates a sentient human being who can enjoy it. Where therefore a law authorises deprivation of the right to life, the reasonableness, fairness and justness of the procedure prescribed by it for such deprivation must be established by the State. Such a law would be 'suspect' in the eyes of the court just as certain kinds of classification are regarded as 'suspect' in the United States of America. Throwing the burden of proof of reasonableness, fairness and justness on the State in such a case is a homage which the Constitution and the courts must pay to the right to life. It is significant to point out that even in case of State action depriving a person of his personal liberty, this Court has always cast the burden of proving the validity of such action on the State, when it has been challenged on behalf of the person deprived of his personal liberty, ft has been consistently held by this Court that when detention of a person is challenged in a habeas corpus petition, the burden of proving the legality of the detention always rests on the State and it is for the State to justify the legality of the detention. this Court has shown the most zealous regard for personal liberty and treated even letters addressed by prisoners and detenus as writ petitions and taken action upon them and called upon the State to show how the detention is justified. If this be the anxiety and concern shown by the court for personal liberty, how much more should be the judicial anxiety and concern for the right to life which indisputably stands on a higher pedestal. Moreover, as already pointed out above, the international standard or norm set by the United Nations is in favour of abolition of death penalty and that is the ultimate objective towards which the world body is moving. The trend of our national legislation is also towards abolition and it is only in exceptional cases for special reasons that death sentence is permitted to be given. There can be no doubt that even under our national legislation death penalty is looked upon with great disfavour. The drastic nature of death penalty involving as it does the possibility of error resulting in judicial murder of an innocent man as also its brutality in inflicting excruciating mental anguish, severe psychological strain and agonising physical pain and suffering on the condemned prisoner are strong circumstances which must compel the State to 50 justify imposition of death penalty. The burden must lie upon the State to show that death penalty is not arbitrary and unreasonable and serves a legitimate social purpose, despite the possibility of judicial error in convicting and sentencing an innocent man and the brutality and pain, mental as well as physical, which death sentence invariably inflicts upon the condemned prisoner. The State must place the necessary material on record for the purpose of discharging this burden which lies upon it and if it fails to show by presenting adequate evidence before the court or otherwise that death penalty is not arbitrary and unreasonable and does serve a legitimate social purpose, the imposition of death penalty under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC would have to be struck down as violative of the protection of Article 21.

33. So far as the question of burden of proof in a case involving challenge under Article 14 is concerned, I must concede that the decisions in Ram Krishan Dalmia's case (supra) and Mohd. Hunnif Qureshi's case (supra) and several other subsequent decisions of this

Court have clearly laid down that there is a presumption in favour of constitutionality of a statute and the burden of showing that it is arbitrary or discriminatory lies upon the petitioner, because it must be presumed "that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds." Sarkaria, J. has pointed out in the majority judgment that underlying this presumption of constitutionality "is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions and the judicial responsibility to guard the trespass from one side or the other." The learned Judge with a belief firmly rooted in the tenets of mechanical jurisprudence, has taken the view that "the primary function of the Courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy making." Now there can be no doubt that in adjudicating upon the constitutional validity of a statute, the Judge should show deference to the legislative judgment and should not be anxious to strike it down as invalid. He does owe to the legislature a margin of tolerance and he must constantly bear in mind that 30 he is not the legislator nor is the court a representative body. But I do not agree with Sarkaria, J. when he seems to suggest that the judicial role is, as it was for Francis Bacon, 'jusdicere and not jus dare; to interpret law and not to make law or give law.' The function of the Court undoubtedly is to interpret the law but the interpretative process is a highly creative function and in this process, the Judge, as pointed out by Justice Holmes, does and must legislate. Lord Reid ridiculed as 'a fairytale' the theory that in some Aladdin's cave is hidden the key to correct judicial interpretation of the law's demands and even Lord Diplock acknowledged that The court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic Oracle. But whoever has final authority to explain what Parliament meant by the words that it used, makes law as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it." Unfortunately we are so much obsessed with the simplicities of judicial formalism which presents the judicial role as jusdicere, that, as pointed out by David Pannick in his "Judicial Review of the Death Penalty," "we have, to a substantial extent, ignored the Judge in administering the judicial process. So heavy a preoccupation we have made with the law, its discovery and its application by independent agents who play no creative role, that we have paid little, if any, regard to the appointment, training, qualities, demeanour and performance of the individuals selected to act as the mouth of the legal oracle." It is now acknowledged by leading jurists all over the world that judges are not descusitized and passionless instruments which weigh on inanimate and impartial scales of legal judgment, the evidence and the arguments presented on each side of the case. They are not political and moral eunuchs able and willing to avoid impregnating the law with their own ideas and judgment. The Judicial exercise in constitutional adjudication is bound to be influenced, consciously or subconsciously, by the social philosophy and scale of values of those who sit in judgment. However, I agree with Sarkaria, J. that ordinarily the judicial function must be characterised by deference to legislative judgment because the legislature represents the voice of the people and it might be

dangerous for the court to trespass into the sphere demarcated by the Constitution for the legislature unless the legislative judgment suffers from a constitutional infirmity. It is a trite saying that the Court has "neither force nor will but merely judgment" and in the exercise of this judgment, it would be a wise rule to adopt to presume the constitutionality of a statute unless it is shown to be invalid. But even here it is necessary to point out that this rule is not a rigid inexorable rule applicable at all times and in all situations. There may conceivably be cases where having regard to the nature and character of the legislation, the importance of the right affected and the gravity the injury caused by it and the moral and social issues involved in the determination, the court may refuse to proceed on the basis of presumption of constitutionality and demand from the State justification of the legislation with a view to establishing that it is not arbitrary or discriminatory. There are times when commitment to the values of the Constitution and performance of the constitutional role as guardian of fundamental rights demands dismissal of the usual judicial deference to legislative judgment. The death penalty, of which the constitutionality is assailed in the present writ petitions, is a fundamental issue to which ordinary standards of judicial review are inappropriate. The question here is one of the most fundamental which has arisen under the Constitution, namely, whether the State is entitled to take the life of a citizen under cover of judicial authority. It is a question so vital to the identity and culture of the society and so appropriate for judicial statement of the standards of a civilised community-often because of legislative apathy-that "passivity and activism become platitudes through which judicial articulation of moral and social values provides a light to guide an uncertain community." The same reasons which have weighed with me in holding that the burden must lie on the State to prove that the death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC is not arbitrary and unreasonable and serves a legitimate penological purpose where the challenge is under Article 21 must apply equally to cast the burden of the proof upon the State where the challenge is under Article 14.

34. Now it is an essential element of the rule of law that the sentence 45 imposed must be proportionate to the offence. If a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational, for it would not pass the test of reason and would be contrary to the rule of law and void under Article 14, 19 and 21. The principle of proportionality is implicit in these three Articles of the Constitution. If, for example, death penalty, was prescribed for the simple offence of theft-as indeed it was at one time in the seventeenth century England-it would be clearly excessive and wholly disproportionate to the offence and hence arbitrary and irrational by any standards of human decency and it would be impossible to sustain it against the challenge of these three Articles of the Constitution. It must therefore be taken to be clear beyond doubt that the proportionality principle constitutes an important constitutional criterion for adjudging the validity of a sentence imposed by law.

35. The Courts in the United States have also recognised the validity of the proportionality principle. In Gregg v. Georgia 428 US 153 Stewart, J. speaking for the plurality of the American Supreme Court said that "to satisfy constitutional requirements, the punishment must not be excessive...the punishment must not be out of proportion to the severity of the crime." This constitutional criterion was also applied in Coker v. Georgia 433 US 584 to invalidate the death penalty for rape of an adult woman. White, J. with whom Stewarts and Blackmun, JJ. agreed, said, with regard to the offence of rape committed against an adult woman: "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." Likewise in Lockette v. Ohio 438 US 586 where the defendant sat outside the scene of robbery waiting to drive her accomplices away and contrary to plan, the robbers murdered three victims in the course of their robbery and she was convicted and sentenced to death by resort to the doctrine of vicarious liability, the Supreme Court of the United States applying the same principle of proportionality held the death sentence unconstitutional. Marshall J. pointed out that because the appellant was convicted under a theory of vicarious liability, the death penalty imposed on her "violates the principle of proportionality embodied in the Eighth Amendment's Prohibition" and White, J. also subscribed to the same reasoning when he said, "the infliction of death upon those who had no intent to bring about the death of the victim is...grossly out of proportion to the severity of the crime." Of course, the Supreme Court of the United States relied upon the Eighth Amendment which prohibits cruel and unusual treatment or punishment and we have no such express prohibition in our Constitution, but this Court has held in Francis Mullen's case (supra) that protection against torture or cruel and inhuman treatment or punishment is implicit in the guarantee of Article 21 and therefore even on the basis of the reasoning in these three American decisions, the principle of proportionality would have relevance under our Constitution. But, quite apart from this, it is clear and we need not reiterate what we have already said earlier, that the principle of proportionality flows directly as a necessary element from Articles 14, 19 and 21 of the Constitution. We find that in Canada too, in the case of Rex v. Miller and Cockriell 70 DLR (3d) 324 the principle of proportionality has been recognised by Laskin CJ. speaking on behalf of Canadian Supreme Court as "one of the constitutional criteria of 'cruel and unusual treatment or punishment' prohibited under the Canadian Bill of Rights." Laskin C.J. pointed out in that case "It would be patent to me, for example, that death as a mandatory penalty today for theft would be offensive to Section 2(b). That is because there are social and moral considerations that enter into the scope and application of Section 2(b). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said; there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. That is not a precise formula for Section 2(b) but I doubt whether a more precise one can be found." Similarly, as pointed out by Mr. David Pannick in his book on "Judicial Review of the Death Penalty" international charters of rights express or imply the principle of proportionality. Article 7 of the International Covenant on Civil and Political Rights

forbids torture and cruel, inhuman or degrading treatment or punishment and so does Article 3 of the European Convention on Human Rights. It has been suggested by Francis Jacobs, a commentator on the European Convention that "among the factors to be considered in deciding whether the death penalty, in particular circumstances was contrary to Article 3, would be whether it was disproportionate to the offence.

36. It is necessary to point out at this stage that death penalty cannot be said to be proportionate to the offence merely because it may be or is believed to be an effective deterrent against the commission of the offence. In Coker v. Georgia (supra) the Supreme Court of the United States held that capital punishment is disproportionate to rape even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so The absence of any rational purpose to the punishment inflicted is a separate ground for attacking its constitutionality. The existence of a rational legislative purpose for imposing the sentence of death is a necessary condition of its constitutionality but not a sufficient one The death penalty for theft would, for example, deter most potential thieves and may have a unique deterrent effect in preventing the commission of the offence; still it would be wholly disproportionate and excessive, for the social effect of the penalty is not decisive of the proportionality to the offence. The European Court of Human Rights also observed in Tyrer v. United Kingdom 2E. H.R.R.I. (1978) that "a punishment does not lose its degrading character just because it is believed to be or actually is, an effective deterrent or aid to crime control. Above all, as the court must emphasize, it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be." The utilitarian value of the punishment has nothing to do with its proportionality to the offence. It would therefore be no answer in the present case for the respondents to say that death penalty has a unique deterrent effect in preventing the crime of murder and therefore it is proportionate to the offence. The proportionality between the offence and death penalty has to be judged by reference to objective factors such as international standards or norms or the climate of international opinion, modern penological theories and evolving standards of human decency. I have already pointed out and 1 need not repeat that the international standard or norms which is being evolved by the United Nations is against death penalty and so is the climate of opinion in most of the civilized countries of the world. I will presently show that penological goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. The standards of human decency with reference to which the proportionality of the punishment to the offence is required to be judged vary from society to society depending on the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of theft or a sentence of stoning to death for the offence of adultery were prescribed by law, there can be no doubt that such punishment would be condemned as barbaric and cruel in our country, even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries. So also the standards of human decency vary from time to time even

within the same society. In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the evolving standards of human decency, be regarded as barbaric and inhuman punishment wholly disproportionate to the offence. There was a time when in the United Kingdom a sentence of death for the offence of theft or shop lifting was regarded as proportionate to the offence and therefore quite legitimate and reasonable according to the standards of human decency then prevailing, but today such punishment would be regarded as totally disproportionate to the offence and hence arbitrary and unreasonable. The question, therefore, is whether having regard to the international standard or norm set by the United Nations in favour of abolition of death penalty, the climate of opinion against death penalty in many civilized countries of the world and the prevailing standards of human decency, a sentence of death for the offence of murder can be regarded as satisfying the test of proportionality and hence reasonable and just. I may make it clear that the question to which I am addressing my self is only in regard to the proportionality of death sentence to the offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State.

37. Now in order to determine what are the prevailing standards of human decency, one cannot ignore the cultural ethos and spiritual tradition of the country. To quote the words of Krishna Iyer, J. in Rajendra Prasad's case "The values of a nation and ethos of a generation mould concepts of crime and punishment. So viewed, the lode-star of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty.... The Indian cultural current also counts and so does our spiritual chemistry, based on divinity in everyone, catalyzed by the Buddha-Gandhi compassion.... Many humane movements and sublime souls have cultured the higher consciousness of mankind," and emphasized the reformatory potential in every man. In this land of Buddha and Gandhi, where from times immemorial, since over 5000 years ago, every human being is regarded as embodiment of Brahman and where it is a firm conviction based not only on faith but also on experience that "every saint has a past and every sinner a future," the standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norm frown upon imposition of death penalty for the offence of murder. It is indisputable that the Constitution of a nation reflects its culture and ethos and gives expression to its sense of moral and ethical values. It affords the surest indication of the standards of human decency cherished by the people and sets out the socio-cultural objectives and goals towards which the nation aspires to move. There can be no better index of the ideals and aspirations of a nation than its Constitution. When we turn to our Constitution, we find that it is a humane document which respects the dignity of the individual and the worth of the human person and directs every organ of the State to strive for the fullest development of the personality of every individual. Undoubtedly, as already pointed out above, our Constitution does

contemplate death penalty, and at the time when the Constitution came to be enacted, death penalty for the offence of murder was on the statute book, but the entire thrust of the Constitution is in the direction of development of the full potential of every citizen and the right to life along with basic human dignity is highly prized and cherished and torture and cruel or inhuman treatment or punishment which would be degrading and destructive of human dignity are constitutionally forbidden. Moreover, apart from the humanistic quintessence of the Constitution, the thoughts, deeds and words of the great men of this country provide the clearest indication of the prevailing standards of human decency. They represent the conscience of the nation and are: the most authentic spokesmen of its culture and ethics. Mahatma Gandhi, the Father of the Nation wrote long ago in the Harijan; "God alone can take life because He alone gives it." He also said and this I may be permitted to emphasize even at the cost of repetition: "Destruction of individuals can never be a virtuous act. The evil doers cannot be done to death.... Therefore all crimes including murder will have to be treated as a disease." I have also quoted above what Jai Prakash Narain said in his message to the Delhi Conference against Death Penalty. The same humanistic approach we find in the utterances of Vinoba Bhave. His approach to the problem of dacoits in Chambal Valley and the manner in which he brought about their surrender through soul-force bear eloquent testimony to the futility of death penalty and shows how even dacoits who have committed countless murders can be reclaimed by the society. But, the more important point is that this action of Vinoba Bhave was applauded by the whole nation and Dr. Rajendra Prasad who was then the President of India, sent the following telegram to Vinoba Bhave when he came to know that about 20 dacoits from the Chambal region had responded to the Saint's appeal to surrender:

The whole nation looks with hope and admiration upon the manner in which you have been able to rouse the better instincts and moral sense, and thereby inspire faith in dacoits which has led to their voluntary surrender. Your efforts, to most of us, come as a refreshing proof of the efficacy of the moral approach for reforming the misguided and drawing the best out of them. I can only pray for the complete success of your mission and offer you my regards and best wishes.

These words coming from the President of India who is the Head of the nation reflect not only his own admiration for the manner in which Vinoba Bhave redeemed the dacoits but also the admiration of the entire nation and that shows that what Vinoba Bhave did, had the approval of the people of the country and the standards of human decency prevailing amongst the people commended an approach favouring reformation and rehabilitation of the dacoits rather than their conviction for the various offences of murder committed by them and the imposition of death penalty on them. Moreover, it is difficult to see how death penalty can be regarded as proportionate to the offence of murder when legislatively it has been ordained that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be imposed. It is obvious from the provision enacted in Section 354(3) of the CrPC that death sentence is legislatively regarded as disproportionate and excessive in most cases of murder and it

is only in exceptional cases what Sarkaria, J. speaking on behalf of the majority, describes as "the rarest of rare" cases, that it can at all be contended that death sentence is proportionate to the offence of murder. But, then the legislature does not indicate as to what are those exceptional cases in which death sentence may be regarded as proportionate to the offence and, therefore, reasonable and just. Merely because a murder is heinous or horrifying, it cannot be said that death penalty is proportionate to the offence when it is not so for a simple murder. How does it become proportionate to the offence merely because it is a 'murder most foul'. I fail to appreciate how it should make any difference to the penalty whether the murder is a simple murder or a brutal one. A murder is a murder all the same, whether it is carried out quickly and inoffensively or in a gory and gruesome manner. If death penalty is not proportionate to the offence in the former case, it is difficult to see how it can be so in the latter. I may usefully quote in this connection the words of Krishna Iyer, J. in Rajendra Prasad's case where the learned Judge said:

Speaking illustratively, is shocking crime, without more, good to justify the lethal verdict? Most murders are horrifying, and an adjective adds but sentiment, not argument. The personal story of an actor in a shocking murder, if considered, may bring tears and soften the sentence. He might have been a tortured child, an ill-treated orphan, a jobless starveling, a badgered brother, a wounded son, a tragic person hardened by societal cruelty or vengeful justice, even a Hamlet or Parasurama. He might have been an angelic boy but thrown into mafia company or inducted into dopes and drugs by parental neglect or morally-mentally retarded or disordered. Imagine a harijan village hacked out of existence by the genocidal fury of a kulak group and one survivor, days later, cutting to pieces the villain of the earlier outrage. Is the court in error in reckoning the prior provocative barbarity as a sentencing factor?

Another facet. Maybe, the convict's poverty had disabled his presentation of the social milieu or other circumstances of extenuation in defence.... When life is at stake, can such frolics of fortune play with judicial verdicts?

The nature of the crime-too terrible to contemplate-has often been regarded a traditional peg on which to hang a death penalty. Even Ediga Anamrna (supra) has hardened here. But 'murder most foul' is not the test, speaking scientifically. The doer may be a patriot, a revolutionary, a weak victim of an overpowering passion who, given better environment, may be a good citizen, a good administrator, a good husband, a great saint. What was Valmiki once? And that sublime spiritual star, Shri Aurobindo, tried once for murder but by history's fortune acquitted.

I agree with these observations of the learned Judge which clearly show that death penalty cannot be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking. The nature and magnitude of the offence or the motive and purposes underlying it or the manner and extent of its commission cannot

have any relevance to the proportionality of death penalty to the offence. It may be argued that though these factors may not of themselves be relevant, they may go to show that the murderer is such a social monster, a psychopath, that he cannot be reformed and he should therefore be regarded as human refuse, dangerous to society, and deserving to be hanged and in such a case, death penalty may legitimately be regarded as proportionate to the offence. But I do not think this is a valid argument. It is for reasons which I shall presently state, wholly untenable and it has dangerous implications. I do not think it is possible to hold that death penalty is, in any circumstances, proportionate to the offence of murder. Moreover, when death penalty does not serve any legitimate social purpose, and this is a proposition which 1 shall proceed to establish in the succeeding paragraphs, infliction of mental and physical pain and suffering on the condemned prisoner by sentencing him to death penalty cannot but be regarded as cruel and inhuman and therefore arbitrary and unreasonable.

38. I will now examine whether death penalty for the offence of murder serves any legitimate social purpose. There are three justifications traditionally advanced in support of punishment in general, namely, (1) reformation; (2) denunciation by the community or retribution and (3) deterrence. These are the three ends of punishment, its three penological goals, with reference to which any punishment prescribed by law must be justified. If it cannot be justified with reference to one or the other of these three penological purposes, it would have to be condemned as arbitrary and irrational, for in a civilised society governed by the rule of law, no punishment can be inflicted on an individual unless it serves some social purpose. It is a condition of legality of a punishment that it should serve a rational legislative purpose or in other words, it should have a measurable social effect. Let us therefore examine whether death penalty for the offence of murder serves any legitimate end of punishment.

It would be convenient first to examine the constitutionality of death penalty with reference to the reformatory end of punishment. The civilised goal of criminal justice is the reformation of the criminal and death penalty means abandonment of this goal for those who suffer it. Obviously death penalty cannot serve the reformatory goal because it extinguishes life and puts an end to any possibility of reformation. In fact, it defeats the reformatory end of punishment. But the answer given by the protagonists of death penalty to this argument is that though there may be a few murderers whom it may be possible to reform and rehabilitate, what about those killers who cannot be reformed and rehabilitated? Why should the death penalty be not awarded to them? But even in their cases, I am afraid, the argument cannot be sustained. There is no way of accurately predicting or knowing with any degree of moral certainty that murderer will not be reformed or is incapable of reformation. All we know is that there have been many many successes even with the most vicious of cases. Was Jean Valjean of Les Miserbles not reformed by the kindness and magnanimity of the Bishop? Was Valmiki a sinner not reformed and did he not become the author of one of the world's greatest epics? Were the dacoits of Chambal not transformed by the saintliness of Vinoba Bhave and Jai Prakash

Narain? We have also the examples of Nathan Leopold. Paul Crump and Edger Smith who were guilty of the most terrible and gruesome murders but who, having escaped the gallows, became decent and productive human beings. These and many other examples clearly show that it is not possible to know before hand with any degree of certainty that a murderer is beyond reformation. Then would it be right to extinguish the life of a human being merely on the basis of speculation and it can only be speculation and not any definitive inference-that he cannot be reformed. There is divinity in every man and to my mind no one is beyond redemption. It was Ramakrishna Paramhansa, one of the greatest saints of the last century, who said, "Each soul is potentially divine." There is Brahman in every living being, lo± [kyq bna czã] as the Upanishad says and to the same effect we find a remarkable utterance in the Brahmasukta of Atharvaveda where a sage exclaims: "Indeed these killers are Brahman; these servants (or slaves) are Brahman; these cheats and rogues are also manifestation of one and the same Brahman itself." Therefore once the dross of Tamas is removed and satva is brought forth by methods of rehabilitation such as community service, yoga, meditation and sat sang or holy influence, a change definitely takes place and the man is reformed. This is not just a fancy or idealised view taken by Indian philosophical thought, but it also finds support from the report of the Royal Commission on Capital Punishment set up in the United Kingdom where it has been said: "Not that murders in general are incapable of reformation, the evidence plainly shows the contrary. Indeed, as we shall see later" (in paragraphs 651-652) "the experience of countries without capital punishment indicates that the prospects of reformation are at least as favourable with murderers as with those who have committed other kinds of serious crimes." The hope of reforming even the worst killer is based on experience as well as faith and to legitimise the death penalty even in the so called exceptional cases where a killer is said to be beyond reformation, would be to destroy this hope by sacrificing it at the alter of superstition and irrationality. I would not therefore, speaking for myself, be inclined to recognise any exception, though Justice Krishna Iyer has done so in Rajendra Prasad's case, that death penalty may be legally-permissible where it is found that a killer is such a monster or beast that he can never be reformed. Moreover, it may be noted, as pointed out by Albert Camus, that in resorting to this philosophy of elimination of social monsters, we would be approaching some of the worst ideas of totalitarianism or the selective racism which the Hitler regime propounded. Sir Ernest Gowers, Chairman of the Royal Commission on Capital Punishment also emphasized the disturbing implications of this argument favouring elimination of a killer who is a social monster and uttered the following warning "If it is right to eliminate useless and dangerous members of the community why should the accident of having committed a capital offence determine who should be selected. These are only a tiny proportion and not necessarily the most dangerous.... It can lead to Nazism." This theory that a killer who is believed to be a social monster or beast should be eliminated in defence of the society cannot therefore be accepted and it cannot provide a justification for imposition of death penalty even in this narrow class of cases.

39. I will now turn to examine the constitutional validity of death penalty with reference to the second goal of punishment, namely, denunciation by the community or retribution. The argument which is sometimes advanced in support of the death penalty is that every punishment is to some extent intended to express the revulsion felt by the society against the wrong doer and the punishment must, therefore, be commensurate with the crime and since murder is one of the gravest crimes against society, death penalty is the only punishment which fits such crime and hence it must be held to be reasonable. This argument is founded on the denunciatory theory of punishment which apparently claiming to justify punishment, as the expression of the moral indignation of the society against the wrong doer, represents in truth and reality an attempt to legitimise the feeling of revenge entertained by the society against him. The denunciatory theory was put forward as an argument in favour of death penalty by Lord 45 Denning before the Royal Commission on Capital Punishment:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty.... The truth is that some crimes are so outrageous that it, irrespective of whether it is a deterrent or not.

The Royal Commission on Capital Punishment seemed to agree with Lord Denning's view about this justification for the death penalty and observed. "...the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought, some times, to give a lead to public opinion, it is dangerous to move too far in advance of it." Though garbed in highly euphemistic language by labelling the sentiment underlying this observation as reprobation and not revenge, its implication can hardly be disguised that the death penalty is considered necessary not because the preservation of the society demands it, but because the society wishes to avenge itself for the wrong done to it. Despite its high moral tone and phrase, the denunciatory theory is nothing but an echo of what Stephen said in rather strong language: The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." The denunciatory theory is a remnant of a primitive society which has no respect for the dignity of man and the worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrong doer. Revenge is an elementary passion of a brute and betrays lack of culture and refinement. The manner in which a society treats crime and criminals affords the surest index of its cultural growth and development. Long ago in the year 1910 Sir Winston Churchill gave expression to this social truth when he-said in his inimitable language:

The mood and temper of the public with regard to the treatment of crime and the criminals is one of the most unfailing tests of civilization of any country. A calm

dispassionate recognition of the right of the accused, and even of the convicted, criminal against the State, a constant heart-searching by all charged with the duty of punishment...tireless efforts towards the discovery of curative and regenerative processes, unfailing faith that there is a treasure if you can only find it in the heart of every man-these are the symbols, which, in treatment of crime and the criminals, mark and measure the stored-up strength of a nation and are sign and proof of the living virtue in it.

A society which is truly cultured-a society which is reared on a spiritual foundation like the Indian society-can never harbour a feeling of revenge against a wrong doer. On the contrary, it would try to reclaim the wrong doer and find the treasure that is in his heart. The wrong doer is as much as part of the society as anyone else and by exterminating him, would the society not injure itself? if a limb of the human body becomes diseased, should we not try to cure it instead of amputating it? Would the human body not be partially disabled: would it not be rendered imperfect by the amputation? Would the amputation not leave a scar on the human body? Would the human body not cease to be what it was intended by its maker? 45 But if the diseased limb can be cured, would it not be so much better that the human body remains intact in all its perfection. Similarly the society also would benefit if one of its members who has gone astray and done some wrong can be reformed and regenerated. It will strengthen the fabric of the society and increase its inner strength and vitality. Let it not be forgotten that no human being is beyond redemption. There is divinity in every human being, if only we can create conditions in which it can blossom forth in its full glory and effulgence. It can dissolve the dross of criminality and make God out of man. "Each soul", said Shri Ramakrishna Paramhansa, "is potentially divine" and it should be the endeavour of the society to reclaim the wrong doer and bring out the divinity in him and not to destroy him in a fit of anger or revenge. Retaliation can have no place in a civilised society and particularly in the land of Budha and Gandhi. The law of Jesus must prevail over the lex tallionis of Moses, "Thou shalt not kill" must pen logically over-power "eye for an eye and tooth for a tooth." The society has made tremendous advance in the last few decades and today the concept of human rights has taken firm root in our soil and there is a tremendous wave of consciousness in regard to the dignity and divinity of man. To take human life even with the sanction of the law and under the cover of judicial authority, is retributive barbarity and violent futility: travesty of dignity and violation of the divinity of man. So long as the offender can be reformed through the rehabilitate therapy which may be administered to him in the prison or other correctional institute and he can be reclaimed as a useful citizen and made conscious of the divinity within him by techniques such as meditation, how can there be any moral justification for liquidating him out of existence? In such a case, it would be most unreasonable and arbitrary to extinguish the flame of life within him, for no social purpose would be served and no constitutional value advanced by doing so. I have already pointed out that death penalty runs counter to the reformatory theory of punishment and I shall presently discuss the deterrent aspect of death penalty and show that death penalty has not greater deterrent effect than life imprisonment. The only ground on which the death penalty may therefore be sought to

be justified is reprobation which as already pointed out, is nothing but a different name for revenge and retaliation. But in a civilised society which believes in the dignity and worth of the human person, which acknowledges and protects the right to life as the most precious possession of mankind, which recognises the divinity in man and describes his kind as ve`rL; iq=k% that is, "children of Immortality," it is difficult to appreciate how retaliatory motivation can ever be countenanced as a justificatory reason. This reason is wholly inadequate since it does not justify punishment by its results, but it merely satisfies the passion for revenge masquerading as righteousness.

40. I may point that in holding this view I am not alone, for I find that most philosophers have rejected retribution as a proper goal of punishment. Plato wrote:

He who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention....
Even in contemporary America, it is firmly settled that retribution has no proper place in our criminal system. The New York Court of Appeals pointed out in a leading judgment in People v. Oliver 1 N.Y. 2d. 152:

The punishment or treatment of offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity. (2) to confine the offender so that he may not harm society; and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution.
Similarly, the California Supreme Court has held that to "to conclude that the Legislature was motivated by a desire for vengeance" would be " a conclusion not permitted in view of modern theories of penology."

41. The same view has been adopted in official studies of capital punishment. The British Royal Commission on Capital Punishment concluded that "modern penological thought discounts retribution in the sense of vengeance. "The Florida Special Commission on capital punishment, which recommended retention of the death penalty on other grounds, rejected "vengeance or retaliation" as justification for the official taking of life."

42. The reason for the general rejection of retribution as a purpose of the criminal system has been stated concisely by Professors Mechael and Wechsler ;

Since punishment consists in the infliction of pain it is, apart from its consequence, an evil: consequently it is good and therefore just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population-Retribution is itself unjust since it requires some human beings to inflict pain upon others, regardless of its effect upon them or upon the social welfare.

The Prime Minister of Canada Mr. Pierre Trudeaux, addressing the Canadian Parliament, pleading for abolition of death penalty posed a question in the same strain:

Are we as a society so lacking in respect for ourselves, so lacking in hope for human betterment, so socially bankrupt that we are ready to accept state vengeance as our penal philosophy?
It is difficult to appreciate how a feeling of vengeance whether on the part of the individual wronged or the society can ever be regarded as a healthy sentiment which the State should foster. It is true that when a heinous offence is committed not only the individual who suffers as a result of the crime but the entire society is oppressed with a feeling of revulsion, but as Arthur Koestler has put it in his inimitable style in his "Reflections on Hanging":

Though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion- whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda-yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being their lurks a tiny Stone Age man, dangling a club to robe and rape, and screaming an eye for an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.
I have no doubt in my mind that if the only justification for the death penalty is to be found in revenge and retaliation, it would be clearly arbitrary and unreasonable punishment falling foul of Article 14 and 21.

43. I must Then turn to consider the deterrent effect of death penalty, for deterrence is undoubtedly an important goal of punishment.

44. The common justification which has been put forward on behalf of the protagonists in support of capital punishment is that it acts as a deterrent against potential murderers. This is, to my mind, a myth, which has been carefully nurtured by a society which is actuated not so much by logic or reason as by a sense of retribution. It is really the belief in retributive justice that makes the death penalty attractive but those supporting it are not inclined to confess to their instinct for retribution but they try to bolster with reasons their un willingness to abandon this retributive instinct and seek to justify the death penalty by attributing to it a deterrent effect. The question whether the death penalty has really and truly a deterrent effect is an important issue which has received careful attention over the last 40 years in several countries including the United States of America. Probably no single subject in criminology has been studied more. Obviously, no penalty will deter all murders and probably any severe penalty will deter many. The key question therefore is not whether death penalty has a deterrent effect but whether

death penalty has a greater deterrent effect than life sentence. Does death penalty deter potential murderers better than life imprisonment? I shall presently consider this question but before I do so let me repeat that the burden of showing that death penalty is not arbitrary and unreasonable and serves a legitimate penological goal is on the State. I have already given my reasons for taking this view on principle but I find that the same view has also been taken by the Supreme Judicial Court of Massachusettes in Commonwealth v. 0' Neal (No. 2) 339 N.E. 2d 675 where it has been held that because death penalty impinges on the right to life itself, the onus lies on the State to show a compelling State interest to justify capital punishment and since in that case the State was unable to satisfy this onus, the Court ruled that death penalty for murder committed in the course of rape or attempted rape was unconstitutional. The Supreme Judicial Court of Massachusettes also reiterated the same view in Opinion of the Justices 364 N E. 2d 184 while giving its opinion whether a Bill before the House of Representatives was compatible with Article 26 of the Constitution which prohibits cruel or unusual punishment. The majority Judges stated that Article 26 "forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose-for example, the purpose of deterring criminal conduct-than the availability in like cases of the penalty of life imprisonment." It is therefore clear that the burden rests on the State to establish by producing material before the Court or otherwise, that death penalty has greater deterrent effect than life sentence in order to justify its imposition under the law. If the State fails to discharge this burden which rests upon it, the Court would have to hold that death penalty has not been shown to have greater deterrent effect and it does not therefore serve a rational legislative purpose.

45. The historical course through which death penalty has passed in the last 150 years shows that the theory that death penalty acts as a greater deterrent than life imprisonment is wholly unfounded. Not more than a century and a half ago, in a civilized country like England, death penalty was awardable even for offences like shoplifting, cattle stealing and cutting down of trees. It is interesting to note that when Sir Samuel Romully brought proposals for abolition of death penalty for such offences, there was a hue and cry from lawyers, judges, Parliamentarians and other so called protectors of social order and they opposed the proposals on the ground that death penalty acted as a deterrent against commission of such offences and if this deterrent was removed, the consequences would be disastrous. The Chief Justice said while opposing abolition of capital punishment for shop-lifting:

Where terror of death which now, as the law stood, threatened the depredator to be removed, it was his opinion the consequence would be that shops would be liable to unavoidable losses from depredations and, in many instances, bankruptcy and ruin must become the lot of honest and laborious tradesmen. After all that had been said in favour of this speculative humanity, they must all agree that the prevention of crime should be

the chief object of the law; and terror alone would prevent the commission of that crime under their consideration.
and on a similar Bill, the Lord Chancellor remarked:

So long as human nature remained what it was, the apprehension of death would have the most powerful co-operation in deterring from the commission of crimes; and he thought it unwise to with draw the salutary influence of that terror.
The Bill for abolition of death penalty for cutting down a tree was opposed by the Lord Chancellor in these terms:

It did undoubtedly seem a hardship that so heavy a punishment as that of death should be affixed to the cutting down of a single tree, or the killing or wounding of a cow. But if the Bill passed in its present state a person might root up or cut down whole acres of plantations or destroy the whole of the stock of cattle of a farmer without being subject to capital punishment.
Six times the House of Commons passed the Bill to abolish capital punishment for shop lifting and six times the House of Lords threw out the Bill, the majority of one occasion including all the judicial members, one Arch Bishop and six Bishops. It was firmly believed by these opponents of abolition that death penalty acted as a deterrent and if it was abolished, offences of shop-lifting etc. would increase. But it is a matter of common knowledge that this belief was wholly unjustified and the abolition of death penalty did not have any adverse effect on the incidence of such offences. So also it is with death penalty for the offence of murder. It is an irrational belief unsubstantiated by any factual data or empirical research that death penalty acts as a greater deterrent than life sentence and equally unfounded is the impression that the removal of death penalty will result in increase of homicide. The argument that the rate of homicide will increase if death penalty is removed from the statute book has always been advanced by the established order out of fear psychosis, because the established order has always been apprehensive that if there is any change and death penalty is abolished, its existence would be imperilled. This argument has in my opinion no validity because, beyond a supertitious belief for which there is no foundation in fact and which is based solely on unreason and fear, there is nothing at all to show that 40 death penalty has any additionally deterrent effect not possessed by life sentence. Arther Koestler tells us an interesting story that in the period when pick-pockets were punished by hanging in England other thieves exercised their talents in the crowds surrounding the scaffold where the convicted pick-pocket was being hanged. Statistics compiled during the last 50 years in England show that out of 250 men hanged, 170 had previously attended one or even two public executions and yet they were not deterred from committing the offence of murder which ultimately led to their conviction and hanging. It is a myth nurtured by superstition and fear that death penalty has some special terror for the criminal which acts as a deterrent against the commission of the crime. Even an eminent Judge like Justice Frankfurter of the Supreme Court of the United States expressed the same opinion when he said in the course of his examination before the Royal Commission on Capital Punishment:

I think scientifically the claim of deterrence is not worth much.
The Royal Commission on Capital Punishment, after four years of investigation which took it throughout the continent and even to the United States, also came to the same conclusion:

Whether the death penalty is used or not and whether executions are frequent or not, both death penalty states and abolition states show rates which suggests that these rates are conditioned by other factors than the death penalty.
and then again, it observed in support of this conclusion:

The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increasing homicide rate or that its reintroduction has led to a fall.
Several studies have been carried out in the United States of America for the purpose of exploring the deterrent effect of death penalty and two different methods have been adopted. The first and by far the more important method seeks to prove the case of the abolitionists by showing that the abolition of capital punishment in other countries has not led to an increase in the incidence of homicide. This is attempted to be shown either by comparing the homicide statistics of countries where capital punishment has been abolished with the statistics for the same period of countries where it has been retained or by comparing statistics of a single country in which capital punishment has been abolished, for periods before and after abolition or where capital punishment has been reintroduced, then for the period before and after its reintroduction. The second method relates to comparison of the 25 number of executions in a country in particular years with the homicide rate in the years succeeding. Now, so far as the comparison of homicide statistics of countries which have abolished capital punishment with the statistics of countries which have retained it, is concerned, it may not yield any definitive inference, because in most cases abolition or retention of death penalty may not be the only differentiating factor but there may be other divergent social, cultural or economic factors which may affect the homicide rates. It is only if all other factors are equal and the only variable is the existence or non-existence of death penalty that a proper comparison can be made for the purpose of determining whether death penalty has an additional deterrent effect which life sentence does not possess, but that would be an almost impossible controlled experiment. It may however be possible to find for comparison a small group of countries or States, preferably contiguous and closely similar in composition of population and social and economic conditions generally, in some of which capital punishment has been abolished and in others not. Comparison of homicide rates in these countries or States may afford a fairly reliable indication whether death penalty has a unique deterrent effect greater than that of life sentence. Such groups of States have been identified by Professor Sellin in the United States of America and similar conditions perhaps exist also in New Zealand and the Australian States. The figures of homicide rate in these States do not show any higher incidence of homicide in States

which have abolished death penalty than in those which have not. Professor Sellin points out that the only conclusion which can be drawn from these figures is that there is no clear evidence of any influence of death penalty on the homicide rates of these States. In one of the best known studies conducted by him, Professor Sellin compared homicide rates between 1920 and 1963 in abolition States with the rates in neighbouring and similar retention States. He found that on the basis of the rates alone, it was impossible to identify the abolition States within each group. A similar study comparing homicide rates in States recently abolishing the death penalty and neighbouring retention States during the 1960's reached the same results. Michigan was the first State in the United States to abolish capital punishment and comparisons between Michigan and the bordering retention states of Ohio and Indiana-States with comparable demographic characteristics-did not show any significant differences in homicide rates. Professor Sellin therefore concluded:

You cannot tell from...the homicide rates alone, in contiguous states, which are abolition and which are retention states; this indicates that capital crimes are dependent upon factors other than the mode of punishment.

46. Students of capital punishment have also studied the effect of abolition and reintroduction of death penalty upon the homicide rate in a single-state. If death penalty has a significant deterrent effect, abolition should produce a rise in homicides apart from the general trend and reintroduction should produce a decline. After examining statistics from 11 states, Professor Sellin concluded that "there is no evidence that the abolition of capital punishment generally causes, an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere."

47. Some criminologists have also examined the short term deterrent effects of capital punishment. One study compared the number of homicides during short periods before and after several well-publicized executions during the twenties and thirties in Philadelphia. It was found that there were significantly more homicides in the period after the executions than before-the opposite of what the deterrence theory would suggest. Other studies have also shown that in those localities where capital punishment is carried out, the incidence of homicide does not show any decline in the period immediately following well publicized executions when, if death penalty had any special deterrent effect, such effect would be greatest. Sometimes, as Bowers points out in his book on "Executions in America," the incidence of homicide is higher. In short, there is no correlation between the ups and downs of the homicide rate on the one hand and the presence or absence of the death penalty on the other.

48. I may also refer to numerous other studies made by jurists and sociologists in regard to the deterrent effect of death penalty. Barring only one study made by Ehrlich to which I shall presently refer, all the other studies are almost unanimous that death penalty has no greater deterrent effect than life imprisonment. Dogan D. Akman, a Canadian

Criminologist, in a study made by him on the basis of data obtained from the records of all Canadian penitentiaries for the years 1964 and 1965 observed that the threat of capital punishment has little influence on potential assaulters. So also on the basis of comparison of homicide and execution rates between Queensland and other Australian States for the period 1860-1920, Barber and Wilson concluded that the suspension of capital punishment from 1915 and its abolition from 1922 in Queensland did not have any significant effect on the murder rate. Chambliss, another Criminologist, also reached the same conclusion in his Article on "Types of Deviance and the Effectiveness of Legal Sanctions" (1967) Wildconcin Law Review 703 namely, that "given the preponderance of evidence, it seems safe to conclude that capital punishment does not act as an effective deterrent to murder." Then we have the opinion of Fred J. Cook who says in his Article on "Capital Punishment: Does it Prevent Crime? " that "abolition of the death penalty may actually reduce rather than encourage murder." The European Committee on Crime Problems of the Council of Europe gave its opinion on the basis of data obtained from various countries who are Members of the Council of Europe that these data did not give any "positive indication regarding the value of capital punishment as a deterrent." 1 do not wish to burden this judgment with reference to all the studies which have been conducted at different times in different parts of the world but I may refer to a few of them, namely "Capital Punishment as a Deterrent to Crime in Georgia" by Frank Gibson, "The Death Penalty in Washington State" by Hayner and Crannor, Report of the Massachusetes Special Commission Relative to the Abolition of the Death Penalty in Capital Cases, "The use of the Death Penalty-Factual Statement" by Walter C Reckless, "Why was Capital Punishment resorted in Delware" by Glenn W Samuelson, "A Study in Capital Punishment" by Leonard O. Savitz, "The Deterrent Influence of the Death Penalty" by Karl F. Schuessler, "Murder and the Death Penalty" by E. H. Sutherland, "Capital Punishment: A case for Abolition" by Tidmarsh, Halloran and Connolly, "Can the Death Penalty Prevent Crime" by George B, Void and "Findings en Detterence with Regard to Homicide" by Wilkens and Feyerherm. Those studies, one and all, have taken the view that "statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value" and that death penalty "fails as a deterrent measure." Arthur Kcestler also observes in his book on "Reflections on Hanging" that the figures obtained by him from various jurisdictions which have abolished capital punishment showed a decline in the homicide rate following abolition. The Report made by the Department of Economic and Social Affairs of the United Nations also reaches the conclusion that "the information assembled confirms the now generally held opinion that the abolition or...suspension of the death penalty does not have the immediate effect of appreciably increasing the incidence of crime." These various studies to which I have referred clearly establish beyond doubt that death penalty does not have any special deterrent effect which life sentence does not possess and that in any event there is no evidence at all to suggest that penalty has any such special deterrent effect.

49. There is unfortunately no empirical study made in India to assess, howsoever imperfectly, the deterrent effect of death penalty. But we have the statistics of the crime

of murder in the former States of Travancore and Cochin during the period when the capital punishment was on the statute book as also during the period when it was kept in abeyance. These figures have been taken by me from the Introduction of Shri Mohan Kumar Mangalam to the book entitled "Can the State Kill its Citizen" brought out by Shri Subramaniam:

Statistics of murder cases during the period when Capital punishment was kept in abeyance.

Statistics of murder cases during the period when Capital punishment was in vogue.

These figures show that the incidence of the crime of murder did not increase at all during the period of six years when the capital punishment was in abeyance. This is in line with the experience of other countries where death penalty has been abolished.

50. I must at this stage refer to the study carried out by Ehrlich on which the strongest reliance has been placed by Sarkaria, J. in the majority judgment. Ehrlich was the first to introduce regression analysis in an effort to isolate the death penalty effect, if it should exist, uncontaminated by other influences on the capital crime rate. His paper was catapulted into the center of legal attention even before it was published, when the Solicitor General of the United States cited it in laudatory terms in his brief in Fowler v. North Carolina (1976) S.C.R. 3212 and delivered copies of it to the court. The Solicitor General called it an "important empirical support for the a priori logic belief that use of the death penalty decreases the number of murders." In view of the evidence available up to that time, Ehrlich's claim was indeed formidable both in substance and precision. The conclusion he reached was; "an additional execution per year...may have resulted in...seven or eight fewer murders." The basic data from which he derived this conclusion were the executions and the homicide rates as recorded in the United States during the years 1933 to 1969, the former generally decreasing, the latter, especially during the sixties, sharply increasing. Ehrlich considered, simultaneously with the execution and homicide rates, other variables that could affect the capital crime rate and sought to isolate the effect of these variables through the process of regression analysis. It is not necessary for the purpose of the present judgment to explain this process of mathematical purification or the various technical refinements of this process, but it is sufficient to point out that the conclusion reached by Ehrlich was that death penalty had a greater deterrent effect than the fear of life imprisonment. Ehrlich's study, because it went against all the hitherto available evidence, received extra ordinary attention from the scholarly community.

51. First, Peter Passell and John Taylor attempted to replicate Ehrlich's findings and found that they stood scrutiny only under an unusually restrictive set of circumstances. They found, for example, that the appearance of deterrence is produced only when the regression equation is in logarithmic form and in the more conventional linear regression framework, the deterrent effect disappeared. They also found that no such effect emerged when data for the years after 1962 were omitted from the analysis and only the years 1953-61 were considered. Kenneth Avio of the University of Victoria made an effort to replicate Ehrlich's findings from Canadian experience but that effort also failed and the conclusion reached by the learned jurist was that the evidence would appear to indicate that Canadian offenders over the period 1926-60 did not behave in a manner consistent with an effective deterrent effect of capital punishment." William Bowers and Glenn Pierce also made an attempt to replicate Ehrlich's results and in replicating Ehrlich's work they confirmed the Passell Taylor finding that Ehrlich's results were extremely sensitive as to whether the logarithmic specification was used and whether the data for the latter part of 1960's were included. During 1975 the Yale Law Journal published a series of Articles reviewing the evidence on the deterrent effect of death penalty and in the course of an Article in this series, Ehrlich defended his work by addressing himself to some of the criticisms raised against his study. Hans Zeisel,. Professor Emeritus of Law and-Sociology in the University of Chicago points out in his article on "The deterrent effect of death penalty: Facts V. Faith" that in this article contributed by him to the Yale Law Journal, Ehrlich did refute some criticisms but the crucial ones were not met. Ehrlich in this Article referred to a second study made by him, basing it this time on a comparison by States for the years 1940 and 1950. He claimed that this study bolstered his original thesis but conceded that his findings were "tentative and inconclusive." In the mean time Passell made a State-by-State comparison for the years 1950 and 1960 and as a result of his findings, concluded that "we know of no reasonable way of interpreting the cross sections (i.e. State-by-State) data that would lend support to the deterrence hypothesis."

52. A particularly extensive review of Ehrlich's time series analysis was made by a team led by Lawrence Klein, President of the American Economic Association. The authors found serious methodological problems with Ehrlich's analysis. They raised questions about his failure to consider the feedback effect of crime on the economic variables in his model, although he did consider other feedback effects in his analysis. They found some of Ehrlich's technical manipulations to be superfluous and tending to obscure the accuracy of his estimates. They, too, raised questions about variables omitted from the analysis, and the effects of these omissions on the findings.

53. Like Passell Taylor and Bowers-Pierce, Klein and his collaborators replicated Ehrlich's results, using Ehrlich's own data, which by that time he had made available. As in previous replications, Ehrlich's results were found to be quite sensitive to the mathematical specification of the model and the inclusion of data at the recent end of the time series.

54. By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went onto reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable reflecting the factors that caused other crimes to increase during the latter part of the period of analysis. The inclusion of such a variable would seem obligatory not only to substitute for the factors that had obviously been omitted but also to account for interactions between the crime rate and the demographic characteristics of the population.

55. Klein also found Ehrlich's results to be affected by an unusually construction of the execution rate variable, the central determinant of the analysis. Ehrlich constructed this variable by using three other variables that appeared elsewhere in his regression model: the estimated homicide arrest rate, the estimated homicide conviction rate, and the estimated number of homicides. Klein showed that with this construction of the execution rate, a very small error in the estimates, of any of these three variables produced unusually strong spurious appearances of a deterrent effect. He went on to show that the combined effect of such slight errors in all three variables was likely to be considerable, and that in view of all these considerations, Ehrlich's estimates of the deterrent effect were so weak that they "could be regarded as evidence.... (of) a counter deterrent effect of capital punishment." In view of these serious problems with Ehrlich's analysis, Klein concluded: "We see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder" and further observed: "Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty."

56. This is the analysis of the subsequent studies of Passell and Taylor, Bowers and Pierce and Klein and his colleagues made by Hans Zeisel in his Article on "The deterrent effect of the Death Penalty: Facts v. Faith." These studies which were definitely more scientific and refined than Ehrlich's demolish to a large extent the validity of the conclusion reached by Ehrlich and establish that death penalty does not possess an additional deterrent effect which life sentence does not. But, according to Hans Zeisel, the final blow to the work of Ehrlich came from a study of Brian Forst, one of Klein's collaborators on the earlier study. Since it had been firmly established that the Ehrlich phenomenon, if it existed, emerged from developments during the sixties, Forst' concentrated on that decade. He found a rigorous way. of investigating whether the ending of executions and the sharps increase in homicides during this period was casual or coincidental. The power of Forst's study derives from his having analysed changes both over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross-state observations; hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides. Forst's analysis, according to Hans Zeisel, was superior to Ehrlich's and it led to a conclusion that went beyond that of Klein. "The findings" observed Forst "give no support to the hypothesis that capital punishment deters homicide" and added: "Our finding that capital punishment does not deter

homicide is remarkably robust with respect to a wide range of alternative constructions." It will thus be seen that the validity of Ehrlich's study which has been relied upon very strongly by Sarkaria, J. in the majority judgment is considerably eroded by the studies carried out by leading criminologists such as Passell and Taylor, Bowers and Pierce, Klein and his colleagues and Forst and with the greatest respect, I do not think that Sarkaria, J. speaking on behalf of the majority was right in placing reliance on that study. The validity, design and findings of that study have been thoroughly discredited by the subsequent studies made by these other econometricians and particularly by the very scientific and careful study carried out by Forst. I may point out that apart from Ehrlich's study there is not one published econometric analysis which supports Ehrlich's results.

57. I may also at this stage refer once again to the opinion expressed by Professor Sellin. The learned Professor after a serious and thorough study of the entire subject in the United States on behalf of the American Law Institute stated his conclusion in these terms:

Any one who carefully examines the above data is bound to arrive at the conclusion that the death penalty as we use it exercises no influence on the extent or fluctuating rate of capital crime. It has failed as a deterrent.

(Emphasis supplied.)

So also in another part of the world very close to our country, a Commission of Inquiry on capital punishment was appointed by late Prime Minister Bhandarnaike of Sri Lanka and it reported:

If the experience of the many countries which have suspended or abolished capital punishment is taken into account, there is in our view cogent evidence of the unlikelihood of this 'hidden protection'.... It is, therefore, our view that the statistics of homicide in Ceylon when related to the social changes since the suspension of the death penalty in Ceylon and when related to the experience of other countries tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that in deciding on the question of reintroduction or abolition of the capital punishment reintroduction cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative of protracted imprisonment.
It is a strange irony of faith that Prime Minister Bhandarnaike who suspended the death penalty in Sri Lanka was himself murdered by a fanatic and in the panic that ensued death penalty was reintroduced in Sri Lanka.

58. The evidence on whether the threat of death penalty has a deterrent effect beyond the threat of life sentence is therefore overwhelmingly on one side. Whatever be the measurement yardstick adopted and howsoever sharpened may be the analytical instruments, they have not been able to discover any special deterrent effect. Even

regression analysis, the most sophisticated of these instruments, after careful application by the scholarly community, has failed to detect special, deterrent effect in death penalty which is not to be found in life imprisonment. One answer which the protagonists of capital punishment try to offer to combat the inference arising from these studies is that one cannot prove that capital punishment does not deter murder be cause people who are deterred by it do not report good news to their police departments. They argue that there are potential murderers in our midst who would be deterred from killing by the death penalty, but would not be deterred by life imprisonment and there is no possible way of knowing about them since these persons do not commit murder and hence are not identified. Or to use the words of Sarkaria, J. "Statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind." But this argument is plainly unsound and cannot be sustained. It is like saying, for example, that we have no way of knowing about traffic safety because motorists do not report when they are saved from accidents by traffic safety programmes or devices. That however cannot stop us from evaluating the effectiveness of those programmes and devices by studying their effect on the accident rates where they are used for a reasonable time. Why use a different standard for evaluating the death penalty, especially when we can measure its effectiveness by comparing homicide rates between countries with similar social and economic conditions in some of which capital punishment has been abolished and in others not or homicide rates in the same country where death penalty has been abolished or subsequently reintroduced. There is no doubt that if death penalty has a special deterrent effect not possessed by life imprisonment, the number of those deterred by capital punishment would appear statistically in the homicide rates of abolitionist jurisdictions but according to all the evidence gathered by different studies made by jurists and criminologists, this is just not to be found.

59. The majority speaking through Sarkaria, J. has observed that "in most of the countries of the world including India, a very large segment of the population including note able penologists, Judges, jurists, legislators and other enlightened people believe that death penalty for murder and certain other capital offences does serve as a deterrent and a greater deterrent than life imprisonment." I do not think this statement represents the correct factual position. It is of course true that there are some penologist?, judges, jurists, legislators and other people who believe that death penalty acts as a greater deterrent but it would not be correct to say that they form a large segment of the population. The enlightened opinion in the world, as pointed out by me, is definitely veering round in favour of abolition of death penalty. Moreover, it is not a rational conviction but merely an unreasoned belief which is entertained by some people including a few penologists, judges, jurists and legislators that death penalty has a uniquely deterrent effect. When you ask these persons as to what is the reason why they entertain this belief, they will not be able to give any convincing answer beyond stating that basically every human being dreads death and therefore death would naturally act as a greater deterrent than life imprisonment. That is the same argument advanced by Sir James Fitz James Stephen, the

draftsman of the Indian Penal Code, in support of the deterrent effect of capital punishment. That great Judge and author said in his Essay on Capital Punishment:

No other punishment deters men so effectually from committing, crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results.... No one goes to certain inevitable death except by compulsion. Put the matter the other way, was there ever yet a criminal who when sentenced to death and brought out to die would refuse the 35 offer of a commutation of a sentence for a severest secondary punishment? Surely not. Why is this? It can only be because 'all that a man has will be given for his life'. In any secondary punishment however terrible, there is hope; but death is death; its tenors cannot be described more forcibly.

The Law Commission in its thirty-fifth report also relied largely on this argument for taking the view that "capital punishment does act as a deterrent." It set out the main points that weighed with it in arriving at this conclusion and the first and foremost amongst them was that: "Basically every human being dreads death," suggesting that death penalty has therefore a greater deterrent effect than any other punishment. But this argument is not valid and a little scrutiny will reveal that it is wholly unfounded. In the first place, even Sir James Fitz James Stephen concedes that the proposition that death penalty has a uniquely deterrent effect not possessed by any other punishment, is one which is difficult to prove, though according to him it is self-evident. Secondly, there is a great fallacy underlying the argument of Sir James Fitz James Stephen and the Law Commission. This argument makes no distinction between a threat of certain and imminent punishment which faces the convicted murderer and the threat of a different problematic punishment which may or may not influence a potential murderer. Murder may be unpremeditated under the stress of some sudden outburst of emotion or it may be premeditated after planning and deliberation. Where the murder is unpremeditated, as for example, where it is the outcome of a sudden argument or quarrel or provocation leading to uncontrollable anger or temporary imbalance of the mind-and most murders fall within this category any thought of possibility of punishment is obliterated by deep emotional disturbance and the penalty of death can no more deter than any other penalty. Where murder is premeditated it may either be the result of lust, passion, jealousy, hatred frenzy or frustration or it may be a cold calculated murder for monetary or other consideration. The former category of murder would conclude any possibility of deliberation or a weighing of consequences; the thought of the likelihood of execution after capture, trial and sentence would hardly enter the mind of the killer. So far as the latter category of murder is concerned, several considerations make it unlikely that the death penalty would play any significant part in his thought. Since both the penalties for murder, death as well as life sentence, are so severe as to destroy the future of any one subjected to them, the crime would not be committed by a rational man unless he thinks

that there is little chance of detection. What would weigh with him in such a case is the uncertainty of detection and consequent punishment rather than the nature of punishment. It is not the harshness or severity of death penalty which acts as a deterrent. A life sentence of twenty years would act as equally strong deterrent against crime as death penalty, provided the killer feels that the crime would not go unpunished. More than the severity of the sentence, it is the certainty of detection and punishment that acts as a deterrent. The Advisory Council on the Treatment of Offenders appointed by the Government of Great Britain stated in its report in 1960 "We were impressed by the argument that the greatest deterrent to crime is not the fear of punishment but the certainty of detection."

Professor Hart emphasized the same point, refuting the argument of Sir James Fitz James Stephen in these words:

This (Stephen's) estimate of the paramount place in human motivation of the fear of death reads impressively but surely contains a suggestio falsi and once this is detected its cogency as an argument in favour of the death penalty for murder vanishes for there is really no parallel between the situation of a convicted murderer over the alternative of life imprisonment in the shadow of the gallows and the situation of the murderer contemplating his crime. The certainty of death is one thing, perhaps for normal people nothing can be compared with it. But the existence of the death penalty does not mean for the murderer certainty of death now. It means not very high probability of death in the future. And, futurity and uncertainty, the hope of an escape, rational or irrational, vastly diminishes the difference between death and imprisonment as deterrent, and may diminish to vanishing point.... The way in which the convicted murderer may view the immediate prospect of the gallows after he has been caught must be a poor guide to the effect of this prospect upon him when he is contemplating committing his crime.
It is also a circumstance of no less significance bearing on the question of deterrent effect of death penalty, that, even after detection and arrest, the likelihood of execution for the murderer is almost nil. In the first place, the machinery of investigation of offences being what it is and the criminal law of our country having a tilt in favour of the accused, the killer can look forward to a chance of acquittal at the trial. Secondly, even if the trial results in a conviction, it would not in all probability, be followed by a sentence of death. Whatever may have been the position prior to the enactment of the CrPC, 1973, it is now clear that under Section 354 Sub-section (3), life sentence is the rule and it is only in exceptional cases for special 5 reasons that death sentence may be awarded. The entire drift of the legislation is against infliction of death penalty and the courts are most reluctant to impose it save in the rarest of rare cases. It is interesting to note that in the last 2 years, almost every case where death penalty is confirmed by the High Court has come up before this Court by way of petition for special leave, and, barring the case of Ranga and Billa, I do not think there is a single case in which death penalty has been affirmed by this Court. There have been numerous cases where even after special leave petitions against sentence of death were dismissed, review petitions have been

entertained and death sentence commuted by this Court. Then there is also the clemency power of the President under Article 72 and of the Governor under Article 161 of the Constitution and in exercise of this power, death sentence has been commuted by the President or the Governor, as the case may be, in a number of cases. The chances of imposition of death sentence following upon a conviction for the offence of murder are therefore extremely slender. This is also evident from the figures supplied to us by the Government of India for the years 1974 to 1978 pursuant to the inquiry made by us. During the course of the hearing, we called upon the Government of India to furnish us statistical information in regard to following three matters, namely, (i) the number of cases in which and the number of persons on whom death sentence was imposed and whose death sentence was confirmed by various High Courts in India; (ii) the number of cases in which death sentence was executed in the various States and the various Union Territories; and 30 (iii) the number of cases in which death sentence was commuted by the President of India under Article 72 or by the Governors under Article 161 of the Constitution. The statistical information sought by us was supplied by the Government of India and our attention was also drawn to the figures showing the total number of offences of murder committed inter alia during the years 1974-77. These figures showed that on an average about 17,000 offences of murder were committed in India every year during the period 1974 to 1977, and if we calculate on the basis of this average, the total number of offences of murder during the period of five years from 1974 to 1978 would come to about 85.000. New, according to the statistical information supplied by the Government of India, out of these approximately 85000 cases of murder, there were only 288 in which death sentence was imposed by the sessions court and confirmed by the High Courts and out of them, in 12 cases death sentence was commuted by the President and in 40 cases, by the Governors and death sentence was executed in only 29 cases. It will thus be seen that during the period of five years from 1974 to 1978, there was an infinite singly small number of cases, only 29 out of an aggregate number of approximately 85COO cases of murder, in which death sentence was executed. Of course, the figures supplied by the Government of India did not include the figures from the State of Bihar, Jammu and Kashmir, West Bengal and Delhi Administration but the figures from these three States and from the Union Territory of Delhi would not make any appreciable difference. It is obvious therefore that even after conviction in a trial, there is high degree of probability that death sentence may not be imposed-by the sessions court and even if death sentence is imposed by the sessions court, it may not be confirmed by the High Court and even after confirmation by the High Court, it may not be affirmed by this Court and lastly, even if affirmed by this Court, it may be commuted by the President of India under Article 72 or by the Governor under Article 161 of the Constitution in exercise of the power of clemency. The possibility of execution pursuant to a sentence of death is therefore almost negligible, particularly after the enactment of Section 354 Sub-section (3) of the CrPC 1973 and it is difficult to see how in these circumstances death penalty can ever act as a deterrent. The knowledge that death penalty is rarely imposed and almost certainly, it will not be imposed takes away what-ever deterrent value death penalty might otherwise have. The expectation, bordering

almost on certainty, that death sentence is extremely unlikely to be imposed is a factor that would condition the behaviour of the offender and death penalty cannot in such a situation have any deterrent effect. The risk of death penalty being remote and improvable, it cannot operate as a greater deterrent than the threat of life imprisonment. Justice Brennan and Justice White have also expressed the same view in Furman v. Georgia (supra), namely, that, when infrequently and arbitrarily imposed, death penalty is not a greater deterrent to murder than is life imprisonment.

60. The majority speaking through Sarkaria, J. has referred to a few decisions of this Court in which, according to majority Judges, the deterrent value of death penalty has been judicially recognised. But I do not think any reliance can be placed on the observations in these decisions in support of the view that death penalty has a uniquely deterrent effect. The learned Judges who made these observations did not have any socio-legal data before them on the basis of which they could logically come to the conclusion that death penalty serves as a deterrent. They merely proceeded upon an impressionistic view which is entertained by quite a few lawyers, judges and legislators with out any scientific investigation or empirical research to support it. It appears to have been assumed by these learned judges that death penalty has an additional deterrent effect which life sentence does not possess. In fact, the learned judges were not concerned in these decisions to enquire and determine whether death penalty has any special deterrent effect and therefore if they proceeded on any such assumption, it cannot be said that by doing so they judicially recognised the deterrent value of death penalty. It is true that in Jagmohan's case (supra) Palekar, J. speaking on behalf of the court did take the view that death penalty has a uniquely deterrent effect but I do not think that beyond a mere traditional belief the validity of which cannot be demonstrated either by logic or by reason, there is any cogent and valid argument put forward by the learned Judge in support of the view that death sentence has greater deterrent effect than life sentence. The majority judges have relied on some of the observations of Krishna Iyer, J. but it must not be forgotten that Krishna Iyer, J. has been one of the strongest opponents of death penalty and he has pleaded with passionate conviction for 'death sentence on death sentence.' In Dalbir Singh and Ors. v. State of Punjab (supra) he emphatically rejected the claim of deterrence in most unequivocal terms: "...the humanity of our Constitution historically viewed (does not) subscribe to the hysterical assumption or facile illusion that a crime free society will dawn if hangmen and firing squads were kept feverishly busy." It would not be right to rely on stray or casual observations of Krishna Iyer, J. in support of the thesis that death penalty has a uniquely deterrent effect. It would be doing grave injustice to him and to the ideology for Which he stands. In fact, the entire basis of the judgment of Krishna Iyer, J. in Rajendra Prasad's case is that death penalty has. no deterrent value and that is only where the killer is found to be a social monster or a beast incapable of reformation that he can be liquidated out of existence. Chinnappa Reddy, J. has also in Bishnu Deo Shaw's case (supra) taken the view that "there is no positive indication that the death penalty has been deterrent" or in other words, "the efficacy of the death penalty as a deterrent is unproven."

61. Then reliance has been placed by Sarkaria, J. speaking on behalf of the majority on the observations of Stewart, J. in Furman v. Georgia (supra) where the learned Judge took the view that death penalty serves a deterrent as well as retributive purpose. In his view, certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator and that, despite the inconclusive empirical evidence, only penalty of death will provide maximum deterrence. It has also been pointed out by Sarkaria, J. that in Gregg v. Georgia (supra) Stewart, J. reiterated the same view in regard to the deterrent and retributive effect of death penalty. But the view taken by Stewart, J. cannot be regarded as decisive of the present question as to the deterrent effect of death penalty. It is just one view like any other and its validity has to be tested on the touchstone of logic and reason. It cannot be accepted merely because it is the view of an eminent judge, I find that as against the view taken by him, there is a contrary view taken by at least two judges of the United States Supreme Court, namely, Brennan J. and Marshall, J. who were convinced in Gregg v. Georgia (supra) that "capital punishment is not necessary as a deterrent to crime in our society." It is natural differing judicial observations supporting one view or the other that these should be particularly on a sensitive issue like this, but what is necessary is to examine objectively and critically the logic and rationale behind these observations and to determine for ourselves which observations represent the correct view that should find acceptance with us. The majority Judges speaking through Sarkaria, J. have relied upon the observations of Stewart, J. as also on the observations made by various other Judges and authors for the purpose of concluding that when so many eminent persons have expressed the view that capital punishment is necessary for the protection of society, how can it be said that it is arbitrary and unreasonable and does not serve any rational penological purpose. It has been observed by Sarkaria, J: "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. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over including sociologists legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society...it is not possible to hold that the provision of death penalty as an alternative punishment for murder...is unreasonable and not in the public interest." I find it difficult to accept this argument which proceeds upon the hypothesis that merely because some lawyers, judges and jurists are of the opinion that death penalty sub-serves a penological goal and is therefore in public interest, the court must shut its eyes in respectful deference to the views expressed by these scholars and refuse to examine whether their views are correct or not. It is difficult to understand how the court, when called upon to determine a vital issue of fact, can surrender its judgment to the views of a few lawyers, judges and jurists and hold that because such eminent persons have expressed these views, there must be some substance in what they say and the provision of death penalty as an alternative punishment for

murder cannot therefore be regarded as. arbitrary and unreasonable. It is to my mind inconceivable that a properly informed judiciary concerned to uphold Fundamental Rights should decline to come to its own determination of a factual dispute relevant to the issue whether death penalty serves a legitimate penological purpose and rest its decision only on the circumstance that there are sociologists, legislators, judges and jurists who firmly believe in the worth and necessity of capital punishment. The court must on the material before it find whether the views expressed by lawyers, judges, jurists and criminologists on one side or the other are well founded in logic and reason and accept those which appear to it to be correct and sound. The Court must always remember that it is charged by the Constitution to act as asentinal on the qui vive guarding the fundamental rights guaranteed by the Constitution and it cannot shirk its responsibility by observing that since there are strong divergent views on the subject, the court need not express any categorical opinion one way or the other as to which of these two views is correct. Hence it is that, in the discharge of my constitutional duty of protecting and upholding the right to life which is perhaps the most basic of all human rights. I have examined the rival views and come to the conclusion, for reasons which I have already discussed, that death penalty has no uniquely deterrent effect and does not serve a penological purpose. But even if we proceed on the hypothesis that the opinion in regard to the deterrent effect of death penalty is divided and it is not possible to say which opinion is right and which opinion is wrong, it is obvious that, in this state of affairs, it cannot be said to be proved that death penalty has an additional deterrent effect not possessed by life sentence and if that be so, the legislative provision for imposition of death penalty as alternative punishment for murder fail, since, as already pointed out above, the burden of showing that death penalty has a uniquely deterrent effect and therefore serves a penological goal is on the State and if the State fails to discharge this burden which lies upon it, death penalty as alternative punishment for murder must be held to be arbitrary and unreasonable.

62. The majority Judges have, in the Judgment of Sarkaria, J. placed considerable reliance on the 35th Report of the Law Commission and I must therefore briefly refer to that Report before I part with this point. The Law Commission set out in their Report the following main-points that weighed with them in arriving at the conclusion that capital punishment does act as a deterrent:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and legislatures and Members of the Bar and police officers-are

definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

So far as the first argument set out in Clause (a) is concerned, I have already shown that the circumstance that every human being dreads death cannot lead to the inference that death penalty acts as a deterrent. The statement made in Clause (b) is perfectly correct and I agree with the Law Commission that death as a penalty stands on a totally different level from life imprisonment and the difference between them is one of quality and not merely of degree, but I fail to see how from this circumstance an inference can necessarily follow that death penalty has a uniquely deterrent effect. Clause (c) sets out that those who are specially qualified to express an opinion on the subject have in their replies to the questionnaire stated their definite view that the deterrent effect of capital punishment is achieved in a fair measure in India. It may be that a large number of persons who send replies to the questionnaire issued by the Law Commission might have expressed the view that death penalty does act as a deterrent in our country, but mere expression of opinion in reply to the questionnaire, unsupported by reasons, cannot have any evidentiary value. There are quite a number of people in this country who still nurture the superstitions and irrational belief, ingrained in their minds by a century old practice of imposition of capital punishment and fostered, though not consciously, by the instinct for retribution, that death penalty alone can act as an effective deterrent against the crime of murder. I have already demonstrated how this belief entertained by lawyers, judges, legislators and police officers is a myth and it has no basis in logic or reason. In fact, the statistical research to which I have referred completely falsifies this belief. Then, there are the arguments in Clauses (d) and (e) but these arguments even according to the Law Commission itself are inconclusive and it is difficult to see how they can be relied upon to support the thesis that capital punishment acts as a deterrent. The Law Commission states in Clause (f) that statistics of other countries are inconclusive on the subject. I do not agree. I have already dealt with this argument and shown that the statistical studies carried out by various jurists and criminologists clearly disclose that there is no evidence at all to suggest that death penalty acts as a deterrent and it must therefore be held on the basis of the available material that death penalty does not act as a deterrent. But even if we accept the proposition that the statistical studies are inconclusive and they can not be regarded as proving that death penalty has no deterrent effect, it is clear that at the same

time they also do not establish that death penalty has a uniquely deterrent effect and in this situation, the burden of establishing that death penalty has an additional deterrent effect which life sentence does not have and therefore serves a penological purpose being on the State, it must be held that the State has failed to discharge the burden which rests upon it and death penalty must therefore be held to be arbitrary and unreasonable.

63. There was also one other argument put forward by the Law Commission in its 35th Report and that argument was that having regard to the conditions in India to the variety of social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need to maintain law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. This argument does not commend itself to me as it is based more on fear psychosis than on reason. It is difficult to see how any of the factors referred to by the Law Commission, barring the factor relating to the need to maintain law and order, can have any relevance to the question of deterrent effect of the capital punishment. I cannot subscribe to the opinion that, because the social upbringing of the people varies from place to place or from class to class or there are demographic diversities and variations, they tend to increase the incidence of homicide and even if they do, I fail to see how death penalty can counteract the effect of these factors. It is true that the level of education in our country is low, because our developmental process started only after we became politically free, but it would be grossly unjust to say that uneducated people are more prone to crime than the educated ones. I also cannot agree that the level of morality which prevails amongst our people is low. I firmly hold the view that the large bulk of the people in our country, barring only a few who occupy positions of political, administrative or economic power, are actuated by a high sense of moral and ethical values. In fact, if we compare the rate of homicide in India with that in the United States, where there is greater homogeneity in population and the level of education is fairly high, we find that India compares very favourably with the United States, The rate of homicide for the year 1952 was 4.7 in the United States as against the rate of only 2.9 in India per 1,00,000 population and the figures for the year 1960 show that the rate of homicide in the United States was 5.1 as against the rate of only 2.5 in India per 1,00,000 population. The comparative figures for the year 1967 also confirm that the rate of homicide per 1,00,000 population in the United States was definitely higher than in India because in the United States it was 6.1 while in India it was only 2.6. It is therefore obvious that, despite the existence of the factors referred to by the Law Commission, the conditions in India, in so far as the rate of homicide is concerned, are definitely better than in the United States and I do not see how these factors can possibly justify an apprehension that it may be risky to abolish capital punishment. There is in fact statistical evidence to show that the attenuation of the area in which death penalty may be imposed and the remoteness and infrequency of abolition of death penalty have not resulted in increase in the rate of homicide. The figures which were placed before us on behalf of the Union clearly show that there was no increase in the rate of homicide even though death sentence was made awardable only in exceptional

cases under Section 354 Sub-section (3) of the new CrPC 1973. I must therefore express my respectful dissent from the view taken by the Law Commission that the experiment of abolition of capital punishment would involve a certain element of risk to the law and order situation.

64. It will thus be seen that death penalty as provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC, 1973 does not sub-serve any legit mate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment, I do not think, for reasons I have already discussed, that it can have any legitimate place in an enlightened philosophy of punishment. It must therefore be held that death penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution.

65. I must now turn to consider the attack against the constitutional validity of death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC, 1973 on the ground that these sections confer an unguided and standardless discretion on the court whether to liquidate an accused out of existence or to let him continue to live and the vesting of such discretion in the court renders the death penalty arbitrary and freakish. This ground of challenge is in my opinion well founded and it furnishes one additional reason why the death penalty must be struck down as violative of Articles 14 and 21. It is obvious on a plain reading of Section 302 of the Indian Penal Code which provides death penalty as alternative punishment for murder that it leaves it entirely to the discretion of the Court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. This section does not lay down any standards or principles to guide the discretion of the court in the matter of imposition of death penalty. The critical choice between physical liquidation and life long incarceration is left to the discretion of the court and no legislative light is shed as to how this deadly discretion is to be exercised. The court is left free to navigate in an uncharted sea without any compass or directional guidance. The respondents sought to find some guidance in Section 354 Sub-section (3) of the CrPC 1973 but I fail to see how that section can be of any help at all in providing guidance in the exercise of discretion. On the contrary it makes the exercise of discretion more difficult and uncertain. Section 354 Sub-section (3) provides I that in case of offence of murder, life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded. But what are the special reasons for which the court may award death penalty is a matter on which Section 354 Sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty

and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers. This was pointed out clearly and emphatically by Mr. Justice Frankfurter in the course of the evidence he gave before the Royal I Commission on Capital Punishment:

I myself think that the bench-we lawyers who become Judges are not very competent, are not qualified by experience, to impose sentence where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training has given you any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery-the rule of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent-I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to possess. Even if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons,' the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bona fide and conscientiously find such reasons to be 'special reasons.' It is now recognised on all hands that judicial conscience is not a fixed conscience; it varies from judge to judge

depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression "social philosophy." We lawyers and judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we refuse to admit the subjective element in judicial decision making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion. Every judgment necessarily bears the impact of the attitude and approach of the judge and his social value system. It would be pertinent here to quote justice Cardozo's analysis of the mind of a Judge in his famous lectures on "Nature of Judicial Process:

We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them-inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.

It may be noted that the human mind, even at infancy, is no blank sheet of paper. We are born with predispositions and the process of education, formal and informal, and, our own subjective experiences create attitudes which affect us in judging situations and coming to. decisions. Jerome Frank says in his book: "Law and the Modern Mind," in an observation with which I find myself in entire agreement:

Without acquired 'slants' preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.... An 'open mind' in the sense of a mind containing no pre-conceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being.

It must be remembered that "a Judge does not shed the attributes of common humanity when he assumes the ermine." The ordinary human mind is a mass of pre-conceptions inherited and acquired, often unrecognised by their possessor. "Few minds are as neutral

as a sheet of plain glass and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason, if human justice is to be done." It is, therefore, obvious that when a Judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence. One Judge may have faith in the Upanishad doctrine that every human being is an embodiment of the Divine and he may believe with Mahatma Gandhi that every offender can be reclaimed and transformed by love and it is immoral and unethical to kill him. while another Judge may believe that it is necessary for social defence that the offender should be put out of way and that no mercy should be shown to him who did not show mercy to another. One Judge may feel that the Naxalites, though guilty of murders, are dedicated souls totally different from ordinary criminals as they are motivated not by any self-interest but by a burning desire to bring about a revolution by eliminating vested interests and should not therefore be put out of corporeal existence while another Judge may take the view that the Naxalites being guilty of cold premeditated murders are a menace to the society and to innocent men and women and therefore deserve to be liquidated. The views of Judges as to what may be regarded as 'special reasons' are bound to differ from Judge to Judge depending upon his value system and social philosophy with the result that whether a person shall live or die depends very much upon the composition of the bench which tries his case and this renders the imposition of death penalty arbitrary and capricious.

66. Now this conclusion reached by me is not based merely on theoretical or a priori considerations. On an analysis of decisions given over a period of years we find that in fact there is no uniform pattern of judicial behaviour in the imposition of death penalty and the judicial practice does not disclose any coherent guidelines for the award of capital punishment. The Judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is apparent from a study of the judicial decisions that some Judges are readily and regularly inclined to sustain death sentences, other are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of capital punishment. If a case comes before one Bench consisting of Judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another Bench consisting of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment. The former would find and I say this not in any derogatory or disparaging sense, but as a consequence of psychological and attitudinal factors operating on the minds of the Judges constituting the Bench-'special reasons' in the case to justify award of death penalty while the latter would reject any such reasons as special reasons. It is also quite possible that one Bench

may, having regard to its perceptions, think that there are special reasons in the case for which death penalty should be awarded while another Bench may bonafide and conscientiously take a different view and hold that there are no special reasons and that only life sentence should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong, because the exercise of discretion in a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude and approach of the Judges constituting the Bench, their value system, the individual tone of their mind, the colour of their experience and the character and variety of their interests and their predispositions. This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented bench structure of our Courts where benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, sometimes before another sometimes before a third and so on. Prof. Blackshield has in his Article on 'Capital Punishment in India' published in Volume 21 of the Journal of the Indian Law Institute pointed out how the practice of bench formation contributes to arbitrariness in the imposition of death penalty. It is well-known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges on Benches which hear capital punishment cases has actually decreased. Most cases are now heard by two judge Benches. Prof. Blackshield has abstracted 70 cases in which the Supreme Court had to choose between life and death while sentencing an accused for the offence of murder and analysing these 70 cases he has pointed out that during the period 28th April 1972 to 8th March 1976 only eleven Judges of the Supreme Court participated in 10% or more of the cases. He has listed these eleven Judges in an ascending order of leniency based on the proportion for each Judge of plus votes (i.e. votes for the death sentence) to total votes and observed that according to these statistics "the preponderance from November 1972 to January 1973 of the Benches consisting of Justice Vaidialingam, Dua and Alagiriswamy may have been unfortunate for the appellants involved." It is significant to note that out of 70 cases analysed by Prof. Blackshield, 37 related to the period subsequent to the coming into force of Section 354 Sub-section (3) of the CrPC 1973. If a similar exercise is performed with reference to cases decided by the Supreme Court after 8th March 1976, that being the date up to which the survey carried out by Prof. Blackshield was limited, the analysis will reveal the same pattern of incoherence and arbitrariness, the decision to kill or not kill being guided to a large extent by the composition of the Bench. Take for example Rajendra Prasad's case (supra) decided on 9th February 1979. In this case, the death sentence imposed on Rajendra Prasad was commuted to life imprisonment by a majority consisting of Krishna Iyer, J. and Desai, J. A.P. Sen, J. dissented and was of the view that the death sentence should be confirmed. Similarly in one of the cases before us, namely, Bachan Singh v. State of Punjab, MANU/SC/0077/1979: 1980CriLJ211. when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasarn, J. was definitely of the view that the majority decision in Rajendra Prasad's case was wrong and that is why he referred that case to the Constitution Bench. So also in Dalbir Singh v. State of Punjab (supra), the

majority consisting of Krishna Iyer, J. and Desai, J. took the view that the death sentence imposed on Dalbir Singh should be commuted to life imprisonment while A.P. Sen, J. stuck to the original view taken by him in Rajendra Prasad's case and was inclined to confirm the death sentence. It will thus be seen that the exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the Judges constituting the Bench. If for example Justice A.P. Sen and Justice Kailasam had constituted the Bench hearing Rajendra Prasad's case, then without meaning the slightest disrespect to these two eminent Judges, one can hazard a guess that perhaps the death sentence of Rajendra Prasad would have been confirmed.

67. The most striking example of freakishness in imposition of death penalty is provided by a recent case which involved three accused, namely, Jeeta Singh, Kashmira Singh and Harbans Singh. These three persons were sentenced to death by the Allahabad High Court by a judgment and order dated 20th October 1975 for playing an equal part in jointly murdering a family of four persons. Each of these three persons preferred a separate petition in the Supreme Court for special leave to appeal against the common judgment sentencing them all to death penalty. The special leave petition of Jeeta Singh came up for hearing before a bench consisting of Chandrachud, J. (as he then was) Krishna Iyer, J. and N.L. Untwalia, J. and it was dismissed on 15th April 1976. Then came the special leave petition preferred by Kashmira Singh from jail and this petition was placed for hearing before another bench consisting of Fazal Ali, J. and myself. We granted leave to Kashmira Singh limited to the question of sentence and by an order dated 10th April 1977 we allowed his appeal and commuted his sentence of death into one of imprisonment for life. The result was that while Kashmira Singh's death sentence was commuted to life imprisonment by one Bench, the death sentence imposed on Jeeta Singh was confirmed by another bench and he was executed on 6th October 1981, though both had played equal part in the murder of the family and there was nothing to distinguish the case of one from that of the other. The special leave petition of Harbans Singh then came up for hearing and this time, it was still another bench which heard his special leave petition. The Bench consisted of Sarkaria and Singhal, JJ. and they rejected the special leave petition of Harbans Singh on 16th October, 1978. Harbans Singh applied for review of this decision, but the review petition was dismissed by Sarkaria, J. and A.P. Sen, J. on 9th May 1980. It appears that though the registry of this Court had mentioned in its office report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the court specifically when the special leave petition of Harbans Singh and his review petition were dismissed. Now since his special leave petition as also his review petition were dismissed by this Court, Harbans Singh would have been executed on 6th October 1981 along with Jeeta Singh, but fortunately for him he filed a writ petition in this Court and on that writ petition, the court passed an order staying the execution of his death sentence. When this writ petition came up for hearing before a still another bench consisting of Chandrachud, C.J., D.A. Desai and A.N. Sen, JJ., it was pointed out to the court that the death sentence imposed on Kashmira Singh had been commuted by a bench consisting of Fazal Ali, J. and myself and when this fact was

pointed out, the Bench directed that the case be sent back to the President for reconsideration of the clemency petition filed by Harbans Singh. This is a classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the bench, even in cases governed by Section 354 Sub-section (3) of the CrPC 1973. The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21.

68. If we study the judicial decisions given by the courts over a number of years, we find Judges resorting to a wide variety of factors in justification of confirmation or commutation of death sentence and these factors when analysed fail to reveal any coherent pattern. This is the inevitable consequence of the failure of the legislature to supply broad standards or guidelines which would structure and canalize the discretion of the court in the matter of imposition of death penalty. Of course, I may make it clear that when I say this I do not wish to suggest that if broad standards or guidelines are supplied by the legislature, they would necessarily cure death penalty of the vice of arbitrariness or freakishness. Mr. Justice Harlan pointed out in Me Gautha v. California 402 US 183 the difficulty of formulating standards or guidelines for canalizing or regulating the discretion of the court in these words:"

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by...history.... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.
But whether adequate standards or guidelines can be formulated or not which would cure the aspects of arbitrariness and capriciousness, the fact remains that no such standards or guidelines are provided by the legislature in the present case, with the result that the court has unguided and untrammelled discretion in choosing between death and life imprisonment as penalty for the crime of murder and this has led to considerable arbitrariness and uncertainty. This is evident from a study of the decided cases which clearly shows that the reasons for confirmation or commutation of death sentence relied upon by the court in different cases defy coherent analysis. Dr. Raizada has, in his monumental doctoral study entitled "Trends in sentencing: a study of the important penal statutes and judicial pronouncements of the High Courts and the Supreme Court" identified a large number of decisions of this Court where inconsistent awards of punishment have been made and the judges have frequently articulated their inability to prescribe or follow consistently any standards or guidelines. He has classified cases up to 1976 in terms of the reasons given by the court for awarding or refusing to award death sentence. The analysis made by him is quite rewarding and illuminating.

(i) One of the reasons given by the courts in a number of cases for imposing death penalty is that the murder is "brutal", "cold blooded", "deliberate", "unprovoked", "fatal", "gruesome", "wicked," "heinous" or "violent". But the use of these labels for describing the nature of the murder is indicative only of the degree of the courts' aversion for the nature or the manner of commission of the crime and it is possible that different judges may react differently to these situations and moreover, some judges may not regard this factor as having any relevance to the imposition of death penalty and may therefore decline to accord to it the status of "special reasons'. In fact, there are numerous cases, where despite the murder being one falling within these categories, the court has refused to award death sentence. For example, Janardharan whose appeal was decided along-with the appeal of Rajendra Prasad had killed his innocent wife and children in the secrecy of night and the murder was deliberate and cold blooded, attended as it was with considerable brutality, and yet the majority consisting of Krishna Iyer, J. and D.A. Desai, J. commuted his death sentence to life imprisonment. So also Dube had committed triple murder and still his death sentence was commuted to life imprisonment by the same two learned Judges, namely, Krishna Iyer, J. and D.A. Desai, J. It is therefore clear that the epithets mentioned above do not indicate any clear-cut well defined categories but are merely expressive of the intensity of judicial reaction to the murder, which may not be uniform in all Judges and even if the murder falls within one of these categories, that factor has been regarded by some judges as relevant and by others, as irrelevant and it has not been uniformly applied as a salient factor in determining whether or not death penalty should be imposed.

(ii) There have been cases where death sentence has been awarded on the basis of constructive or joint liability arising under Sections 34 and 149. Vide: Babu v. State of U.P. 1965 C L J SC 539 Mukhtiar Singh v. State of Punjab 1965 C L J SC 1298 Masalt v. State of U.P. 1965 C L J SC 226 Gurcharan Singh v. State of Punjab 1973 C L J SC 323 But, there are equally a large number of cases where death sentence has not been awarded because the criminal liability of the accused was only under Section 34 or Section 149. There are no established criteria for awarding or refusing to award death sentence to an accused who himself did not give the fatal blow but was involved in the commission of murder along with other assailants under Section 34 or Section 149.

(iii) The position as regards mitigating factors also shows the same incoherence. One mitigating factor which has often been relied upon for the purpose of commuting the death sentence to life imprisonment is the youth of the offender. But this too has been quite arbitrarily applied by the Supreme Court. There are such cases as State of U. P. v. Suman Das 1972 C L J SC 489: Raghubir Singh v. State of Haryana MANU/SC/0185/1974: 1974CriLJ603 and Gurudas Singh v. State of Rajasthan MANU/SC/0126/1975: 1975CriLJ1218 where the Supreme Court took into account the young age of the appellant and refused to award death sentence to him. Equally there are cases such as Bhagwan Swamp v. State of U.P. 1971 C L J SC 413 and Raghomani v. State

of U.P. MANU/SC/0189/1975: 1977CriLJ345 where the Supreme Court took the view that youth is no ground for extenuation of sentence. Moreover there is also divergence of opinion as to what should be the age at which an offender may be regarded as a young man deserving of commutation. The result is that as pointed out by Dr. Raizada, in some situations young offenders who have committed multiple murders get reduction in life sentence whereas in others, "where neither the loss of as many human lives nor of higher valued properly" is involved, the accused are awarded death sentence.

(iv) One other mitigating factor which is often taken into account is delay in final sentencing. This factor of delay after sentence received great emphasis in Ediga Anamma v. State of Andhra Pradesh MANU/SC/0128/1974: 1974CriLJ683 Chawla v. State of Haryana, MANU/SC/0119/1974: 1974CriLJ791 Raghubir Singh v. State of Haryana (supra) Bhur Singh v. State of Punjab MANU/SC/0109/1974: 1974CriLJ929 State of Punjab v. Hari Singh MANU/SC/0227/1974: 1974CriLJ822 and Gurudas Singh v. State of Rajasthan and in these cases delay was taken into account for the purpose of awarding the lesser punishment of life imprisonment. In fact, in Raghubir Singh v. State of Haryana (supra) the fact that for months the specter of death penalty must have been to impending his soul was held sufficient to entitle the accused to reduction in sentence. But equally there are a large number of cases where death sentences have been confirmed, even when two or more years were taken in finally disposing of the appeal; Vide: Rishdeo v. State of U.P. MANU/SC/0126/1975: 1975CriLJ1218 Bharmal Mapa v. State of Bombay 1960 C L J SC 494 1955 Criminal Law Journal SC 873. given by Dr. Raizada in foot-note 186 to chapter III. These decided cases show that there is no way of predicting the exact period of prolonged proceeding which may favour an accused. Whether any importance should be given to the factor of delay and if so to what extent are matters entirely within the discretion of the court and it is not possible to assert with any definitiveness that a particular period of delay after sentencing will earn for the accused immunity from death penalty. It follows as a necessary corollary from these vagaries in sentencing arising from the factor of delay, that the imposition of capital punishment becomes more or less a kind of cruel judicial lottery. If the case of the accused is handled expeditiously by the prosecution, defence lawyer, sessions court, High Court and the Supreme Court, then this mitigating factor of delay is not available to him for reduction to life sentence. If, on the other hand, there has been lack of despatch, engineered or natural, then the accused may escape the gallows, subject of course to the judicial vagaries arising from other causes. In other words, the more efficient the proceeding, the more certain the death sentence and vice-versa.

(v) The embroilment of the accused in an immoral relationship has been condoned and in effect, treated as an extenuating factor in Raghubir Singh, v. State of Haryana (supra) and Basant Laxman More v. State of Maharashtra MANU/SC/0234/1974: 1974CriLJ1166 while in Lajar Masih v. State of U.P MANU/SC/0128/1974: 1974CriLJ683 it has been condemned and in effect treated as an aggravating factor. There is thus no uniformity of approach even so far as this factor is concerned.

69. All these factors singly and cumulatively indicate not merely that there is an enormous potential of arbitrary award of death penalty by the High Courts and the Supreme Court but that, in fact, death sentences have been awarded arbitrarily and freakishly. Vide: Dr. Upendra Baxi's note on "Arbitrariness of Judicial Imposition of Capital Punishment."

70. Professor Blackshield has also in his article on "Capital Punishment in India" commented on the arbitrary and capricious nature of imposition of death penalty and demonstrated forcibly and almost conclusively, that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment. He has taken the decision of this Court in Ediga Anamma v. State of Andhra Pradesh (supra) as the dividing line and examined the judicial decisions given by this Court subsequent to the decisions in Ediga Anamma's case, where this Court had to choose between life and death under Section 302 of the Indian Penal Code. The cases subsequent to the decision in Ediga Anamma's case have been chosen for study and analysis presumably because that was the decision in which the court for the first time set down some working formula whereby a synthesis could be reached between death sentence and life imprisonment and Krishna Iyer, J. speaking on behalf of the court, formulated various grounds which, in his opinion, might warrant death sentence as an exceptional measure, But, despite this attempt made in Ediga Anamma's case to evolve some broad standards or guidelines for imposition of death penalty, the subsequent decisions, as pointed out by Professor Black shield, display the same pattern of confusion, contradictions and aberrations as the decisions before that case. The learned author has taken 45 reported decisions given after Ediga Anamma's case, and 'shown that it is not possible to discern any coherent pattern in these decisions and they reveal contradictions and inconsistencies in the matter of imposition of death penalty. This is how the learned author has summed up his conclusion after an examinations of these judicial decisions:

But where life and death are at stake, inconsistencies which are understandable may not be acceptable. The hard evidence of the accompanying "kit of cases" compels the conclusion that, at least in contemporary India, Mr. Justice Douglas' argument in Funman v. Georgia is correct: that arbitrariness and uneven incidence are inherent and inevitable in a system of capital punishment; and that therefore-in Indian constitutional terms, and in spite of Jagmohan Singh-the retention of such a system necessarily violates Article 14's guarantee of "equality before the law.
It is clear from a study of the decisions of the higher courts on the life-or-death choice that judicial adhocism or judicial impressionism dominates the sentencing exercise and the infliction of death penalty suffers from the vice of arbitrariness and caprice.

71. I may point out that Krishna Iyer, J. has also come to the same conclusion on the basis of his long experience of the sentencing process. He has analysed the different factors which have prevailed with the Judges from time to time in awarding or refusing to award

death penalty and shown how some factors have weighed with one Judge, some with another; some with a third and so on, resulting in chaotic arbitrariness in the imposition of death penalty. I can do no better than quote his own words in Rajendra Prasad's case (supra):

Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapon used, others count the corpses or the degree of horror and yet others look into the age or sex of the offender and even the lapse of time between the trial Court's award of death sentence and the final disposal of the appeal? With some judges, motives, pro vocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculas. Stranger still, a good sentence, of death by the trial Court is some times upset by the Supreme Court because of law's delays. Courts have even directed execution of murderers who are mental cases, who do not fall within the McNaughten rules, because of the insane fury of the slaughter. A big margin of subjectivism, a preference for old English precedents, theories of modern penology, behavioral emphasis or social antecedents, judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as part of history-this plurality of forces plays a part in swinging the pendulum of sentencing justice erratically.
This passage from the judgment of the learned Judge exposes, in language remarkable for its succinctness as well as eloquence, the vagarious nature of the imposition of death penalty and highlights a few of the causes responsible for its erratic operation. I find myself totally in agreement with these observations of the learned Judge.

72. But when it was contended that sentencing discretion is inherent in our legal system, and, in fact, it is desirable, because no two cases or criminals are identical and if no discretion is left to the court and sentencing is to be done according to a rigid pre-determined formula leaving no room for judicial discretion, the sentencing process would cease to be judicial and would de-generate into a bed of procrustean cruelty. The argument was that having regard to the nature of the sentencing process, it is impossible to lay down any standards or guidelines which will provide for the endless and often unforeseeable variations in fact situations and sentencing discretion has necessarily to be left to the court and the vesting of such discretion in the court, even if no standards or guidelines are provided by the legislature for structuring or channeling such discretion, cannot be regarded as arbitrary or unreasonable. This argument, plausible though it may seem, is in my opinion not well founded and must be rejected. It is true that criminal cases do not fall into set behaviorist patterns and it is 10 almost impossible to find two cases which are exactly identical. There are, as pointed out by Sarkaria, J. in the majority judgment, "countless permutations and combinations which are beyond the anticipatory capacity of the human calculus." Each case presents its own distinctive 'features, its peculiar combinations of events and its unique configuration of facts. That is why, in the

interest of individualised justice, it is necessary to vest sentencing discretion in the court so that appropriate sentence may be imposed by the court in the exercise of its judicial discretion, having regard to the peculiar facts and circumstances of a given case, or else the sentencing process would cease to be just and rational and justice would be sacrificed at the altar of blind uniformity. But at the same time, the sentencing discretion conferred upon the court cannot be altogether uncontrolled or unfettered. The stratagem which is therefore followed by the legislatures while creating and defining offences is to prescribe the maximum punishment and in some cases, even the minimum and leave it to the discretion of the court to decide upon the actual term of imprisonment. This cannot be regarded as arbitrary or unreasonable since the discretion that is left to the court is to choose an appropriate term of punishment between the limits laid down by the legislature, having regard to the distinctive features and the peculiar facts and circumstances of the case. The conferment of such sentencing discretion is plainly and indubitably essential for rendering individualised justice. But where the discretion granted to the court is to choose between life and death without any standards or guidelines provided by the legislature, the death penalty does become arbitrary and unreasonable. The death penalty is qualitatively different from a sentence of imprisonment. Whether a sentence of imprisonment is for two years or five years or for life, it is qualitatively the same, namely, a sentence of imprisonment, but the death penalty is totally different. It is irreversible; it is beyond recall or reparation; it extinguishes life. It is the choice between life and death which the court is required to make and this is left to its sole discretion unaided and unguided by any legislative yardstick to determine the choice. The only yardstick which may be said to have been provided by the legislature is that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded, but it is nowhere indicated by the legislature as to what should be regarded as 'special reasons' justifying imposition of death penalty. The awesome and fearful discretion whether to kill a man or to let him live is vested in the court and the court is called upon to exercise this discretion guided only by its own perception of what may be regarded as 'special reasons' without any light shed by the legislature. It is difficult to appreciate how a law which confers such unguided discretion on the court without any standards or guidelines on so vital an issue as the choice between life and death can be regarded as constitutionally valid. If I may quote the words of Harlan, J:

Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principles, not on ad hoc notions of what is right or wrong in a particular case.

There must be standards or principles to guide the court in making the choice between life and death and it cannot be left to the court to decide upon the choice on an ad hoc notion of what it conceives to be 'special reasons' in a particular case. That is exactly what we mean when we say that the government should be of laws and not of men and it makes no difference in the application of this principle, whether 'men 'belong to the administration or to the judiciary. It is a basic requirement of the equality clause

contained in Article 14 that the exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situate. Where unguided and unfettered discretion is conferred on any authority, whether it be the executive or the judiciary, it can be exercised arbitrarily or capriciously by such authority, because there would be no standards or principles provided by the legislature with reference to which the exercise of the discretion can be tested. Every form of arbitrariness, whether it be executive waywardness or judicial adhocism is anathema in our constitutional scheme. There can be no equal protection without equal principles in exercise of discretion. Therefore the equality clause of the Constitution obligates that whenever death sentence is imposed, it must be a principled sentence, a sentence based on some standard or principle and not arbitrary or indignant capital punishment. It has been said that 'a Judge undeterred by a text is a dangerous instrument' and I may well add that Judge power, uncanalised by clear principles, may be equally dangerous when the consequence of the exercise of discretion may result in the hanging of a human being. It is obvious that if judicial discretion is not guided by any standard or norms, it would degenerate into judicial caprice, which, as is evident from the foregoing discussion, has in fact happened and in such a situation, unregulated and unprincipled sentencing discretion in a highly sensitive area involving a question of life and death would clearly be arbitrary and hence violative of the equal protection clause contained in Article 14. It would also militate against Article 21 as interpreted in Maneka Gandhi's case (supra) because no procedure for depriving a person of his life can be regarded as reasonable, fair and just, if it vests uncontrolled and unregulated discretion in the court whether to award death sentence or to inflict only the punishment of life imprisonment. The need for well recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power not structured or guided by any standards or principles would fall foul of Article 21.

73. The respondents however contended that the absence of any standards or guidelines in the legislation did not affect the constitutional validity of the death penalty, since the sentencing discretion being vested in the court, standards or principles for regulating the exercise of such discretion could always be evolved by the court and the court could by a judicial fiat lay down standards or norms which would guide the Judge in exercising his discretion to award the death penalty. Now it is true that there are cases where the court lays down principles and standards for guidance in the exercise of the discretion conferred upon it by a statute, but that is done by the court only in those cases where the principles or standards are gatherable from the provisions of the statute. Where a statute confers discretion upon a court, the statute may lay down the broad standards or principles which should guide the court in the exercise of such discretion or such standards or principles may be discovered from the object and purpose of the statute, its underlying policy and the scheme of its provisions and some times, even from the surrounding circumstances. When the court lays down standards or principles which should guide it in the exercise of its discretion, the court does not evolve any new standards or principles of its own but merely discovers them from the statute. The

standards or principles laid down by the court in such a case are not standards or principles created or evolved by the court but they are standards or principles enunciated by the legislature in the statute and are merely discovered by the court as a matter of statutory interpretation. It is not legitimate for the court to create or evolve any standards or principles which are not found in the statute, because enunciation of such standards or principles is a legislative function which belongs to the legislative and not to the judicial department. Moreover, it is difficult to see how any standards or principles which would adequately guide the exercise of discretion in the matter of imposition of death penalty can be evolved by the court. Sarkaria, J. himself has lamented the impossibility of formulating standards or guidelines in this highly sensitive area and pointed out in the majority judgment:

...there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crime are only to be measured by the injury done to society. But the 20th Century sociologists do not wholly agree with this view. In (he opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of actor's culpability." But how is the degree of that culpability to be measured. Can any thermo meter be devised to measure its degree?
This passage from the majority judgment provides a most complete and conclusive answer to the contention of the respondents that the court may evolve its own standards or principles for guiding the exercise of its discretion. This is not a function which can be satisfactorily and adequately performed by the court more particularly when the judicial perception of what may be regarded as proper and relevant standards or guidelines is bound to vary from judge to judge having regard to his attitude and approach, his predilections and prejudices and his scale of values and social philosophy.

74. I am fortified in this view by the decision of the Supreme Court of the United States in Furman v. Georgia (supra). The question which was brought before the court for consideration in that case was whether the imposition and execution of death penalty constituted "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. The court, by a majority of five against four, held that the death penalty as then administered in the United States was unconstitutional, because it was being used in an arbitrary manner and such arbitrariness in capital punishment was a violation of the Eighth Amendment prohibition against "cruel and unusual punishment" which was made applicable to the States by the Fourteenth Amendment. Brennan J. and Marshall, J. took the view that the death penalty was per se unconstitutional as violative of the prohibition of the Eighth Amendment. Brennan, J. held that the death penalty constituted cruel and unusual punishment as it did not comport with human dignity and it was a denial of human dignity for a State arbitrarily to subject a person to an unusually severe punishment which society indicated

that it did not regard as acceptable and which could not be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Marshal], J. stated that the death penalty violated the Eighth Amendment because it was an excessive and unnecessary punishment and also because it was morally unacceptable to the people of the United States. The other three learned Judges namely, Douglas, J. Stewart, J. and White, J. did not subscribe to the view that the death penalty was per se unconstitutional in all circumstances but rested their judgment on the limited ground that the death penalty as applied in the United States was unconstitutional. Douglas J. argued that "we deal with a system of law and of justice that leaves' to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die dependent on the whim of one man or of twelve." Stewart, J. also voiced his concern about the unguided and unregulated discretion in the sentencing process and observed: "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." The remaining four Judges, namely, Burger, C.J. Blackmun, J. Powell, J. and Rehnquist J. took the opposite view and upheld the constitutional validity of the death penalty in its entirety. It will thus be seen that the view taken by the majority decision in this case was that a law which gives uncontrolled and unguided discretion to the Judge (or the jury) to choose arbitrarily between death sentence and life imprisonment for a capital offence violates the Eighth Amendment which inhibits cruel and unusual punishment. Now Sarkaria, J. speaking on behalf of the majority, has brushed aside this decision as inapplicable in India on the ground that we "do not have in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply the 'due process' clause" I am unable to agree with this reasoning put forward in the majority judgment. I have already pointed out that though there is no explicit provision in our Constitution prohibiting cruel and unusual punishment, this Court has in Francis Mullan's case (supra) held that immunity against torture or cruel and unusual punishment or treatment is implicit in Article 21 and therefore, if any punishment is cruel and unusual, it would be violative of basic human dignity which is guaranteed under Article 21. Moreover, in Maneka Gandhi's case (supra) this Court has by a process of judicial interpretation brought in the procedural due process clause of the American Constitution by reading in Article 21 the requirement that the procedure by which a person may be deprived of his life or personal liberty must be reasonable fair and just. Douglas, J. has also pointed out in Furman's case (supra) that "there is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishment A penalty...should be considered 'unusually' imposed, if it is administered arbitrarily or discriminatory" and thus brought in the equal protection clause for invalidating the death penalty. It is also significant to note that despite the absence of provisions like the American Due Process Clause and the Eighth Amendment, this Court speaking through Desai, J. said in Sunil Batra v. Delhi Administration MANU/SC/0184/1978: 1978CriLJ1741

Treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14....
Krishna Iyer, J. was more emphatic and he observed in the same case

True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper...and Maneka Gandhi...the consequence is the same. For what is punitively outrageous, scandalizing unusual or cruel or rehabilitatively counterproductive is unarguably unreasonable and arbitrary and is shot down by Article 15 and 19....
It should be clear from these observations in Sunil Batra's case to which Chandrachud, C.J. was also a party, that Sarkaria, J. speaking on behalf of the majority Judges, was in error in relying on the absence of the American due process clause and the Eighth Amendment for distinguishing the decision in Furman's case (supra) and upholding death penalty. The decision in Furman case cannot therefore be rejected as inapplicable in India. This decision clearly supports the view that where uncontrolled and unregulated discretion is conferred on the court without any standards or guidelines provided by the legislature, so as to permit arbitrary and uneven imposition of death penalty, it would be violative of both Articles 14 and 21.

75. It may be pointed out that subsequent to the decision in Furman's case (supra) and as a reaction to it the legislatures of several States in the United States passed statutes limiting or controlling the exercise of discretion by means of explicit standards to be followed in the sentencing process. These 'guided discretion' statutes provided standards typically in the form of specific aggravating and mitigating circumstances that must be taken into account before death sentence can be handed down. They also provided for separate phases of the trial to determine guilt and punishment and for automatic appellate review of death sentences. The constitutional validity of some of these 'guided discretion' statutes was challenged in Gregg v. Georgia (supra) and companion cases and the Supreme Court of the United States upheld these statutes on the ground that providing specific sentencing guidelines to be followed in a separate post conviction phase of the trial would free the sentencing decision of arbitrariness and discrimination. There is considerable doubt expressed by leading jurists in the United States in regard to the correctness of this decision, because in their view the guidelines provided by these statutes in the form of specific aggravating and/or mitigating circumstances are too broad and too vague to serve as an effective guide to discretion. In fact, while dealing with the challenge to the constitutional validity of a 'guided discretion' statute enacted by the Legislature of Massachusettes, the Supreme Court of Massachusettes by a majority held in District Attorney for the Suffolk District v. Watson Mass Adv. Sh. (1980) that the statute providing for imposition of death penalty was unconstitutional on the ground that it was violative of Article 26 of the Declaration of Rights of the Massachusettes Constitution which prohibits infliction of cruel or unusual punishment. Henneseey, C.J.

pointed out that in enacting 50 the impugned statute, the Legislature of Massachusettes had clearly attempted to follow the mandate of the Furman opinion and its progeny by promulgating a law of guided and channeled jury discretion, but even so it transgressed the prohibition of Article 26 of the Declaration of Rights of the State Constitution. The learned Chief Justice observed: "...it follows that we accept the wisdom of Furman that arbitrary and capricious infliction of death penalty is unconstitutional. However, we add that such arbitrariness and discrimination, which inevitably persists even under a statute which meets the demands of Furman, offends Article 26 of the Massachusettes Declaration of Rights." But we are not concerned here with the question as to whether the decision in Gregg's case represents the correct law or the decision of the Massachusettes Supreme Court in Watson's case. That controversy does not arise here because admittedly neither the Indian Penal Code nor any other provision of law sets out any aggravating or mitigating circumstance or any other considerations which must be taken into account in determining whether death sentence should be awarded or not. Here the sentencing discretion conferred upon the court is totally, uncontrolled and unregulated or if I may borrow an expression from Furman's decision, it is 'standard less' and 'unprincipled.'

76. It is true that there are certain safeguards provided in the CrPC, 1973 which are designed to obviate errors in the exercise of judicial discretion in the matter of imposition of death penalty. Section 235 Sub-section (2) bifurcates the trial by providing two hearings-one at the pre-conviction stage and another at pre sentence stage, so that at the second stage following upon conviction, the court can gather relevant information bearing on the question of punishment and decide, on the basis of such information, what would be the appropriate punishment to be imposed on the offender. Section 366 Sub-section (1) requires the court passing a sentence of death to submit the proceedings to the High Court and when such reference is made to the High Court for confirmation of the death sentence, the High Court may under Section 367 direct further inquiry to be made or additional evidence to be taken and under Section 368, confirm the sentence of death or pass any other sentence warranted by law or annul or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every reference so made, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such court consists of two or more judges, be made, passed and signed by at least two of them. Then there is also a provision in Section 369 which says that when the High Court on appeal reverses an order of acquittal and convicts the accused and sentences him to death, the accused shall have a right to appeal to the Supreme Court. Lastly there is an over-riding power conferred on the Supreme Court under Article 136 to grant, in its discretion, special leave to appeal to an accused who has been sentenced to death. These are undoubtedly some safeguards provided by the legislature, but in the absence of any standards or principles provided by the legislature to guide the exercise of the sentencing discretion and in view of the fragmented bench structure of the High Courts and the Supreme Court, these safeguards cannot be of any help in eliminating arbitrariness and freakishness in imposition of death penalty. Judicial ad hocism or way worldliness would continue to characterise the exercise of sentencing discretion whether

the Bench be of two judges of the High Court or of two or three judges of the Supreme Court and arbitrary and uneven incidence of death penalty would continue to affect is the sentencing process despite these procedural safeguards. The reason is that these safeguards are merely peripheral and do not attack the main problem which stems from lack of standards or principles to guide the exercise of the sentencing discretion. Stewart, J. pointed out in Gregg's case (supra), "...the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." The first requirement that there should be a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence is met by the enactment of Section 235 Sub-section (2), but the second requirement that the sentencing authority should be provided with standards to guide its use of the information is not satisfied and the imposition of death penalty under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC, 1973 must therefore be held to be arbitrary and capricious and hence violative of Articles 14 and 21.

77. There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death sentence has a certain class complexion or class bias inasmuch as it is largely the poor and the down trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows. Capital punishment, as pointed out by Warden Duffy is "a privilege of the poor." Justice Douglas also observed in a famous death penalty case "Former Attorney Ramsey Clark has said: 'it is the poor, the sick, the ignorant, the powerless and the hated who are executed'. "So also Governor Disalle of Ohio State speaking from his personal experience with the death penalty said:

During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless. There were other common denominators, low mental capacity, little or no education, few friends, broken homes-but the fact that they had no money was a principal factor in their being condemned to death....
The same point was stressed by Krishna Iyer, J. in Rajendra Prasad's case (supra) with his usual punch and vigour and in hard hitting language distinctive of his inimitable style:

Who, by and large, are the men whom the gallows swallow? The white-collar criminals and the corporate criminals whose wilful economic and environmental crimes inflict mass deaths or who hire assassins and murder by remote control? Rarely. With a few exceptions, they hardly fear the halter. The feuding villager, heady with country liquor, the striking workers desperate with defeat, the political dissenter and sacrificing liberator intent on changing the social order from satanic misrule, the waifs and strays whom

society has hardened by neglect into street toughs, or the poor householder husband or wife-driven by dire necessity or burst of tantrums it is this person who is the morning meal of the macabre executioner.

"Historically speaking, capital sentence perhaps has a class bias and colour bar, even as criminal law barks at both but bites the proletariat to defend the proprietary a reason which, incidentally, explains why corporate criminals including top executives whom by subtle processes, account for slow or sudden killing of large members by adulteration, smuggling, cornering, pollution and other invisible operations, are not on the wanted list and their offending operations which directly derive profit from mafia and white-collar crimes are not visited with death penalty, while relatively lesser delinquencies have, in statutory and forensic rhetoric, deserved 'the extreme penalty.

There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.

78. Before I part with this topic I may point out that the only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting en bane and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and therefore, from a practical point of view death penalty would be almost non existent. But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformative and rehabilitative therapy, he can never be reclaimed for the society, then he may be awarded death penalty. If this test is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands to-day.

79. This view taken by me in regard to the constitutional validity of the death penalty under Articles 14 and 21 renders it unnecessary for me to consider the challenge under Article 19 and I do not therefore propose to express any opinion on that question. But

since certain observations have been made in the majority judgment of Sarkaria, J. which seem to run counter to the decisions of this Court in R.C. Cooper v. Union of India MANU/SC/0011/1970: [1970]3SCR530 and Maneka Gandhi's case (supra), I am constrained to add a few words voicing my respectful dissent from those observations. Sarkaria, J. speaking on behalf of the majority judges has observed in the present case that the 'form and object test' or 'pith and substance rule' adopted by Kania, C.J. and Fazal Ali, J. in AK. Gopalan v. State of Madras (supra) is the same as the 'test of direct and inevitable effect' enunciated in R.C. Cooper's case and Maneka Gandhi's case and it has not been discarded or jettisoned by these two decisions. I cannot look with equipment on this attempt to resuscitate the obsolete 'form and object test' or 'pith and substance rule' which was evolved in A.K. Gopalan's case and which for a considerable number of years dwarfed the growth and development of fundamental rights and cut down their operational amplitude. This view proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters and where the requirement of an Article dealing with a particular matter in question is satisfied and there is no infringement of the fundamental right guaranteed by that Article, no recourse can be had to a fundamental right conferred by another Article and furthermore, in order to determine which is the fundamental right violated, the court must consider the pith and substance of the legislation and ask the question: what is the object of the legislature in enacting the legislation; what is the subject matter of the legislation and to which fundamental right does it relate. But this doctrine of exclusivity of fundamental rights was clearly and unequivocally over-ruled in R.C. Cooper's case by a majority of the Full Court, Ray, J. alone dissenting and so was the 'object and form test' or 'pith and substance rule' laid down in A.K. Gopalan's case. Shah, J. speaking on behalf of the majority Judges said in R.C. Cooper's case (supra)-

--it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.

We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme--.

In our judgment, the assumption in A.K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State

action alone need be considered and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.

This view taken in RC Cooper's case has since then been consistently followed in several decisions of which I may mention only a few, namely, Shambhu Nath Sarkar v. State of West Bengal MANU/SC/0537/1972: [1973]1SCR856 Haradan Saha v. State of West Bengal MANU/SC/0419/1974: 1974CriLJ1479 Khudham Das v. State of West Bengal MANU/SC/0423/1974: [1975]2SCR832 and Maneka Gandhi's case (supra). I cannot therefore assent to the proposition in the majority judgment that RC Cooper's case and Maneka Gandhi's case have not given a complete go by to the test of direct and indirect effect, some times described as 'form and object test' or 'pith and substance rule' evolved by Kania, CJ. and Fazal Ali, J. in A.K. Gopalan's case and that the 'pith and substance rule' still remains a valid rule for resolving the question of the constitutionality of a law assailed on the ground of its being violative of a fundamental right. Nor can I agree with the majority judgment when it says that it is Article 21 which deals with the right to life and not Article 19 and Section 302 of the Indian Penal Code is therefore not required to be tested on the touchstone of any one or more of the clauses of Article 19. This approach of the majority judgment not only runs counter to the decision in R.C. Cooper's case and other subsequent decisions of this Court including Maneka Gandhi's case but is also fraught with grave danger inasmuch as it seeks to put the clock back and reverse the direction in which the law is moving towards realisation of the full potential of fundamental rights as laid down in R.C. Cooper's case and Maneka Gandhi's case. It is significant to note that the doctrine of exclusivity enunciated in A.K. Gopalan's case led to the property rights under Article 19(1)(f) and 31 being treated as distinct and different rights traversing separate grounds, but this view was over-turned in Kochune's case MANU/SC/0019/1960: [1960]3SCR887 where this Court by a majority held that a law seeking to deprive a person of his property under Article 31 must be a valid law and it must therefore meet the challenge of other fundamental rights including Article 19(1)(f). this Court overruled the proposition laid down in State of Bombay v. Bhanji Munji MANU/SC/0034/1954: [1955]1SCR777 that Article 19(1)(f) read with Clause (5) postulates the existence of property which can be enjoyed and there fore if the owner is deprived of his property by a valid law under Article 31, there can be no question of exercising any rights' under Article 19(1)(f) in respect of such property. The court ruled that even if a law seeks to deprive a person of his property under Article 31, it must still, in order to be valid, satisfy the requirement of Article 19(1)(f) read with Clause (5). If this be the true position in regard to the inter-relation between Article 19(1)(f) and Article 31, it is difficult to see why a law authorising deprivation of the right to life under Article 21 should not have to meet the test of other fundamental rights including those set out in the different clauses of Article 19. But even if Section 302 in so far as it provides for imposition of death penalty as alternative punishment has to meet the challenge of Article 19, the question would still remain whether the 'direct and inevitable consequence' of that provision is to affect any of the rights guaranteed under that Article. That is a question on which I do not wish to express any definite opinion. It is sufficient for me to state that

the 'object and form test' or the 'pith and substance rule' has been completely discarded by (he decisions in RC Cooper's case and Maneka Gandhi's case and it is now settled law that in order to locate the fundamental right violated by a statute, the court must consider what is the direct and inevitable consequence of the statute. The impugned statute may in its direct and inevitable effect invade more than one fundamental right and merely because it satisfies the requirement of one fundamental right, it is not freed from the obligation to meet the challenge of another applicable Fundamental right.

80. These are the reasons for which I made my order dated May 9, 1980 declaring the death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the CrPC, 1973 as unconstitutional and void as being violative of Articles 14 and 21. I must express my profound regret at the long delay in delivering this judgment but the reason is that there was a considerable mass of material which had to collected from various sources and then examined and analysed and this took a large amount of time.

MANU/SC/0147/1961

Back to Section 304 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 195 of 1960

Decided On: 24.11.1961

K.M. Nanavati vs. State of Maharashtra

Hon'ble Judges/Coram:
K. Subba Rao, Raghubar Dayal and S.K. Das, JJ.

JUDGMENT
K. Subba Rao, J.

1. This appeal by special leave arises out of the judgment of the Bombay High Court sentencing Nanavati, the appellant, to life imprisonment for the murder of Prem Bhagwandas Ahuja, a businessman of Bombay.

2. This appeal presents the commonplace problem of an alleged murder by an enraged husband of a paramour of his wife: but it aroused considerable interest in the public mind by reason of the publication it received and the important constitutional point it had given rise to at the time of its admission.

3. The appellant was charged under s. 302 as well as under s. 304, Part I, of the Indian Penal Code and was tried by the Sessions Judge, Greater Bombay, with the aid of special jury. The jury brought in a verdict of "not guilty" by 8: 1 under both the sections; but the Sessions Judge did not agree with the verdict of the jury, as in his view the majority verdict of the jury was such that no reasonable body of men could, having regard to the evidence, bring in such a verdict. The learned Sessions Judge submitted the case under s. 307 of the Code of Criminal Procedure to the Bombay High Court after recording the grounds for his opinion. The said reference was heard by a division bench of the said High Court consisting of Shelat and Naik, JJ. The two learned Judges gave separate judgments, but agreed in holding that the accused was guilty of the offence of murder under s. 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life. Shelat, J., having held that there were misdirections to the jury, reviewed the entire evidence and came to the conclusion that the accused was clearly guilty of the offence of murder, alternatively, he expressed the view that the verdict of the jury was perverse, unreasonable and, in any event, contrary to the weight of evidence. Naik, J., preferred to base his conclusion on the alternative ground, namely, that no reasonable body of persons could have come to the conclusion arrived at by the jury. Both the learned Judges agreed that no case had been made out to reduce the offence from

murder to culpable homicide not amounting to murder. The present appeal has been preferred against the said conviction and sentence.

4. The case of the prosecution may be stated thus: This accused, at the time of the alleged murder, was second in command of the Indian Naval Ship "Mysore". He married Sylvia in 1949 in the registry office at Portsmouth, England. They have three children by the marriage, a boy aged 9 1/2 years a girl aged 5 1/2 years and another boy aged 3 years. Since the time of marriage, the couple were living at different places having regard to the exigencies of service of Nanavati. Finally, they shifted to Bombay. In the same city the deceased Ahuja was doing business in automobiles and was residing, along with his sister, in a building called "Shreyas" till 1957 and thereafter in another building called "Jivan Jyot" in Setalvad Road. In the year 1956, Agniks, who were common friends of Nanavatis and Ahujas, introduced Ahuja and his sister to Nanavatis. Ahuja was unmarried and was about 34 years of age at the time of his death, Nanavati, as a Naval Officer, was frequently going away from Bombay in his ship, leaving his wife and children in Bombay. Gradually, friendship developed between Ahuja and Sylvia, which culminated in illicit intimacy between them. On April 27, 1959, Sylvia confessed to Nanavati of her illicit intimacy with Ahuja. Enraged at the conduct of Ahuja, Nanavati went to his ship, took from the stores of the ship a semi-automatic revolver and six cartridges on a false pretext, loaded the same, went to the flat of Ahuja entered his bed-room and shot him dead. Thereafter, the accused surrendered himself to the police. He was put under arrest and in due course he was committed to the Sessions for facing a charge under s. 302 of the Indian Penal code.

5. The defence version, as disclosed in the statement made by the accused before the Sessions Court under s. 342 of the Code of Criminal Procedure and his deposition in the said Court, may be briefly stated: The accused was away with his ship from April 6, 1959, to April 18, 1959. Immediately after returning to Bombay, he and his wife went to Ahmednagar for about three days in the company of his younger brother and his wife. Thereafter, they returned to Bombay and after a few days his brother and his wife left them. After they had left, the accused noticed that his wife was behaving strangely and was not responsive or affectionate to him. When questioned, she used to evade the issue. At noon on April 27, 1959, when they were sitting in the sitting-room for the lunch to be served, the accused put his arm round his wife affectionately, when she seemed to go tense and unresponsive. After lunch, when he questioned her about her fidelity, she shook her head to indicate that she was unfaithful to him. He guessed that her paramour was Ahuja. As she did not even indicate clearly whether Ahuja would marry her and look after the children, he decided to settle the matter with him. Sylvia pleaded with him not go to Ahuja's house, as he might shoot him. Thereafter, he drove his wife, two of his children and a neighbour's child in his car to a cinema, dropped them there and promised to come and pick them up at 6 P.M. when the show ended. He then drove his car to his ship, as he wanted to get medicine for his sick dog, he represented to the authorities in the ship, that he wanted to draw a revolver and six rounds from the stores of the ship as

he was going to drive alone to Ahmednagar by night, though the real purpose was to shoot himself. On receiving the revolver and six cartridges, and put it inside a brown envelope. Then he drove his car to Ahuja's office, and not finding him there, he drove to Ahuja's flat, range the door bell, and, when it was opened by a servant, walked to Ahuja's bed-room, went into the bed-room and shut the door behind him. He also carried with him the envelope containing the revolver. The accused saw the deceased inside the bed-room, called him a filthy swine and asked him whether he would marry Sylvia and look after the children. The deceased retorted, "Am I to marry every woman I sleep with?" The accused became enraged, put the envelope containing the revolver on a cabnit nearby, and threatened to thrash the deceased. The deceased made a sudden move to grasp at the envelope, when the accused whipped out his revolver and told him to get back. A struggle ensued between the two and during that struggle two shots went off accidentally and hit Ahuja resulting in his death. After the shooting the accused went back to his car and drove it to the police station where he surrendered himself. This is broadly, omitting the details, the case of the defence.

6. It would be convenient to dispose of at the outset the questions of law raised in this case.

7. Mr. G. S. Pathak, learned counsel for the accused, raised before us the following points: (1) Under s. 307 of the Code of Criminal Procedure, the High Court should decide whether a reference made by a Sessions Judge was competent only on a perusal of the order of reference made to it and it had no jurisdiction to consider the evidence and come to a conclusion whether the reference was competent or not. (2) Under s. 307(3) of the said Code, the High Court had no power to set aside the verdict of a jury on the ground that there were misdirections in the charge made by the Sessions Judge. (3) There were no misdirections at all in the charge made by the Sessions Judge; and indeed his charge was fair to the prosecution as well to the accused. (4) The verdict of the jury was not perverse and it was such that a reasonable body of persons could arrive at it on the evidence placed before them. (5) In any view, the accused shot at the deceased under grave and sudden provocation, and therefore even if he had committed an offence, it would not be murder but only culpable homicide not amounting to murder.

8. Mr. Pathak elaborates his point under the first heading thus: Under s. 307 of the Code of Criminal Procedure, the High Court deals with the reference in two stages. In the first stage, the High Court has to consider, on the basis of the referring order, whether a reasonable body of persons could not have reached the conclusion arrived at by the jury; and, if it is of the view that such a body could have come to that opinion the reference shall be rejected as incompetent. At this stage, the High Court cannot travel beyond the order of reference, but shall confine itself only to the reasons given by the Sessions Judge. If, on a consideration of the said reasons, it is of the view that no reasonable body of persons could have come to that conclusion, it will then have to consider the entire evidence to ascertain whether the verdict of the jury is unreasonable. If the High Court

holds that the verdict of the jury is not unreasonable, in the case of a verdict of "not guilty", the High Court acquits the accused, and in the case where the verdict is one of "guilty" it convicts the accused. In case the High Court holds that the verdict of "not guilty", is unreasonable, it refers back the case to the Sessions Judge, who convicts the accused; thereafter the accused will have a right of appeal wherein he can attack the validity of his conviction on the ground that there were misdirections in the charge of the jury. So too, in the case of a verdict of "guilty" by the jury, the High Court, if it holds that the verdict is unreasonable, remits the matter to the Sessions Judge, who acquits the accused, and the State, in an appeal against that acquittal, may question the correctness of the said acquittal on the ground that the charge to the jury was vitiated by misdirections. In short, the argument may be put in three propositions, namely, (i) the High Court rejects the reference as incompetent, if on the face of the reference the verdict of the jury does not appear to be unreasonable, (ii) if the reference is competent, the High Court can consider the evidence to come to a definite conclusion whether the verdict is unreasonable or not, and (iii) the High Court has no power under s. 307 of the Code of Criminal Procedure to set aside the verdict of the jury on the ground that it is vitiated by misdirections in the charge to the jury.

9. The question raised turns upon the construction of the relevant provisions of the Code of Criminal Procedure. The said Code contains two fascicule of sections dealing with two different situations. Under s. 268 of the Code, "All trials before a Court of Session shall be either by jury, or by the Judge himself." Under s. 297 thereof:

"In cases tried by jury, when the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided....."
10. Section 298 among other imposes a duty on a judge to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to be proved, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and to decide upon all matters of fact which it is necessary to prove in order to enable evidence of particular matter to be given. It is the duty of the jury "to decide which view of the facts is true and then to return the verdict which under such view ought, according to the directions of the Judges, to be returned." After charge to the jury, the jury retire to consider their verdict and, after due consideration, the foreman of the jury informs the Judge what is their verdict or what is the verdict of the majority of the jurors.

11. Where the Judge does not think it necessary to disagree with the verdict of the jurors or of the majority of them, he gives judgment accordingly. If the accused is acquitted, the Judge shall record a verdict of acquittal; if the accused is convicted, the Judge shall pass sentence on him according to law. In the case of conviction, there is a right of appeal

under s. 410 of the Code, and in a case of acquittal, under s. 417 of the Code, to the High Court. But s. 418 of the Code provides:

"(1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only."
12. Sub-section (2) thereof provides for a case of a person sentenced to death, with which we are not now concerned. Section 423 confers certain powers on an appellate Court in the matter of disposing of an appeal, such as calling for the record, hearing of the pleaders, and passing appropriate orders therein. But sub-s. (2) of s. 423 says:

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owning to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."
13. It may be noticed at this stage, as it will be relevant in considering one of the arguments raised in this case, that sub-s. (2) does not confer any power on an appellate court, but only saves the limitation on the jurisdiction of an appellate court imposed under s. 418 of the Code. It is, therefore, clear that in an appeal against conviction or acquittal in a jury trial, the said appeal is confined only to a matter of law.

14. The Code of Criminal Procedure also provides for a different situation. The Sessions Judge may not agree with the verdict of the jurors or the majority of them; and in that event s. 307 provides for a machinery to meet that situation. As the argument mainly turns upon the interpretation of the provisions of this section, it will be convenient to read the relevant clauses thereof.

15. Section 307: (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

16. (3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

17. This section is a clear departure from the English law. There are good reasons for its enactment. Trial by jury outside the Presidency Towns was first introduced in the Code

of Criminal Procedure of 1861, and the verdict of the jury was, subject to re-trial on certain events, final and conclusive. This led to miscarriage of justice through jurors returning erroneous verdicts due to ignorance and inexperience. The working of the system was reviewed in 1872, by a Committee appointed for that purpose and on the basis of the report of the said Committee, s. 262 was introduced in the Code of 1872. Under that section, where there was difference of view between the jurors and the judge, the Judge was empowered to refer the case to the High Court in the ends of justice, and the High Court dealt with the matter as an appeal. But in 1882 the section was amended and under the amended section the condition for reference was that the High Court should differ from the jury completely; but in the Code of 1893 the section was amended practically in terms as it now appears in the Code. The history of the legislation shows that the section was intended as a safeguard against erroneous verdicts of inexperienced jurors and also indicates the clear intention of the Legislature to confer on a High Court a separate jurisdiction, which for convenience may be described as "reference jurisdiction". Section 307 of the Code of Criminal Procedure, while continuing the benefits of the jury system to persons tride by a Court of Session, also guards against any possible injustice, having regard to the conditions obtaining in India. It is, therefore clear that there is an essential difference between the scope of the jurisdiction of the High Court in disposing of an appeal against a conviction or acquittal, as the case may be, in a jury trial, and that in a case submitted by the Sessions Judge when he differs from the verdict of the jury: in the former the acceptance of the verdict of the jury by the Sessions Judge is considered to be sufficient guarantee against its perversity and therefore an appeal is provided only on questions of law, whereas in the latter the absence of such agreement necessitated the conferment of a larger power on the High Court in the matter of interfering with the verdict of the jury.

18. Under s. 307(1) of the Code, the obligation cast upon the Sessions Judge to submit the case to the High Court is made subject to two conditions, namely, (1) the Judge shall disagree with the verdict of the jurors, and (2) he is clearly of the opinion that it is necessary in the ends of justice to submit the case to the High Court. If the two conditions are complied with, he shall submit the case, recording the grounds of his opinion. The words "for the ends of justice" are comprehensive, and coupled with the words "is clearly of opinion", they give the Judge a discretion to enable him to exercise his power under different situations, the only criterion being his clear opinion that the reference is in the ends of justice. But the Judicial Committee, in Ramanugrah Singh v. King Emperor (1946) L.R. 173, IndAp 174, construed the words "necessary for the ends of justice" and laid down that the words mean that the Judge shall be of the opinion that the verdict of the jury is one which no reasonable body of men could have reached on the evidence. Having regard to that interpretation, it may be held that the second condition for reference is that the Judge shall be clearly of the opinion that the verdict is one which no reasonable body of men could have reached on the evidence. It follows that if a Judge differs from the jury and is clearly of such an opinion, he shall submit the case to the High Court recording the grounds of his opinion. In that event, the said reference is clearly competent. If on the

other hand, the case submitted to the High Court does not ex facie show that the said two conditions have been complied with by the Judge, it is incompetent. The question of competency of the reference does not depend upon the question whether the Judge is justified in differing from the jury or forming such an opinion on the verdict of the jury. The argument that though the Sessions Judge has complied with the conditions necessary for making a reference, the High Court shall reject the reference as incompetent without going into the evidence if the reasons given do not sustain the view expressed by the Sessions Judge, is not supported by the provisions of sub-s. (1) of s. 307 of the Code. But it is said that it is borne out of the decision of the Judicial Committee in Ramanugrah Singh's case [(1946) L.R. 73, I.A. 174, 182, 186]. In that case the Judicial Committee relied upon the words "ends of justice" and held that the verdict was one which no reasonable body of men could have reached on the evidence and further laid down that the requirements of the ends of justice must be the determining factor both for the Sessions Judge in making the reference and for the High Court in disposing of it. The Judicial Committee observed:

"In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that on the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded."
19. The Judicial Committee proceeded to state:

"In their Lordships' opinion had the High Court approached the reference on the right lines and given due weight to the opinion of the jury they would have been bound to hold that the reference was not justified and that the ends of justice did not require any interference with the verdict of the jury."
20. Emphasis is laid on the word "justified", and it is argued that the High Court should reject the reference as incompetent if the reasons given by the Sessions Judge in the statement of case do not support his view that it is necessary in the ends of the justice to refer the case to the High Court. The Judicial Committee does not lay down any such proposition. There, the jury brought in a verdict of not "guilty" under s. 302, Indian Penal Code. The Sessions Judge differed from the jury and made a reference to the High Court. The High Court accepted the reference and convicted the accused and sentenced him to transportation for life. The Judicial Committee held, on the facts of that case, that the High Court was not justified in the ends of justice to interfere with the verdict of the jury. They were not dealing with the question of competency of a reference but only with that of the justification of the Sessions Judge in making the reference, and the High Court in accepting it. It was also not considering a case of any disposal of the reference by the High Court on the basis of the reasons given in the reference, but were dealing with a case

where the High Court on a consideration of the entire evidence accepted the reference and the Judicial Committee held on the evidence that there was no justification for the ends of justice to accept it. This decision, therefore, has no bearing on the competency of a reference under s. 307(1) of the Code of Criminal Procedure.

21. Now, coming to sub-s. (3) of s. 307 of the Code, it is in two parts. The first part says that the High Court may exercise any of the powers which it may exercise in an appeal. Under the second part, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, the High Court shall acquit or convict the accused. These parts are combined by the expression "and subject thereto". The words "subject thereto" were added to the section by an amendment in 1896. This expression gave rise to conflict of opinion and it is conceded that it lacks clarity. That may be due to the fact that piecemeal amendments have been made to the section from time to time to meet certain difficulties. But we cannot ignore the expression, but we must give it a reasonable construction consistent with the intention of the Legislature in enacting the said section. Under the second part of the section, special jurisdiction to decide a case referred to it is conferred on the High Court. It also defines the scope of its jurisdiction and its limitations. The High Court can acquit or convict an accused of an offence of which the jury could have convicted him, and also pass such sentence as might have been passed by the Court of Session. But before doing so, it shall consider the entire evidence and give due weight to the opinions of the Sessions Judge and the jury. The second part does not confer on the High Court any incidental procedural powers necessary to exercise the said jurisdiction in a case submitted to it, for it is neither an appeal nor a revision. The procedural powers are conferred on the High Court under the first part. The first part enables the High Court to exercise any of the powers which it may exercise in appeal, for without such powers it cannot exercise its jurisdiction effectively. But the expression "subject to" indicates that in exercise of its jurisdiction in the manner indicated by the second part, it can call in aid only any of the powers of an appellate court, but cannot invoke a power other than that conferred on an appellate court. The limitation on the second part implied in the expression "subject thereto" must be confined to the area of the procedural powers conferred on a appellate court. If that be the construction, the question arises, how to reconcile the provisions of s. 423(2) with those of s. 307 of the Code? Under sub-s. (2) of s. 423:

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."
22. It may be argued that, as an appellate court cannot alter or reverse the verdict of a jury unless such a verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him, the High Court, in exercise of its jurisdiction under s. 307 of the Code, likewise could not do so except for the said reasons. Sub-section (2) of s. 423 of the Code does not confer any power of the High Court; it only restates the scope of the limited jurisdiction conferred on the court

under s. 418 of the Code, and that could not have any application to the special jurisdiction conferred on the High Court under s. 307. That apart, a perusal of the provisions of s. 423(1) indicates that there are powers conferred on an appellate court which cannot possibly be exercised by courts disposing of a reference under s. 307 of the Code, namely, the power to order commitment etc. Further s. 423(1)(a) and (b) speak of conviction, acquittal, finding and sentence, which are wholly inappropriate to verdict of a jury. Therefore, a reasonable construction will be that the High Court can exercise any of the powers conferred on an appellate court under s. 423 or under other sections of the Code which are appropriate to the disposal of a reference under s. 307. The object is to prevent miscarriage of the justice by the jurors returning erroneous or perverse verdict. The opposite construction defeats this purpose, for it equates the jurisdiction conferred under s. 307 with that of an appellate court in a jury trial. That construction would enable the High Court to correct an erroneous verdict of a jury only in a case of misdirection by the Judge but not in a case of fair and good charge. This result effaces the distinction between the two types of jurisdiction. Indeed, learned counsel for the appellant has taken a contrary position. He would say that the High Court under s. 307(3) could not interfere with the verdict of the jury on the ground that there were misdirections in the charge to the jury. This argument is built upon the hypothesis that under the Code of Criminal Procedure there is a clear demarcation of the functions of the jury and the Judge, the jury dealing with facts and the Judge with law, and therefore the High Court could set aside a verdict on the ground of misdirection only when an appeal comes to it under s. 418 and could only interfere with the verdict of the jury for the ends of justice, as interpreted by the Privy Council, when the matter comes to it under s. 307(3). If this interpretation be accepted, we would be attributing to the Legislature an intention to introduce a circuitous method and confusion in the disposal of criminal cases. The following illustration will demonstrate the illogical result of the argument. The jury brings in a verdict of "guilty" on the basis of a charge replete with misdirections; the Judge disagrees with that verdict and states the case to the High Court; the High Court holds that the said verdict is not erroneous on the basis of the charge, but is of the opinion that the verdict is erroneous because of the misdirections in the charge; even so, it shall hold that the verdict of the jury is good and reject the reference thereafter, the Judge has to accept the verdict and acquit the accused; the prosecution then will have to prefer an appeal under s. 417 of the Code on the ground that the verdict was induced by the misdirections in the charge. This could not have been the intention of the Legislature. Take the converse case. On similar facts, the jury brings in a verdict of "guilty"; the Judge disagrees with the jury and makes a reference to the High Court; even though it finds misdirections in the charge to the jury, the High Court cannot set aside the conviction but must reject the reference; and after the conviction, the accused may prefer an appeal to the High Court. This procedure will introduce confusion in jury trials, introduce multiplicity of proceedings, and attribute ineptitude to the Legislature. What is more, this construction is not supported by the express provisions of s. 307(3) of the Code. The said sub-section enables the High Court to consider the entire evidence, to give due weight to the opinions of the Sessions Judge and the jury, and to acquit or convict the accused. The key words in the sub-section are

"giving due weight to the opinions of the Sessions Judge and the jury". The High Court shall give weight to the verdict of the jury; but the weight to be given to a verdict depends upon many circumstances - it may be one that no reasonable body of persons could come to; it may be a perverse verdict; it may be a divided verdict and may not carry the same weight as the united one does; it may be vitiated by misdirections or non-directions. How can a Judge give any weight to a verdict if it is induced and vitiated by grave misdirections in the charge? That apart, the High Court has to give due weight to the opinion of the Sessions Judge. The reasons for the opinion of the Sessions Judge are disclosed in the case submitted by him to the High Court. If the case stated by the Sessions Judge discloses that there must have been misdirections in the charge, how can the High Court ignore them in giving due weight to his opinion? What is more, the jurisdiction of the High Court is couched in very wide terms in sub-s. (3) of s. 307 of the Code: it can acquit or convict an accused. It shall take into consideration the entire evidence in the case; it shall give due weight to the opinions of the Judge and the jury; it combines in itself the functions of the Judge and jury; and it is entitled to come to its independent opinion. Tee phraseology used does not admit of an expressed or implied limitation on the jurisdiction of the High Court.

23. It appears to us that the Legislature designedly conferred a larger power on the High Court under s. 307(3) of the Code than that conferred under s. 418 thereof, as in the former case the Sessions Judge differs from the jury while in the latter he agrees with the jury.

24. The decisions cited at the Bar do not in any way sustain in narrow construction sought to be placed by learned counsel on s. 307 of the Code. In Ramanugrah Singh's case [(1945-46) L.R. 73 I.A. 174, 182], which has been referred to earlier, the Judicial Committee described the wide amplitude of the power of the High Court in the following terms:

"The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and jury, and then acquit or convict the accused."
25. The Judicial Committee took care to observe:

".....the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably."
26. This passage indicates that the Judicial Committee did not purport to lay down exhaustively the circumstances under which the High Court could interfere under the said sub-section with the verdict of the jury. This Court in Akhlakali Hayatalli v. The State of Bombay MANU/SC/0137/1953: 1954CriLJ451 accepted the view of the Judicial Committee on the construction of s. 307 of the Code of Criminal Procedure, and applied it to the facts of that case. But the following passage of this Court indicates that it also

does not consider the test of reasonableness as the only guide in interfering with the verdict of the jury:

"The charge was not attacked before the High Court nor before us as containing any misdirections or non-directions to the jury such as to vitiate the verdict."

27. This passage recognizes the possibility of interference by the High Court with the verdict of the jury under the said sub-section if the verdict is vitiated by misdirections or non-directions. So too, the decision of this Court in Ratan Rai v. State of Bihar [1957] S.C.R. 273 assumes that such an interference is permissible if the verdict of the jury was vitiated by misdirections. In that case, the appellants were charged under Sections 435 and 436 of the Indian Penal Code and were tried by a jury, who returned a majority verdict of "guilty". The Assistant Sessions Judge disagreed with the said verdict and made a reference to the High Court. At the hearing of the reference the counsel for the appellants contended that the charge to the jury was defective, and did not place the entire evidence before the Judges. The learned Judges of the High Court considered the objections as such and nothing more, and found the appellants guilty and convicted them. This Court, observing that it was incumbent on the High Court to consider the entire evidence and the charge as framed and placed before the jury and to come to its own conclusion whether the evidence was such that could properly support the verdict of guilty against the appellants, allowed the appeal and remanded the matter to the High Court for disposal in accordance with the provisions of s. 307 of the Code of Criminal Procedure. This decision also assumes that a High Court could under s. 307(3) of the Code of Criminal Procedure interfere with the verdict of the jury, if there are misdirections in the charge and holds that in such a case it is incumbent on the court to consider the entire evidence and to come to its own conclusion, after giving due weight to the opinions of the Sessions Judge, and the verdict of the jury. This Court again in Sashi Mohan Debnath v. The State of West Bengal [1958] S.C.R. 960, held that where the Sessions Judge disagreed with the verdict of the jury and was of the opinion that the case should be submitted to the High Court, he should submit the whole case and not a part of it. There, the jury returned a verdict of "guilty" in respect of some charges and "not guilty" in respect of others. But the Sessions Judge recorded his judgment of acquittal in respect of the latter charges in agreement with the jury and referred the case to the High Court only in respect of the former. This Court held that the said procedure violated sub-s. (2) of s. 307 of the Code of Criminal Procedure and also had the effect of preventing the High Court from considering the entire evidence against the accused and exercising its jurisdiction under sub-s. (3) of s. 307 of the said Code. Imam, J., observed that the reference in that case was incompetent and that the High Court could not proceed to exercise any of the powers conferred upon it under sub-s. (3) of s. 307 of the Code, because the very foundation of the exercise of that power was lacking, the reference being incompetent. This Court held that the reference was incompetent because the Sessions Judge contravened the express provisions of sub-s. (2) of s. 307 of the Code, for under that sub-section whenever a Judge submits a case under that section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has

been tried, but he may either remand such accused to custody or admit him to bail. As in that case the reference was made in contravention of the express provisions of sub-s. (2) of s. 307 of the Code and therefore the use of the word 'incompetent' may not be inappropriate. The decision of a division bench of the Patna High Court in Emperor v. Ramadhar Kurmi A.I.R. 1948 Pat. 79 may usefully be referred to as it throws some light on the question whether the High Court can interfere with the verdict of the jury when it is vitiated by serious misdirections and non-directions. Das, J., observed:

"Where, however, there is misdirection, the principle embodied in s. 537 would apply and if the verdict is erroneous owing to the misdirection, it can have no weight on a reference under s. 307 as on an appeal."

28. It is not necessary to multiply decisions. The foregoing discussion may be summarized in the form of the following propositions: (1) The competency of a reference made by a Sessions Judge depends upon the existence of two conditions, namely, (i) that he disagrees with the verdict of the jurors, and (ii) that he is clearly of the opinion that the verdict is one which no reasonable body of men could have reached on the evidence, after reaching that opinion, in the case submitted by him he shall record the grounds of his opinion. (2) If the case submitted shows that the conditions have not been complied with or that the reasons for the opinion are not recorded, the High Court may reject the reference as incompetent: the High Court can also reject it if the Sessions Judge has contravened sub-s. (2) of s. 307. (3) If the case submitted shows that the Sessions Judge has disagreed with the verdict of the jury and that he is clearly of the opinion that no reasonable body of men could have reached the conclusion arrived at by the jury, and he discloses his reasons for the opinion, sub-s. (3) of s. 307 of the Code comes into play, and thereafter the High Court has an obligation to discharge its duty imposed thereunder. (4) Under sub-s. (3) of s. 307 of the Code, the High Court has to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused. (5) The High Court may deal with the reference in two ways, namely, (i) if there are misdirections vitiating the verdict, it may, after going into the entire evidence, disregard the verdict of the jury and come to its own conclusion, and (ii) even if there are no misdirections, the High Court can interfere with the verdict of the jury if it finds the verdict "perverse in the sense of being unreasonable", "manifestly wrong", or "against the weight of evidence", or, in other words, if the verdict is such that no reasonable body of men could have reached on the evidence. (6) In the disposal of the said reference, the High Court can exercise any of the procedural powers appropriate to the occasion, such as, issuing of notice, calling for records, remanding the case, ordering a retrial, etc. We therefore, reject the first contention of learned counsel for the appellant.

29. The next question is whether the High Court was right in holding that there were misdirections in the charge to the jury. Misdirection is something which a judge in his charge tells the jury and is wrong or in a wrong manner tending to mislead them. Even an omission to mention matters which are essential to the prosecution or the defence case in order to help the jury to come to a correct verdict may also in certain circumstances

amount to a misdirection. But, in either case, every misdirection or non-direction is not in itself sufficient to set aside a verdict, but it must be such that it has occasioned a failure of justice.

30. In Mushtak Hussein v. The State of Bombay MANU/SC/0026/1953: [1953]4SCR809, this Court laid down:

"Unless therefore it is established in a case that there has been a serious misdirection by the judge in charging the jury which has occasioned a failure of justice and has misled the jury in giving its verdict, the verdict of the jury cannot be set aside."
31. This view has been restated by this Court in a recent decision, viz., Smt. Nagindra Bala Mitra v. Sunil Chandra Roy MANU/SC/0074/1960: 1960CriLJ1020.

32. The High Court in its judgment referred to as many as six misdirections in the charge to the jury which in its view vitiated the verdict, and it also stated that there were many others. Learned counsel for the appellant had taken each of the said alleged misdirections and attempted to demonstrate that they were either no misdirections at all, or even if they were, they did not in any way affect the correctness of the verdict.

33. We shall now take the first and the third misdirections pointed out by Shelat, J., as they are intimately connected with each other. They are really omissions. The first omission is that throughout the entire charge there is no reference to s. 105 of the Evidence Act or to the statutory presumption laid down in that section. The second omission is that the Sessions Judge failed to explain to the jury the legal ingredients of s. 80 of the Indian Penal code, and also failed to direct them that in law the said section was not applicable to the facts of the case. To appreciate the scope of the alleged omissions, it is necessary to read the relevant provisions.

34. Section 80 of the Indian Penal Code.

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. "
35. Evidence Act.

36. Section 103: "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. "

37. Section 105: "When 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 (XLV of 1860) 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. "

38. Section 3: "In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

39. 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.

40. Section 4:..... "Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

41. The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, s. 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved.

An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in s. 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of circumstances bringing the case within the provisions of s. 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged: that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under s. 105 of the Evidence Act is more

imaginary than real. Indeed, there is no conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (see Sections 4 and 5 of the Prevention of Corruption Act). (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients: (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence: (see s. 80 of the Indian Penal Code). In the first case the burden of proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the exception lies on the accused. In the third case, though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of s. 300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a presumption is drawn under s. 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in s. 80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of s. 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of s. 300, Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder. In that event though the accused failed to bring his case within the terms of s. 80 of the Indian Penal Code, the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.

42. The English decisions relied upon by Mr. Pathak, learned counsel for the accused, may not be of much help in construing the provisions of s. 105 of the Indian Evidence Act. We would, therefore, prefer not to refer to them, except to one of the leading decisions on the subject, namely, Woolmington v. The Director of Public Prosecutions L.R. (1935) A.C. 462. The headnote in that decision gives its gist, and it read:

"In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. "

43. In the course of the judgment Viscount Sankey, L.C., speaking for the House, made the following observations:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence..... Throughout the web of the English Criminal Law one 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. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."

44. These passages are not in conflict with the opinion expressed by us earlier. As in England so in India, the prosecution must prove the guilt of the accused, i.e., it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt. In India if an accused pleads an exception within the meaning of s. 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him. In England there is no provision similar to s. 80 of the Indian Penal Code, but Viscount Sankey, L.C., makes it clear that such a burden lies upon the accused if his defence is one of insanity and in a case where there is a statutory exception to the general rule of burden of proof. Such an exception we find in s. 105 of the Indian Evidence Act. Reliance is placed by learned counsel for the accused on the decision of the Privy Council in Attygalle v. Emperor A.I.R. 1936 P.C. 169 in support of the contention that notwithstanding s. 105 of the Evidence Act, the burden of establishing the absence of accident within the meaning of s. 80 of the Indian Penal Code is on the prosecution. In that case, two persons were prosecuted, one for performing an illegal operation and the other for abetting him in that crime. Under s. 106 of the Ordinance 14 of 1895 in the Ceylon Code, which corresponds to s. 106 of the Indian Evidence Act, it was enacted that when any fact was especially within the knowledge of any person, the burden of proving that fact was upon him. Relying upon that section, the Judge in his charge to the jury said:

"Miss Maye - that is the person upon whom the operation was alleged to have been performed - was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says, is upon him, namely that no criminal operation took place but what took place was this and this speculum examination."

45. The Judicial Committee pointed out:

"It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge. The summing-up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there."

46. The said observations do not support the contention of learned counsel. Section 106 of Ordinance 14 of 1895 of the Ceylon Code did not cast upon the accused a burden to prove that he had not committed any crime; nor did it deal with any exception similar to that provided under s. 80 of the Indian Penal Code. It has no bearing on the construction of s. 105 of the Indian Evidence Act. The decisions of this Court in The State of Madras v. A. Vaidyanatha Iyer MANU/SC/0108/1957: 1958CriLJ232, which deals with s. 4 of the Prevention of Corruption Act, 1947, and C.S.D. Swami v. The State MANU/SC/0025/1959: 1960CriLJ131, which considers the scope of s. 5(3) of the said Act, are examples of a statute throwing the burden of proving and even of establishing the absence of some of the ingredients of the offence on the accused; and this Court held that notwithstanding the general burden on the prosecution to prove the offence, the burden of proving the absence of the ingredients of the offence under certain circumstances was on the accused. Further citations are unnecessary as, in our view, the terms of s. 105 of the Evidence Act are clear and unambiguous.

47. Mr. Pathak contends that the accused did not rely upon any exception within the meaning of s. 80 of the Indian Penal Code and that his plea all through has been only that the prosecution has failed to establish intentional killing on his part. Alternatively, he argues that as the entire evidence has been adduced both by the prosecution and by the accused, the burden of proof became only academic and the jury was in a position to come to one conclusion or other on the evidence irrespective of the burden of proof. Before the Sessions Judge the accused certainly relied upon s. 80 of the Indian Penal Code, and the Sessions Judge dealt with the defence case in his charge to the jury. In paragraph 6 of the charge, the learned Sessions Judge stated:

"Before I proceed further I have to point out another section which is section 80. You know by now that the defence of the accused is that the firing of the revolver was a matter of accident during a struggle for possession of the revolver. A struggle or a fight by itself does not exempt a person. It is the accident which exempts a person from criminal

liability because there may be a fight, there may be a struggle and in the fight and in the struggle the assailant may over-power the victim and kill the deceased so that a struggle or a fight by itself does not exempt an assailant. It is only an accident, whether it is in struggle or a fight or otherwise which can exempt an assailant. It is only an accident, whether it is in a struggle or a fight of otherwise which can exempt a prisoner from criminal liability. I shall draw your attention to section 80 which says:..... (section 80 read). You know that there are several provisions which are to be satisfied before the benefit of this exception can be claimed by an accused person and it should be that the act itself must be an accident or misfortune, there should be no criminal intention or knowledge in the doing of that act, that act itself must be done in a lawful manner and it must be done by lawful means and further in the doing of it, you must do it with proper care and caution. In this connection, therefore, even while considering the case of accident, you will have to consider all the factors, which might emerge from the evidence before you, whether it was proper care and caution to take a loaded revolver without a safety catch to the residence of the person with whom you were going to talk and if you do not get an honourable answer you were prepared to thrash him. You have also to consider this further circumstance whether it is an act with proper care and caution to keep that loaded revolver in the hand and thereafter put it aside, whether that is taking proper care and caution. This is again a question of fact and you have to determine as Judges of fact, whether the act of the accused in this case can be said to be an act which was lawfully done in a lawful manner and with proper care and caution. If it is so, then and only then can you call it accident or misfortune. This is a section which you will bear in mind when you consider the evidence in this case."

48. In this paragraph the learned Sessions Judge mixed up the ingredients of the offence with those of the exception. He did not place before the jury the distinction in the matter of burden of proof between the ingredients of the offence and those of the exception. He did not tell the jury that where the accused relied upon the exception embodied in s. 80 of the Indian Penal Code, there was a statutory presumption against him and the burden of proof was on him to rebut that presumption. What is more, he told the jury that it was for them to decide whether the act of the accused in the case could be said to be an act which was lawfully done in a lawful manner with proper care and caution. This was in effect abdicating his functions in favour of the jury. He should have explained to them the implications of the terms "lawful act", "lawful manner", "lawful means" and "with proper care and caution" and pointed out to them the application of the said legal terminology to the facts of the case. On such a charge as in the present case, it was not possible for the jury, who were laymen, to know the exact scope of the defence and also the circumstances under which the plea under s. 80 of the Indian Penal Code was made out. They would not have also known that if s. 80 of the Indian Penal Code applied, there was a presumption against the accused and the burden of proof to rebut the presumption was on him. In such circumstances, we cannot predicate that the jury understood the legal implications of s. 80 of the Indian Penal Code and the scope of the burden of proof under s. 105 of the Evidence Act, and gave their verdict correctly. Nor can we say that the jury understood the distinction between the ingredients of the offence and the circumstances

that attract s. 80 of the Indian Penal Code and the impact of the proof of some of the said circumstances on the proof of the ingredients of the offence. The said omissions therefore are very grave omissions which certainly vitiated the verdict of the jury.

49. The next misdirection relates to the question of grave and sudden provocation. On this question, Shelat, J., made the following remarks:

"Thus the question whether a confession of adultery by the wife of accused to him amounts to grave and sudden provocation or not was a question of law. In my view, the learned Session Judge was in error in telling the jury that the entire question was one of fact for them to decide. It was for the learned Judge to decide as a question of law whether the sudden confession by the wife of the accused amounted to grave and sudden provocation as against the deceased Ahuja which on the authorities referred to hereinabove it was not. He was therefore in error in placing this alternative case to the jury for their determination instead of deciding it himself."

50. The misdirection according to the learned Judge was that the Sessions Judge in his charge did not tell the jury that the sudden confession of the wife to the accused did not in law amount to sudden and grave provocation by the deceased, and instead he left the entire question to be decided by the jury. The learned judge relied upon certain English decisions and textbooks in support of his conclusion that the said question was one of law and that it was for the Judge to express his view thereon. Mr. Pathak contends that there is an essential difference between the law of England and that of India in the matter of the charge to the jury in respect of grave and sudden provocation. The House of Lords in Holmes v. Director of Public Prosecution L.R. (1946) A.C. 588 laid down the law in England thus:

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

51. Viscount Simon brought out the distinction between the respective duties of the judge and the jury succinctly by formulating the following questions:

"The distinction, therefore, is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in affirmative,

asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?' and, if so, 'Did the accused act under the stress of such provocation'?"
52. So far as England is concerned the judgment of the House of Lords is the last word on the subject till it is statutorily changed or modified by the House of Lords. It is not, therefore, necessary to consider the opinions of learned authors on the subject cited before us to show that the said observations did not receive their approval.

53. But Mr. Pathak contends that whatever might be the law in England, in India we are governed by the statutory provisions, and that under the explanation to Exception I to s. 300 of the Indian Penal Code, the question "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is one of fact", and therefore, unlike in England, in India both the aforesaid questions fall entirely within the scope of the jury and they are for them to decide. To put it in other words, whether a reasonable person in the circumstances of a particular case committed the offence under provocation which was grave and sudden is a question of fact for the jury to decide. There is force in this argument, but it is not necessary to express our final opinion thereon, as the learned Attorney-General has conceded that there was no misdirection in regard to this matter.

54. The fourth misdirection found by the High Court is that the learned Sessions Judge told the jury that the prosecution relied on the circumstantial evidence and asked them to apply the stringent rule of burden of proof applicable to such cases, whereas in fact there was direct evidence of Puransingh in the shape of extra-judicial confession. In paragraph 8 of the charge the Sessions Judge said:

"In this case the prosecution relies on what is called circumstantial evidence that is to say there is no witness who can say that he saw the accused actually shooting and killing deceased. There are no direct witnesses, direct witnesses as they are called, of the event in question. Prosecution relies on certain circumstances from which they ask you to deduce an inference that it must be the accused and only the accused who must have committed this crime. That is called circumstantial evidence. It is not that prosecution cannot rely on circumstantial evidence because it is not always the case or generally the case that people who go out to commit crime will also take witnesses with them. So that it may be that in some cases the prosecution may have to rely on circumstantial evidence. Now when you are dealing with circumstantial evidence you will bear in mind certain principles, namely, that the facts on which the prosecution relies must be fully established. They must be fully and firmly established. These facts must lead to one conclusion and one only namely the guilt of the accused and lastly it must exclude all reasonable hypothesis consistent with the innocence of the accused, all reasonable hypothesis consistent with the innocence of the accused should be excluded. In other words you must come to the conclusion by all the human probability, it must be the

accused and the accused only who must have committed this crime. That is the standard of proof in a case resting on circumstantial evidence."

55. Again in paragraph 11 the learned Sessions Judge observed that the jury were dealing with circumstantial evidence and graphically stated:

"It is like this, take a word, split it up into letters, the letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the circumstances together and judge for yourself whether the prosecution have established their case."

56. In paragraph 18 of the charge, the learned Sessions Judge dealt with the evidence of Puransingh separately and told the jury that if his evidence was believed, it was one of the best forms of evidence against the man who made the admission and that if thy accepted that evidence, then the story of the defence that it was an accident would become untenable. Finally he summarized all the circumstances on which the prosecution relied in paragraph 34 and one of the circumstances mentioned was the extra-judicial confession made to Puransingh. In that paragraph the learned Sessions Judge observed as follows:

"I will now summarize the circumstances on which the prosecution relies in this case. Consider whether the circumstances are established beyond all reasonable doubt. In this case you are dealing with circumstantial evidence and therefore consider whether they are fully and firmly established and consider whether they lead to one conclusion and only one conclusion that it is the accused alone who must have shot the deceased and further consider that it leaves no room for any reasonable hypothesis consistent with the innocence of the accused regard being had to all the circumstances in the case and the conclusion that you have to come to should be of this nature and by all human probability it must be the accused and the accused alone who must have committed this crime."

57. Finally the learned Sessions Judge told them:

"If on the other hand you think that the circumstances on which the prosecution relies are fully and firmly established, that they lead to one and the only conclusion and one only, of the guilt of the accused and that they exclude all reasonable hypothesis of the innocence of the accused then and in that case it will be your duty which you are bound by the oath to bring verdict accordingly without any fear or any favour and without regard being had to any consequence that this verdict might lead to."

58. Mr. Pathak contends that the learned Sessions Judge dealt with the evidence in two parts, in one part he explained to the jury the well settled rule of approach to circumstantial evidence, whereas in another part he clearly and definitely pointed to the jury the great evidentiary value of the extra-judicial confession of guilt by the accused made to Puransingh, if that was believed by them. He therefore, argues that there was no scope for any confusion in the minds of the jurors in regard to their approach to the evidence or in regard to the evidentiary value of the extra-judicial confession. The

argument proceeds that even if there was a misdirection, it was not such as to vitiate the verdict of the jury. It is not possible to accept this argument. We have got to look at the question from the standpoint of the possible effect of the said misdirection in the charge on the jury, who are laymen. In more than one place the learned Sessions Judge pointed out that the case depended upon circumstantial evidence and that the jury should apply the rule of circumstantial evidence settled by decisions. Though at one place he emphasized upon evidentiary value of a confession he later on included that confession also as one of the circumstances and again directed the jury to apply the rule of circumstantial evidence. It is not disputed that the extra-judicial confession made to Puransingh is direct piece of evidence and that the stringent rule of approach to circumstantial evidence does not apply to it. If that confession was true, it cannot be disputed that the approach of the jury to the evidence would be different from that if that was excluded. It is not possible to predicate that the jury did not accept that confession and therefore applied the rule of circumstantial evidence. It may well have been that the jury accepted it and still were guided by the rule of circumstantial evidence as pointed out by the learned Sessions Judge. In these circumstances we must hold, agreeing with the High Court, that this is a grave misdirection affecting the correctness of the verdict.

59. The next misdirection relied upon by the High Court is the circumstance that the three letters written by Sylvia were not read to the jury by the learned Sessions Judge in his charge and that the jury were not told of their effect on the credibility of the evidence of Sylvia and Nanavati. Shelat, J., observed in regard to this circumstance thus:

"It cannot be gainsaid that these letters were important documents disclosing the state of mind of Mrs. Nanavati and the deceased to a certain extent. If these letters had been read in juxtaposition of Mrs. Nanavati's evidence they would have shown that her statement that she felt that Ahuja had asked her not to see him for a month for the purpose of backing out of the intended marriage was not correct and that they had agreed not to see each other for the purpose of giving her and also to him an opportunity to coolly think out the implications of such a marriage and then to make up her own mind on her own. The letters would also show that when the accused asked her, as he said in his evidence, whether Ahuja would marry her, it was not probable that she would fence that question. On the other hand, she would, in all probability, have told him that they had already decided to marry. In my view, the omission to refer even once to these letters in the charge especially in view of Mrs. Nanavati's evidence was a non-direction amounting to misdirection."

60. Mr. Pathak contends that these letters were read to the jury by counsel on both sides and a reference was also made to them in the evidence of Sylvia and, therefore the jury clearly knew the contents of the letters, and that in the circumstances the non-mention of the contents of the letters by the Sessions Judge was not a misdirection and even if it was it did not affect the verdict of the jury. In this context reliance is placed upon two English decisions, namely, R. v. Roberts [1942] 1 All. E.R. 187 and R. v. Attfield [1961] 3 All. E.R. 243. In the former case the appellant was prosecuted for the murder of a girl by shooting

her with a service rifle and he pleaded accident as his defence. The Judge in his summing-up, among other defects, omitted to refer to the evidence of certain witnesses; the jury returned a verdict of "guilty" not the charge of murder and it was accepted by the judge, it was contended that the omission to refer to the evidence of certain witnesses was a misdirection. Rejecting that plea, Humphreys, J., observed:

"The jury had the Dagduas before them. They had the whole of the evidence before them, and they had, just before the summing up, comments upon those matters from counsel for the defence, and from counsel for the prosecution. It is incredible that they could have forgotten them or that they could have misunderstood the matter in any way, or thought, by reason of the fact that the judge did not think it necessary to refer to them, that they were not to pay attention to them. We do not think there is anything in that point at all. A judge, in summing-up, is not obliged to refer to every witness in the case, unless he thinks it necessary to do so. In saying this, the court is by no means saying that it might not have been more satisfactory if the judge had referred to the evidence of the two witnesses, seeing that he did not think it necessary to refer to some of the Dagduas made by the accused after the occurrence. No doubt it would have been more satisfactory from the point of view of the accused. All we are saying is that we are satisfied that there was no misdirection in law on the part of judge in omitting those statements, and it was within his discretion."

61. This passage does not lay down as a proposition of law that however important certain documents or pieces of evidence may be from the standpoint of the accused or the prosecution, the judge need not refer to or explain them in his summing-up to the jury, and, if he did not, it would not amount to misdirection under any circumstances. In that case some Dagduas made by witnesses were not specifically brought to the notice of the jury and the Court held in the circumstances of that case that there was no misdirection. In the latter case the facts were simple and the evidence was short; the judge summed up the case directing the jury as to the law but did not deal with evidence except in regard to the appellant's character. The jury convicted the appellant. The court held that, "although in a complicated and lengthy case it was incumbent on the court to deal with the evidence in summing-up, yet where, as in the present case, the issues could be simply and clearly stated, it was not fatal defect for the evidence not to be reviewed in the summing-up." This is also a decision on the facts of that case. That apart, we are not concerned with a simple case here but with a complicated one. This decision does not help us in deciding the point raised. Whether a particular omission by a judge to place before the jury certain evidence amounts to a misdirection or not falls to be decided on the facts of each case.

62. These letters show the exact position of Sylvia in the context of her intended marriage with Ahuja, and help to test the truthfulness or otherwise of some of the assertions made by her to Nanavati. A perusal of these letters indicates that Sylvia and Ahuja were on intimate terms, that Ahuja was willing to marry her, that they had made up their minds to marry, but agreed to keep apart for a month to consider coolly whether they really

wanted to marry in view of the serious consequences involved in taking such a step. Both Nanavati and Sylvia gave evidence giving an impression that Ahuja was backing out of his promise to marry Sylvia and that was the main reason for Nanavati going to Ahuja's flat for an explanation. If the Judge had read these letters in his charge and explained the implication of the contents thereof in relation to the evidence given by Nanavati and Sylvia, it would not have been possible to predicate whether the jury would have believed the evidence of Nanavati and Sylvia. If the marriage between them was a settled affair and if the only obstruction in the way was Nanavati, and if Nanavati had expressed his willingness to be out of the way and even to help them to marry, their evidence that Sylvia did not answer the direct question about the intentions of Ahuja to marry her, and the evidence of Nanavati that it became necessary for him to go to Ahuja's flat to ascertain the latter's intentions might not have been believed by the jury. It is no answer to say that the letters were read to the jury at different stages of the trial or that they might have read the letters themselves for in a jury trial, especially where innumerable documents are filed, it is difficult for a lay jury, unless properly directed, to realise the relative importance of specified documents in the context of different aspects of a case. That is why the Code of Criminal Procedure, under s. 297 thereof, imposes a duty on the Sessions Judge to charge the jury after the entire evidence is given, and after counsel appearing for the accused and counsel appearing for the prosecution have addressed them. The object of the charge to the jury by the Judge is clearly to enable him to explain the law and also to place before them the facts and circumstances of the case both for and against the prosecution in order to help them in arriving at a right decision. The fact that the letters were read to the jury by prosecution or by the counsel for the defence is not of much relevance, for they would place the evidence before the jury from different angles to induce them to accept their respective versions. That fact in itself cannot absolve the Judge from his clear duty to put the contents of the letters before the jury from the correct perspective. We are in agreement with the High Court that this was a clear misdirection which might have affected the verdict of the jury.

63. The next defect pointed out by the High Court is that the Sessions Judge allowed the counsel for the accused to elicit from the police officer, Phansalkar, what Puransingh is alleged to have stated to him orally, in order to contradict the evidence of Puransingh in the court, and the Judge also dealt with the evidence so elicited in paragraph 18 of his charge to the jury. This contention cannot be fully appreciated unless some relevant facts are stated. Puransingh was examined for the prosecution as P.W. 12. He was a watchman of "Jivan Jyot". He deposed that when the accused was leaving the compound of the said building, he asked him why he had killed Ahuja, and the accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. At about 5-5 P.M. on April 27, 1959, this witness reported this incident to Gamdevi Police Station. On that day Phansalkar (P.W. 13) was the Station House Duty Officer at that station from 2 to 8 P.M. On the basis of the statement of Puransingh, Phansalkar went in a jeep with Puransingh to the place of the alleged offence. Puransingh said in his evidence that he told Phansalkar in the jeep what the accused had told him when he was

leaving the compound of "Jivan Jyot". After reaching the place of the alleged offence, Phansalkar learnt from a doctor that Ahuja was dead and he also made enquiries from Miss Mammie, the sister of the deceased. He did not record the statement made by Puransingh. But latter on between 10 and 10-30 P.M. on the same day, Phansalkar made a statement to Inspector Mokashi what Puransingh had told him and that statement was recorded by Mokashi. In the statement taken by Mokashi it was not recorded that Puransingh told Phansalkar that the accused told him why he had killed Ahuja. When Phansalkar was in the witness-box to a question put to him in cross-examination he answered that Puransingh did not tell him that he had asked Nanavati whey he killed Ahuja and that the accused replied that he had a quarrel with the deceased as the latter had "connections" with his wife and that he had killed him. The learned Sessions Judge not only allowed the evidence to go in but also, in paragraph 18 of his charge to the jury, referred to that statement. After giving the summary of the evidence given by Puransingh, the learned Sessions Judge proceeded to state in his charge to the jury:

"Now the conversation between him and Phansalkar (Sub-Inspector) was brought on record in which what the chowkidar told Sub-Inspector Phansalkar was, the servants of the flat of Miss Ahuja had informed him that a Naval Officer was going away in the car. He and the servants had tried to stop him but the said officer drove away in the car saying that he was going to the Police Station and to Sub-Inspector Phansalkar he did not state about the admission made by Mr. Nanavati to him that he killed the deceased as the deceased had connections with his wife. The chowkidar said that he had told this also to sub-Inspector Phansalkar. Sub-Inspector Phansalkar said the Puransingh had not made this statement to him. You will remember that this chowkidar went to the police station at Gamdevi to give information about this crime and while coming back he was with Sub-Inspector Phansalkar and Sub-Inspector Phansalkar in his own statement to Mr. Mokashi has referred to the conversation which he had between him and this witness Puransingh and that had been brought on record as a contradiction."

64. The learned Sessions Judge then proceeded to state other circumstances and observed, "Consider whether you will accept the evidence of Puransingh or not." It is manifest from the summing-up that the learned Sessions Judge not only read to the jury the evidence of Phansalkar wherein he stated that Puransingh did not tell him that the accused told him why he killed Ahuja but also did not tell the jury that the evidence of Phansalkar was not admissible to contradict the evidence of Puransingh. It is not possible to predicate what was the effect of the alleged contradiction on the mind of the jury and whether they had not rejected the evidence of Puransingh because of that contradiction. If the said evidence was not admissible, the placing of that evidence before the jury was certainly a grave misdirection which must have affected their verdict. The question is whether such evidence is legally admissible. The alleged omission was brought on record in the cross-examination of Phansalkar, and, after having brought it in, it was sought to be used to contradict the evidence of Puransingh. Learned Attorney-General contends that the statement made by Phansalkar to Inspector Mokashi could be used only to contradict the evidence of Phansalkar and not that of Puransingh under s. 162 of the Code of Criminal

Procedure; and the statement made by Puransingh to Phansalkar, it not having been recorded, could not be used at all to contradict the evidence of Puransingh under the said section. He further argues that the alleged omission not being a contradiction, it could in no event be used to contradict Puransingh. Learned counsel for the accused, on the other hand, contends that the alleged statement was made to a police officer before the investigation commenced and, therefore, it was not hit by s. 162 of the Code of Criminal Procedure, and it could be used to contradict the evidence of Puransingh. Section 162 of the Code of Criminal Procedure reads:

(1) No statement made by any person to a Police officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872), and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

65. The preliminary condition for the application of s. 162 of the Code is that the statement should have been made to a police-officer in the course of an investigation under Chapter XIV of the Code. If it was not made in the course of such investigation, the admissibility of such statement would not be governed by s. 162 of the Code. The question, therefore, is whether Puransingh made the statement to Phansalkar in the course of investigation. Section 154 of the Code says that every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station shall be reduced to writing by him or under his direction; and section 156(1) is to the effect that any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIV relating to the place of inquiry or trial. The evidence in the case clearly establishes that Phansalkar, being the Station House Duty Officer at Gamdevi Police-station on April 27, 1959, from 2 to 8 P.M., was an officer in charge of the Police-station within the meaning of the said sections. Puransingh in his evidence says that he went to Gamdevi Police-station and gave the information of the shooting incident to the Gamdevi Police. Phansalkar in his evidence says that on the basis of the information he went along with Puransingh to the place of the alleged offence. His evidence also discloses that he had questioned Puransingh, the doctor and also Miss Mammie in regard to the said incident. On this uncontradicted evidence there cannot be any doubt that the investigation of the

offence had commenced and Puransingh made the statement to the police officer in the course of the said investigation. But it is said that, as the information given by Puransingh was not recorded by Police Officer Phansalkar as he should do under s. 154 of the Code of Criminal Procedure, no investigation in law could have commenced with the meaning of s. 156 of the Code. The question whether investigation had commenced or not is a question of fact and it does not depend upon any irregularity committed in the matter of recording the first information report by the concerned police officer. If so, s. 162 of the Code is immediately attracted. Under s. 162(1) of the Code, no statement made by any person to a Police-officer in the course of an investigation can be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. But the proviso lifts the ban and says that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing, any part of his statement, if duly proved, may be used by the accused to contradict such witness. The proviso cannot be invoked to bring in the statement made by Phansalkar to Inspector Mokashi in the cross-examination of Phansalkar, for the statement made by him was not used to contradict the evidence of Phansalkar. The proviso cannot obviously apply to the oral statement made by Puransingh to Phansalkar, for the said statement of Puransingh has not been reduced into writing. The faint argument of learned counsel for the accused that the statement of Phansalkar recorded by Inspector Mokashi can be treated as a recorded statement of Puransingh himself is to be stated only to be rejected, for it is impossible to treat the recorded statement of Phansalkar as the recorded statement of Puransingh by a police-officer. If so, the question whether the alleged omission of what the accused told Puransingh in Puransingh's oral statement to Phansalkar could be used to contradict Puransingh, in view of the decision of this Court in Tahsildar Singh's case MANU/SC/0053/1959: [[1959] Supp. (2) S.C.R. 875], does not arise for consideration. We are, therefore, clearly of the opinion that not only the learned Sessions Judge acted illegally in admitting the alleged omission in evidence to contradict the evidence of Puransingh, but also clearly misdirected himself in placing the said evidence before the jury for their consideration.

66. In addition to the misdirections pointed out by the High Court, the learned Attorney-General relied upon another alleged misdirection by the learned Sessions Judge in his charge. In paragraph 28 of the charge, the learned Sessions Judge stated thus:

"No one challenges the marksmanship of the accused but Commodore Nanda had come to tell you that he is a good shot and Mr. Kandalawala said that here was a man and good marksman, would have shot him, riddled him with bullets perpendicularly and not that way and he further said that as it is not done in this case it shows that the accused is a good marksman and a good shot and he would not have done this thing, this is the argument."

67. The learned Attorney-General points out that the learned Sessions Judge was wrong in saying that no one challenged the marksmanship of the accused, for Commodore Nanda was examined at length on the competency of the accused as a marksman. Though

this is a misdirection, we do not think that the said passage, having regard to the other circumstances of the case, could have in any way affected the verdict of the jury. It is, therefore, clear that there were grave misdirections in this case, affecting the verdict of the jury, and the High Court was certainly within its rights to consider the evidence and come to its own conclusion thereon.

68. The learned Attorney-General contends that if he was right in his contention that the High Court could consider the evidence afresh and come to its own conclusion, in view of the said misdirection, this Court should not, in exercise of its discretionary jurisdiction under Art. 136 of the Constitutions interfere with the findings of the High Court. There is force in this argument. But, as we have heard counsel at great length, we propose to discuss the evidence.

69. We shall now proceed to consider the evidence in the case. The evidence can be divided into three parts, namely, (i) evidence relating to the conduct of the accused before the shooting incident, (ii) evidence in regard to the conduct of the accused after the incident, and (iii) evidence in regard to the actual shooting in the bed-room of Ahuja.

70. We may start with the evidence of the accused wherein he gives the circumstances under which he came to know of the illicit intimacy of his wife Sylvia with the deceased Ahuja, and the reasons for which he went to the flat of Ahuja in the evening of April 27, 1959. After his brother and his brother's wife, who stayed with him for a few days, had left, he found his wife behaving strangely and without affection towards him. Though on that ground he was unhappy and worried, he did not suspect of her unfaithfulness to him. On the morning of April 27, 1959, he and his wife took out their sick dog to the Parel Animal Hospital. On their way back, they stopped at the Metro Cinema and his wife bought some tickets for the 3-30 show. After coming home, they were sitting in the room for the lunch to be served when he put his arm around his wife affectionately and she seemed to go tense and was very unresponsive. After lunch, when his wife was reading in the sitting room, he told her "Look, we must get these things straight" or something like that, and "Do you still love me?" As she did not answer, he asked her "Are you in love with some one else?", but she gave no answer. At that time he remembered that she had not been to a party given by his brother when he was away on the sea and when asked why she did not go, she told him that she had a previous dinner engagement with Miss Ahuja. On the basis of this incident, he asked her "Is it Ahuja?" and she said "Yes." When he asked her "Have you been faithful to me?", she shook her head to indicate "No." Sylvia in her evidence, as D.W. 10, broadly supported this version. It appears to us that this is clearly a made-up conversation and an unnatural one too. Is it likely that Nanavati, who says in his evidence that prior to April 27, 1959, he did not think that his wife was unfaithful to him, would have suddenly thought that she had a lover on the basis of a trivial circumstance of her being unresponsive when he put his arm around her affectionately? Her coldness towards him might have been due to many reasons. Unless he had a suspicion earlier or was informed by somebody that she was unfaithful to him,

this conduct of Nanavati in suspecting his wife on the basis of the said circumstance does not appear to be the natural reaction of a husband. The recollection of her preference to attend the dinner given by Miss Mammie to that of his brother, in the absence of an earlier suspicion or information, could not have flashed on his mind the image of Ahuja as a possible lover of his wife. There was nothing extraordinary in his wife keeping a previous engagement with Mis Mammie and particularly when she could rely upon her close relations not to misunderstand her. The circumstances under which the confession of unfaithfulness is alleged to have been made do not appear to be natural. This inference is also reinforced by the fact that soon after the confession, which is alleged to have upset him so much, he is said to have driven his wife and children to the cinema. If the confession of illicit intimacy between Sylvia and Ahuja was made so suddenly at lunch time, even if she had purchased the tickets, it is not likely that he would have taken her and the children to the cinema. Nanavati then proceeds to say in his evidence: on his wife admitting her illicit intimacy with Ahuja, he was absolutely stunned; he then got up and said that he must go and settle the matter with the swine; he asked her what were the intentions of Ahuja and whether Ahuja was prepared to marry her and look after the children; he wanted an explanation from Ahuja for his caddish conduct. In the cross-examination he further elaborated on his intentions thus: He thought of having the matters settled with Ahuja; he would find out from him whether he would take an honourable way out of the situation; and he would thrash him if he refused to do so. The honourable course which he expected of the deceased was to marry his wife and look after the children. He made it clear further that when he went to see Ahuja the main thing in his mind was to find out what Ahuja's intentions were towards his wife and children and to find out the explanation for his conduct. Sylvia in her evidence says that when she confessed her unfaithfulness to Nanavati, the latter suddenly got up rather excitedly and said that he wanted to go to Ahuja's flat and square up the things. Briefly stated, Nanavati, according to him, went to Ahuja's flat to ask for an explanation for seducing his wife and to find out whether he would marry Sylvia and take care of the children. Is it likely that a person, situated as Nanavati was, would have reacted in the manner stated by him? It is true that different persons react, under similar circumstances, differently. A husband to whom his wife confessed of infidelity may kill his wife, another may kill his wife as well as her paramour, the third, who is more sentimental, may commit suicide, and the more sophisticated one may give divorce to her and marry another. But it is most improbable, even impossible, that a husband who has been deceived by his wife would voluntarily go to the house of his wife's paramour to ascertain his intentions, and, what is more, to ask him to take charge of his children. What was the explanation Nanavati wanted to get from Ahuja? His wife confessed that she had illicit intimacy with Ahuja. She is not a young girl, but a woman with three children. There was no question of Ahuja seducing an innocent girl, but both Ahuja and Sylvia must have been willing parties to the illicit intimacy between them. That apart, it is clear from the evidence that Ahuja and Sylvia had decided to marry and, therefore, no further elucidation of the intention of Ahuja by Nanavati was necessary at all. It is true that Nanavati says in his evidence that when he asked her whether Ahuja was prepared to marry her and look after the children,

she did not give any proper rely; and Sylvia also in her evidence says that when her husband asked her whether Ahuja was willing to marry her and look after the children she avoided answering that question as she was too ashamed to admit that Ahuja was trying to back out from the promise to marry her. That this version is not true is amply borne out by the letters written by Sylvia to Ahuja. The first letter written by Sylvia is dated May 24, 1958, but that was sent to him only on March 19, 1959, along with another letter. In that letter dated May 24, 1958, she stated:

"Last night when you spoke about your need to marry and about the various girls you may marry, something inside me snapped and I know that I could not bear the thought of your loving or being close to someone else."

71. Reliance is placed upon these words by learned counsel for the accused in support of his contention that Ahuja intended to marry another girl. But this letter is of May 1958 and by that time it does not appear that there was any arrangement between Sylvia and Ahuja to marry. It may well have been that Ahuja was telling Sylvia about his intentions to marry another girl to make her jealous and to fall in for him. But as days passed by, the relationship between them had became very intimate and they began to love each other. In the letter dated March 19, 1959, she said: "Take a chance on our happiness, my love. I will do my best to make you happy; I love you, I want you so much that everything is bound to work out well." The last sentence indicates that they had planned to marry. Whatever ambiguity there may be in these words, the letter dated April 17, 1959, written ten days prior to the shooting incident, dispels it; therein she writes.

"In any case nothing is going to stop my coming to you. My decision is made and I do not change my mind. I am taking this month so that we may afterwards say we gave ourselves every chance and we know what we are doing. I am torturing myself in every possible way as you asked, so that, there will be no surprise afterwards."

72. This letter clearly demonstrates that she agreed not to see Ahuja for a month, not because that Ahuja refused to marry her, but because it was settled that they should marry, and that in view of the far-reaching effects of the separation from her husband on her future life and that of her children, the lovers wanted to live separately to judge for themselves whether they really loved each other so much as to marry. In the cross-examination she tried to wriggle out of these letters and sought to explain them away; but the clear phraseology of the last letter speaks for itself, and her oral evidence, contrary to the contents of the letters, must be rejected. We have no doubt that her evidence, not only in regard to the question of marriage but also in regard to other matters, indicates that having lost her lover, out of necessity or out of deep penitence for her past misbehavior, she is out to help her husband in his defence. This correspondence belies the entire story that Sylvia did not reply to Nanavati when the latter asked her whether Ahuja was willing to marry her and that that was the reason why Nanavati wanted to visit Ahuja to ask him about his intentions. We cannot visualize Nanavati as a romantic lover determined to immolate himself to give opportunity to his unfaithful wife to start a new life of happiness and love with her paramour after convincing him that the only

honourable course open to him was to marry her and take over his children. Nanavati was not ignorant of the ways of life or so gullible as to expect any chivalry or honour in a man like Ahuja. He is an experienced Naval Officer and not a sentimental hero of a novel. The reason therefore for Nanavati going to Ahuja's flat must be something other than asking him for an explanation and to ascertain his intention about marrying his wife and looking after the children.

73. Then, according to Nanavati, he drove his wife and children to cinema, and promising them to come and pick them up at the end of the show at about 6 P.M., he drove straight to his ship. He would say that he went to his ship to get medicine for his sick dog. Though ordinarily this statement would be insignificant, in the context of the conduct of Nanavati, it acquires significance. In the beginning of his evidence, he says that on the morning of the day of the incident he and his wife took out their sick dog to the Parel Animal Hospital. It is not his evidence that after going to the hospital he went to his ship before returning home. It is not even suggested that in the ship there was a dispensary catering medicine for animals. This statement, therefore, is not true and he did not go to the ship for getting medicine for his dog but for some other purpose, and that purpose is clear from his subsequent evidence. He met Captain Kolhi and asked for his permission to draw a revolver and six rounds because he was going to drive to Ahmednagar by night. Captain Kolhi gave him the revolver and six rounds, he immediately loaded the revolver with all the six rounds and put the revolver inside an envelope which was lying in his cabin. It is not the case of the accused that he really wanted to go to Ahmednagar and he wanted the revolver for his safety. Then why did he take the revolver? According to him, he wanted to shoot himself after driving far away from his children. But he did not shoot himself either before or after Ahuja was shot dead. The taking of the revolver on a false pretext and loading it with six cartridges indicate the intention on his part to shoot somebody with it.

74. Then the accused proceeded to state that he put the envelope containing the revolver in his car and found himself driving to Ahuja's office. At Ahuja's office he went in keeping the revolver in the car, and asked Talaja, the Sales Manager of Universal Motors of which Ahuja was the proprietor whether Ahuja was inside. He was told that Ahuja was not there. Before leaving Ahuja's office, the accused looked for Ahuja in the Show Room, but Ahuja was not there. In the cross-examination no question was put to Nanavati in regard to his statement that he kept the revolver in the car when he entered Ahuja's office. On the basis of this statement, it is contended that if Nanavati had intended to shoot Ahuja he would have taken the revolver inside Ahuja's office. From this circumstance it is not possible to say that Nanavati's intention was not to shoot Ahuja. Even if his statement were true, it might well have been that he would have gone to Ahuja's office not to shoot him there but to ascertain whether he had left the office for his flat. Whatever it may be, from Ahuja's office he straightway drove to the flat of Ahuja. His conduct at the flat is particularly significant. His version is that he parked his car in the house compound near the steps, went up the steps, but remembered that his wife had told him that Ahuja might

shoot him and so he went back to his car, took the envelope containing the revolver, and went up to the flat. He rang the doorbell; when a servant opened the door, he asked him whether Ahuja was in. Having ascertained that Ahuja was in the house, he walked to his bedroom, opened the door and went in shutting the door behind him. This conduct is only consistent with his intention to shoot Ahuja. A person, who wants to seek an interview with another in order to get an explanation for his conduct or to ascertain his intentions in regard to his wife and children, would go and sit in the drawing-room and ask the servant to inform his master that he had come to see him. He would not have gone straight into the bed-room of another with a loaded revolver in hand and closed the door behind. This was the conduct of an enraged man who had gone to wreak vengeance on a person who did him a grievous wrong. But it is said that he had taken the loaded revolver with him as his wife had told him that Ahuja might shoot him. Earlier in his cross-examination he said that when he told her that he must go and settle the matter with the "swine" she put her hand upon his arm and said, "No, No, you must not go there, don't go there, he may shoot you." Sylvia in her evidence corroborates his evidence in this respect: But Sylvia has been cross-examined and she said that she knew that Ahuja had a gun and she had seen it in Ashoka Hotel in New Delhi and that she had not seen any revolver at the residence of Ahuja at any time. It is also in evidence that Ahuja had not licence for a revolver and no revolver of his was found in his bed-room. In the circumstances, we must say that Sylvia was only attempting to help Nanavati in his defence. We think that the evidence of Nanavati supported by that of Sylvia was a collusive attempt on their part to explain away the otherwise serious implication of Nanavati carrying the loaded revolver into the bed-room of Ahuja. That part of the version of the accused in regard to the manner of his entry into the bed-room of Ahuja, was also supported by the evidence of Anjani (P.W. 8), the bearer, and Deepak, the Cook. Anjani opened the door of the flat to Nanavati at about 4-20 P.M. He served tea to his master at about 4-15 P.M. Ahuja then telephoned to ascertain the correct time and then went to his bed-room. About five minutes thereafter this witness went to the bed-room of his master to bring back the tea-tray from there, and at that time his master went into the bathroom for his bath. Thereafter, Anjani went to the kitchen and was preparing tea when he heard the door-bell. He then opened the door to Nanavati. This evidence shows that at about 4-20 P.M. Ahuja was taking his bath in the bathroom and immediately thereafter Nanavati entered the bed-room. Deepak, the cook of Ahuja, also heard the ringing of the door-bell. He saw the accused opening the door of the bed-room with a brown envelope in his hand and calling the accused by his name "Prem"; he also saw his master having a towel wrapped around his waist and combing his hair standing before the dressing-table, when the accused entered the room and closed the door behind him. These two witnesses are natural witnesses and they have been examined by the police on the same day and nothing has been elicited against them to discredit their evidence. The small discrepancies in their evidence do not in any way affect their credibility. A few seconds thereafter, Mammie, the sister of the deceased, heard the crack of the window pane. The time that elapsed between Nanavati entering the bed-room of Ahuja and her hearing the noise was about 15 to 20 seconds. She describes the time that elapsed between

the two events as the time taken by her to take up her saree from the door of her dressing-room and her coming to the bed-room door. Nanavati in his evidence says that he was in the bed-room of Ahuja for about 30 to 60 seconds. Whether it was 20 seconds, as Miss Mammie says, or 30 to 60 seconds, as Nanavati deposes, the entire incident of shooting took place in a few seconds.

75. Immediately after the sounds were heard, Anjani and Miss Mammie entered the bed-room and saw the accused.

76. The evidence discussed so far discloses clearly that Sylvia confessed to Nanavati of her illicit intimacy with Ahuja; that Nanavati went to his ship at about 3.30 P.M. and took a revolver and six rounds on a false pretext and loaded the revolver with six rounds; that thereafter he went to the office of Ahuja to ascertain his whereabouts, but was told that Ahuja had left for his house; that the accused then went to the flat of the deceased at about 4-20 P.M.; that he entered the flat and then the bed-room unceremoniously with the loaded revolver, closed the door behind him and a few seconds thereafter sounds were heard by Miss Mammie, the sister of the deceased, and Anjani, a servant; that when Miss Mammie and Anjani entered the bed-room, they saw the accused with the revolver in his hand, and found Ahuja lying on the floor of the bathroom. This conduct of the accused to say the least, is very damaging for the defence and indeed in itself ordinarily sufficient to implicate him in the murder of Ahuja.

77. Now we shall scrutinize the evidence to ascertain the conduct of the accused from the time he was found in the bed-room of Ahuja till he surrendered himself to the police. Immediately after the shooting, Anjani and Miss Mammie went into the bed-room of the deceased. Anjani says in his evidence that he saw the accused facing the direction of his master who was lying in the bathroom.; that at that time the accused was having a "pistol" in his hand; that when he opened the door, the accused turned his face towards this witness and saying that nobody should come in his way or else he would shoot at them, he brought his "pistol" near the chest of the witness; and that in the meantime Miss Mammie came there, and said that the accused had killed her brother.

78. Miss Mammie in her evidence says that on hearing the sounds, she went into the bed-room of her brother, and there she saw the accused nearer to the radiogram than to the door with a gun in his hand; that she asked the accused "what is this?" but she did not hear the accused saying anything.

79. It is pointed out that there are material contradictions between what was stated by Miss Mammie and what was stated by Anjani. We do not see any material contradictions. Miss Mammie might not have heard what the accused said either because she came there after the aforesaid words were uttered or because in her anxiety and worry she did not hear the words. The different versions given by the two witnesses in regard to what Miss Mammie said to the accused is not of any importance as the import of what both of them

said is practically the same. Anjani opened the door to admit Nanavati into the flat and when he heard the noise he must have entered the room. Nanavati himself admitted that he saw a servant in the room, though he did not know him by name; he also saw Miss Mammie in the room. These small discrepancies, therefore, do not really affect their credibility. In effect and substance both saw Nanavati with a fire-arm in his hand - though one said pistol and the other gun - going away from the room without explaining to Miss Mammie his conduct and even threatening Anjani. This could only be the conduct of a person who had committed a deliberate murder and not of one who had shot the deceased by accident. If the accused had shot the diseased by accident, he would have been in a depressed and apologetic mood and would have tried to explain his conduct to Miss Mammie or would have phoned for a doctor or asked her to send for one or at any rate he would not have been in a belligerent mood and threatened Anjani with his revolver. Learned counsel for the accused argues that in the circumstances in which the accused was placed soon after the accidental shooting he could not have convinced Miss Mammie with any amount of explanation and therefore there was no point in seeking to explain his conduct to her. But whether Miss Mammie would have been convinced by his explanation or not, if Nanavati had shot the deceased by accident, he would certainly have told her particularly when he knew her before and when she happened to be the sister of the man shot at. Assuming that the suddenness of the accidental shooting had so benumbed his senses that he failed to explain the circumstances of the shooting to her, the same cannot be said when he met others at the gate. After the accused had come out of the flat of Ahuja, he got into his car and took a turn in the compound. He was stopped near the gate by Puransingh, P.W. 12, the watchman of the building. As Anjani had told him that the accused had killed Ahuja the watchman asked him why he had killed his master. The accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. The watchman told the accused that he should not go away from the place before the police arrived, but the accused told him that he was going to the police and that if he wanted he could also come with him in the car. At that time Anjani was standing in front of the car and Deepak was a few feet away. Nanavati says in his evidence that it was not true that he told Puransingh that he had killed the deceased as the latter had "connection" with his wife and that the whole idea was quite absurd. Puransingh is not shaken in his cross-examination. He is an independent witness; though he is a watchman of Jivan Jyot, he was not an employee of the deceased. After the accused left the place, this witness, at the instance of Miss Mammie, went to Gamdevi Police Station and reported the incident to the police officer Phansalkar, who was in charge of the police-station at that time, at about 5-5 P.M. and came along with the said police-officer in the jeep to Jivan Jyot at about 7 P.M. he went along with the police-officer to the police station where his statement was recorded by Inspector Mokashi late in the night. It is suggested that this witness had conspired with Deepak and Anjani and that he was giving false evidence. We do not see any force in this contention. His statement was regarded on the night of the incident itself. It is impossible to conceive that Miss Mammie, who must have had a shock, would have been in a position to coach him up to give a false statement. Indeed, her evidence discloses that she

was drugged to sleep that night. Can it be said that these two illiterate witnesses, Anjani and Deepak, would have persuaded him to make false statement that night. Though both of them were present when Puransingh questioned the accused, they deposed that they were at a distance and therefore they did not hear what the accused told Puransingh. If they had all colluded together and were prepared to speak to a false case, they could have easily supported Puransingh by stating that they also heard what the accused told Puransingh. We also do not think that these two witnesses are so intelligent as to visualize the possible defence and beforehand coached Puransingh to make a false statement on the very night of the incident. Nor do we find any inherent improbability in his evidence if really Nanavati had committed the murder. Having shot Ahuja he was going to surrender himself to the police; he knew that he had committed a crime; he was not a hardened criminal and must have had a moral conviction that he was justified in doing what he did. It was quite natural, therefore, for him to confess his guilt and justify his act to the watchman who stopped him and asked him to wait there till the police came. In the mood in which Nanavati was soon after the shooting, artificial standards of status or position would not have weighed in his mind if he was going to confess and surrender to the police. We have gone through the evidence of Puransingh and we do not see any justification to reject his evidence.

80. Leaving Jivan Jyot the accused drove his car and came to Raj Bhavan Gate. There he met a police constable and asked him for the location of the nearest police station. The direction given by the police constable were not clear and, therefore, the accused requested him to go along with him to the police station, but the constable told him that as he was on duty, he could not follow him. This is a small incident in itself, but it only shows that the accused was anxious to surrender himself to the police. This would not have been the conduct of the accused, if he had shot another by accident, for in that event he would have approached a lawyer or a friend for advice before reporting the incident to the police. As the police constable was not able to give him clear directions in regard to the location of the nearest police station, the accused went to the house of Commander Samuel, the Naval Provost Marshal. What happened between the accused and Samuel is stated by Samuel in his evidence as P.W. 10. According to his evidence, on April 27, 1959, at about 4.45 P.M., he was standing at the window of his study in his flat on the ground floor at New Queen's Road. His window opens out on the road near the band stand. The accused came up to the window and he was in a dazed condition. The witness asked him what had happened, and the accused told him, "I do not quite know what happened, but I think I have shot a man." The witness asked him how it happened, and the accused told him that the man had seduced his wife and he would not stand it. When the witness asked him to come inside and explain everything calmly, the accused said "No, thank you, I must go", "please tell me where I should go and report." Though he asked him again to come in, the accused did not go inside and, therefore, this witness instructed him to go to the C.I.D. Office and report to the Deputy Commissioner Lobo. The accused asked him to phone to Lobo and he telephoned to Lobo and told him that an officer by name Commander Nanavati was involved in an affair and that he was on the way to

report to him. Nanavati in his evidence practically corroborates the evidence of Samuel. Nanavati's version in regard to this incident is as follows:

"I told him that something terrible had happened, that I did not know quite what had happened but I thought I had shot a man. He asked me where this had happened. I told him at Nepean Sea Road. He asked me why I had been there. I told him I went there because a fellow there had seduced my wife and I would not stand for it. He asked me many times to go inside his room. But I was not willing to do so. I was anxious to go to the police station. I told Commander Samuel that there had been a fight over a revolver. Commander Samuel asked to report to Deputy Commissioner Lobo."

81. The difference between the two versions lies in the fact that while Nanavati said that he told Samuel that something terrible had happened, Samuel did not say that; while Nanavati said that he told Samuel that there had been a fight over a revolver, Samuel did not say that. But substantially both of them say that though Samuel asked Nanavati more than once to get inside the house and explain to him everything calmly, Nanavati did not do so; both of them also deposed that the accused told Samuel, "I do not quite know what happened but I think I have shot a man." It may be mentioned that Samuel is a Provost Marshal of the Indian navy, and he and the accused are of the same rank though the accused is senior to Samuel as Commander. As Provost Marshal, Samuel discharges police duties in the navy. It is probable that if the deceased was shot by accident, the accused would not have stated that fact to this witness? Is it likely that he would not have stepped into his house, particularly when he requested him more than once to come in and explain to him how the accident had taken place? Would he not have taken his advice as a colleague before he proceeded to the police station to surrender himself? The only explanation for this unusual conduct on the part of the accused is that, having committed the murder, he wanted to surrender himself to the police and to make a clean breast of everything. What is more, when he was asked directly what had happened he told him "I do not quite know what happened but I think I have shot a man". When he was further asked how it happened, that is, how he shot the man he said that the man had seduced his wife and that he would not stand for it. In the context his two answers read along with the questions put to him by Samuel only mean that, as the deceased had seduced his wife, the accused shot him as he would not stand for it. If really the accused shot the deceased by accident, why did he not say that fact to his colleague, particularly when it would not only be his defence, if prosecuted, but it would put a different complexion to his act in the eyes of his colleague. But strong reliance is placed on what this witness stated in the cross-examination viz., "I heard the word fight from the accused", "I heard some other words from the accused but I could not make out a sense out of these words". Learned counsel for the accused contends that this statement shows that the accused mentioned to Samuel that the shooting of the deceased was in a fight. It is not possible to build upon such slender foundation that the accused explained to Samuel that he shot the deceased by accident in a struggle. The statement in the cross-examination appears to us to be an attempt on the part of this witness to help his colleague by saying something which may fit in the scheme of his defence, though at the same time he is not willing to

lie deliberately in the witness-box, for he clearly says that he could not make out the sense of the words spoken along with the word "fight". This vague statement of this witness, without particulars, cannot detract from the clear evidence given by him in the examination-in-chief.

82. What Nanavati said to the question put by the Sessions Judge under s. 342 of the Code of Criminal Procedure supports Samuel's version. The following question was put to him by the learned Sessions Judge:

Q. - It is alleged against you that thereafter as aforesaid you went to Commander Samuel at about 4.45 P.M. and told him that something terrible had happened and that you did not quite know but you thought that you shot a man as he had seduced your wife which you could not stand and that on the advice of Commander Samuel you then went to Deputy Commissioner Lobo at the Head Crime Investigation Department Office. Do you wish to say anything about this?
83. A. - This is correct.

84. Here Nanavati admits that he told Commander Samuel that he shot the man as he had seduced his wife. Learned counsel for the accused contends that the question framed was rather involved and, therefore, Nanavati might not have understood its implication. But it appears from the statement that, after the questions were answered, Nanavati read his answers and admitted that they were correctly recorded. The answer is also consistent with what Samuel said in his evidence as to what Nanavati told him. This corroborates the evidence of Samuel that Nanavati told him that, as the man had seduced his wife, he thought that he had shot him. Anyhow, the accused did not tell the Court that he told Samuel that he shot the deceased in a fight.

85. Then the accused, leaving Samuel, went to the office of the Deputy Commissioner Lobo. There, he made a statement to Lobo. At that time, Superintendent Korde and Inspector Mokashi were also present. On the information given by him, Lobo directed Inspector Mokashi to take the accused into custody and to take charge of the articles and to investigate the case.

86. Lobo says in his evidence that he received a telephone call from Commander Samuel to the effect that he had directed Commander Nanavati to surrender himself to him as he had stated that he had shot a man. This evidence obviously cannot be used to corroborate what Nanavati told Samuel, but it would only be a corroboration of the evidence of Samuel that he telephoned to Lobo to that effect. It is not denied that the accused set up the defence of accident for the first time in the Sessions Court. This conduct of the accused from the time of the shooting of Ahuja to the moment he surrendered himself to the police is inconsistent with the defence that the deceased was shot by accident. Though the accused had many opportunities to explain himself, he did not do so; and he exhibited

the attitude of a man who wreaked out his vengeance in the manner planned by him and was only anxious to make a clean breast of everything to the police.

87. Now we will consider what had happened in the bed-room and bathroom of the deceased. But before considering the evidence on this question, we shall try to describe the scene of the incident and other relevant particulars regarding the things found therein.

88. The building "Jivan Jyot" is situate in Setalvad Road, Bombay. Ahuja was staying on the first floor of that building. As one goes up the stairs, there is a door leading into the hall; as one enters the hall and walks a few feet towards the north he reaches a door leading into the bed-room of Ahuja. In the bed-room, abutting the southern wall there is a radiogram; just after the radiogram there is a door on the southern wall leading to the bathroom, on the eastern side of the door abutting the wall there is a cupboard with a mirror thereon; in the bathroom, which is of the dimensions 9 feet x 6 feet, there is a commode in the front along the wall, above the commode there is a window with glass panes overlooking the chowk, on the east of the commode there is a bath-tub, on the western side of the bathroom there is a door leading into the hall; on the southern side of the said door there is a wash-basin adjacent to the wall.

89. After the incident the corpse of Ahuja was found in the bathroom; the head of the deceased was towards the bed-room and his legs were towards the commode. He was lying with his head on his right hand. This is the evidence of Miss Mammie, and she has not been cross-examined on it. It is also not contradicted by any witness. The top glass pane of the window in the bathroom was broken. Pieces of glass were found on the floor of the bathroom between the commode and the wash-basin. Between the bath-tub and the commode a pair of spectacles was lying on the floor and there were also two spent bullets. One chappal was found between the commode and the wash basin, and the other was found in the bedroom. A towel was found wrapped around the waist of the deceased. The floor of the bathroom was bloodstained. There was white handkerchief and bath-towel, which was bloodstained lying on the floor. The western wall was found to be bloodstained and drops of blood were trickling down. The handle of the door leading to the bathroom from the bed-room and a portion of the door adjacent to the handle were bloodstained from the inner side. The blood on the wall was little over three feet from the floor. On the floor of the bed-room there was an empty brown envelope with the words "Lt. Commander K.M. Nanavati" written on it. There was no mark showing that the bullets had hit any surface. (See the evidence of Rashmikant, P.W. 16)

90. On the dead-body the following injuries were found:

(1) A punctured would 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound.

(2) A lacerated punctured wound in the web between the ring finger and the little finger of the left hand 1/4" x 1/4" communicating with a punctured would 1/4" x 1/4" on the palmar aspect of the left hand at knuckle level between the left little and the ring finger. Both the wounds were communicating.

(3) A lacerated ellipsoid would oblique in the left parietal region with dimensions 1 1/8" x 1/4" x skull deep.

(4) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the distal end of the proximal interphalangeal joint of the left index finger dorsal aspect. That means at the first joint of the crease of the index finger on its dorsal aspect, i.e., back aspect.

(5) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the joint level of the left middle finger dorsal aspect.

(6) Vertical abrasion inside the right shoulder blade 3" x 1" just outside the spine.

91. On internal examination the following wounds were found by Dr. Jhala, who performed the autopsy on the dead-body. Under the first injury there was:

"A small ellipsoid wound oblique in the front of the piece of the breast bone (Sternum) upper portion right side center with dimensions 1/4" x 1/3" and at the back of the bone there was a lacerated wound accompanied by irregular chip fracture corresponding to external injury No. 1, i.e., the punctured wound chest cavity deep. Same wound continued in the contusion in area 3" x 1 1/4" in the right lung upper lobe front border middle portion front and back. Extensive clots were seen in the middle compartment upper and front part surrounding the laceration impregnated pieces of fractured bone. There was extensive echymosis and contusion around the root of the right lung in the diameter of 2 1/2" involving also the inner surface of the upper lobe. There were extensive clots of blood around the aorta. The left lung was markedly pale and showed a through and through wound in the lower lobe beginning at the inner surface just above the root opening out in the lacerated wound in the back region outer aspect at the level between 6th and 7th ribs left side not injuring the rib and injuring the space between the 6th and 7th rib left side 2" outside the junction of the spine obliquely downward and outward. Bullet was recovered from tissues behind the left shoulder blade. The wound was lacerated in the whole tract and was surrounded by contusion of softer tissues."

92. The doctor says that the bullet, after entering "the inner end, went backward, downward and then to the left" and therefore he describes the wound as "ellipsoid and oblique". He also points out that the abrasion collar was missing on the left side. Corresponding to the external injury No. 3, the doctor found on internal examination that the skull showed a haematoma under the scalp, i.e., on the left parietal region; the dimension was 2" x 2". The skull cap showed a gutter fracture of the outer table and a

fracture of the inner table. The brain showed sub-arachnoid haemorrhage over the left parieto-occipital region accompanying the fracture of the vault of the skull.

93. A description of the revolver with which Ahuja was shot and the manner of its working would be necessary to appreciate the relevant evidence in that regard. Bhanagay, the Government Criminologist, who was examined as P.W. 4, describes the revolver and the manner of its working. The revolver is a semi-automatic one and it is six-chambered. To load the revolver one has to release the chamber; when the chamber is released, it comes out on the left side. Six cartridges can be inserted in the holes of the chamber and then the chamber is pressed to the revolver. After the revolver is thus loaded, for the purpose of firing one has to pull the trigger of the revolver; when the trigger is pulled the cartridge gets cocked and the revolver being semi-automatic the hammer strikes the percussion cap of the cartridge and the cartridge explodes and the bullet goes off. For firing the second shot, the trigger has to be pulled again and the same process will have to be repeated each time it is fired. As it is not an automatic revolver, each time it is fired, the trigger has to be pulled and released. If the trigger is pulled but not released, the second round will not come in its position of firing. Pulling of the trigger has a double action - one is the rotating of the chamber and cocking, and the other, releasing of the hammer. Because of this double action, the pull must be fairly strong. A pressure of about 20 pounds is required for pulling the trigger. There is controversy on the question of pressure, and we shall deal with this at the appropriate place.

94. Of the three bullets fired from the said revolver, two bullets were found in the bathroom, and the third was extracted from the back of the left shoulder blade. Exs. F-2 and F-2a are the bullets found in the bathroom. These two bullets are flattened and the copper jacket of one of the bullets, Ex. F-2a, has been turn off. The third bullet is marked as Ex. F-3.

95. With this background let us now consider the evidence to ascertain whether the shooting was intentional, as the prosecution avers, or only accidental, as the defence suggests. Excepting Nanavati, the accused, and Ahuja, the deceased, no other person was present in the latter's bed-room when the shooting took place. Hence the only person who can speak to the said incident is the accused Nanavati. The version of Nanavati, as given in his evidence may be stated thus: He walked into Ahuja's bed-room, shutting the door behind him. Ahuja was standing in front of the dressing-table. The accused walked towards Ahuja and said, "You are a filthy swine", and asked him, "Are you going to marry Sylvia and look after the kids?" Ahuja became enraged and said in a nasty manner, "Do I have to marry every woman that I sleep with?" Then the deceased said, "Get the hell out of here, otherwise, I will have you thrown out." The accused became angry, put the packet containing the revolver down on a cabinet which was near him and told him, "By God I am going to thrash you for this." The accused had his hands up to fight the deceased, but the latter made a sudden grab towards the packet containing the revolver. The accused grappled the revolver himself and prevented the deceased from getting it. He then

whipped out the revolver and told the deceased to get back. The deceased was very close to him and suddenly caught with his right hand the right hand of the accused at the wrist and tried to twist it and take the revolver off it. The accused "banged" the deceased towards the door of the bathroom, but Ahuja would not let go of his grip and tried to kick the accused with his knee in the groin. The accused pushed Ahuja again into the bathroom, trying at the same time desperately to free his hand from the grip of the accused by jerking it around. The deceased had a very strong grip and he did not let go the grip. During the struggle, the accused thought that two shots went off: one went first and within a few seconds another. At the first shot the deceased just kept hanging on to the hand of the accused, but suddenly he let go his hand and slumped down. When the deceased slumped down, the accused immediately came out of the bathroom and walked down to report to the police.

96. By this description the accused seeks to raise the image that he and the deceased were face to face struggling for the possession of the revolver, the accused trying to keep it and the deceased trying to snatch it, the deceased catching hold of the wrist of the right hand of the accused and twisting it, and the accused desperately trying to free his hand from his grip; and in the struggle two shots went off accidentally - he does not know about the third shot - and hit the deceased and caused his death. But in the cross-examination he gave negative answers to most of the relevant questions put to him to test the truthfulness of his version. The following answers illustrate his unhelpful attitude in the court:

(1) I do not remember whether the deceased had the towel on him till I left the place.

(2) I had no idea where the shots went because we were shuffling during the struggle in the tiny bathroom.

(3) I have no impression from where and how the shots were fired.

(4) I do not know anything about the rebound of shots or how the shots went off.

(5) I do not even know whether the spectacles of the deceased fell off.

(6) I do not know whether I heard the third shot. My impression is that I heard two shots.

(7) I do not remember the details of the struggle.

(8) I do not give any thought whether the shooting was an accident or not, because I wished to go to the police and report to the police.

(9) I gave no thought to this matter. I thought that something serious had happened.

(10) I cannot say how close we were to each other, we might be very close and we might be at arm's length during the struggle.

(11) I cannot say how the deceased had his grip on my wrist.

(12) I do not remember feeling any blows from the deceased by his free hand during the struggle; but he may have hit me.

97. He gives only a vague outline of the alleged struggle between him and the deceased. Broadly looked at, the version given by the accused appears to be highly improbable. Admittedly he had entered the bed-room of the deceased unceremoniously with a fully loaded revolver; within half a minute he cannot out of the room leaving Ahuja dead with bullet wounds. The story of his keeping the revolver on the cabinet is very unnatural. Even if he had kept it there, how did Ahuja come to know that it was a revolver for admittedly it was put in an envelope. Assuming that Ahuja had suspected that it might be a revolver, how could he have caught the wrist of Nanavati who had by that time the revolver in his hand with his finger on the trigger? Even if he was able to do so, how did Nanavati accidentally pull the trigger three times and release it three times when already Ahuja was holding his wrist and when he was jerking his hand to release it from the grip of Ahuja? It also appears to be rather curious that both the combatants did not use their left hands in the struggle. If, as he has said, there was a struggle between them and he pushed Ahuja into the bathroom, how was it that the towel wrapped around the waist of Ahuja was intact? So too, if there was a struggle, why there was no bruise on the body of the accused? Though Nanavati says that there were some "roughings" on his wrist, he had not mentioned that fact till he gave his evidence in the court, nor is there any evidence to indicate such "roughings". It is not suggested that the clothes worn by the accused were torn or even soiled. Though there was blood up to three feet on the wall of the bathroom, there was not a drop of blood on the clothes of the accused. Another improbability in the version of the accused is, while he say that in the struggle two shots went off, we find three spent bullets - two of them were found in the bathroom and the other in the body of the deceased. What is more, how could Ahuja have continued to struggle after he had received either the chest injury or the head injury, for both of them were serious ones. After the deceased received either the first or the third injury there was no possibility of further struggling or pulling of the trigger by reflex action. Dr. Jhala says that the injury on the head of the victim was such that the victim could not have been able to keep standing and would have dropped unconscious immediately and that injury No. 1 was also so serious that he could not stand for more than one or two minutes. Even Dr. Baliga admits that the deceased would have slumped down after the infliction of injury No. 1 or injury No. 3 and that either of them individually would be sufficient to cause the victim to slump down. It is, therefore, impossible that after either of the said two injuries was inflicted, the deceased could have still kept on struggling with the accused. Indeed, Nanavati says in his evidence that at the first shot the deceased just kept on hanging to his hand, but suddenly he let go his grip and slumped down.

98. The only circumstance that could be relied upon to indicate a struggle is that one of the chappals of the deceased was found in the bed-room while the other was in the bathroom. But that is consistent with both intentional and accidental shooting, for in his anxiety to escape from the line of firing the deceased might have in hurry left his one chappal in the bed-room and fled with the other to the bathroom. The situation of the spectacles near the commode is more consistent with intentional shooting than with accidental shooting, for if there had been a struggle it was more likely that the spectacles would have fallen off and broken instead of their being intact by the side of the dead-body. The condition of the bed-room as well as of the bathroom, as described by Rashmikant, the police-officer who made the inquiry, does not show any indication of struggle or fight in that place. The version of the accused, therefore, is brimming with improbabilities and is not such that any court can reasonably accept it.

99. It is said that if the accused went to the bed-room of Ahuja to shoot him he would not have addressed him by his first name "Prem" as deposed by Deepak. But Nanavati says in his evidence that he would be the last person to address the deceased as Prem. This must have been as embellishment on the part of Deepak. Assuming he said it, it does not indicate any sentiment of affection or goodwill towards the deceased - admittedly he had none towards him - but only an involuntary and habitual expression.

100. It is argued that Nanavati is a good shot - Nanda, D.W. 6, a Commodore in the Indian Navy, certifies that he is a good shot in regard to both moving and stationary targets - and therefore if he had intended to shoot Ahuja, he would have shot him perpendicularly hitting the chest and not in a haphazard way as the injuries indicate. Assuming that accused is a good shot, this argument ignores that he was not shooting at an inanimate target for practice but was shooting to commit murder; and it also ignores the desperate attempts the deceased must have made to escape. The first shot might have been fired and aimed at the chest as soon as the accused entered the room, and the other two presumably when the deceased was trying to escape to or through the bathroom.

101. Now on the question whether three shots would have gone off the revolver accidentally, there is the evidence of Bhanagay, P.W. 4, who is a Government Criminologist. The Deputy Commissioner of Police, Bombay, through Inspector Rangnekar sent to him the revolver, three empty cartridge cases, three bullets and three live rounds for his inspection. He has examined the revolver and the bullets which are marked as Exs. F-2, F-2a and F-3. He is of the opinion that the said three empties were fired from the said revolver. He speaks to the fact that for pulling the trigger a pressure of 28 pounds is required and that for each shot the trigger has to be pulled and for another shot to be fired it must be released and pulled again. He also says that the charring around the wound could occur with the weapon of the type we are now concerned within about 2 to 3 inches of the muzzle of the weapon and the blackening around the would described as carbonaceous tattooing could be caused from such a revolver up to about 6 to 8 inches

from the muzzle. In the cross examination he says that the flattening of the two damaged bullets, Exs. F-2 and F-2a, could have been caused by their hitting a flat hard surface, and that the tearing of the copper jacket of one of the bullets could have been caused by a heavy impact, such as hitting against a hard surface; it may have also been caused, according to him, by a human bone of sufficient strength provided the bullet hits the bone tangently and passes of without obstruction. These answers, if accepted - we do not see any reason why we should not accept them - prove that the bullets, Exs. F-2 and F-2a, could have been damaged by their coming into contact with some hard substance such as a bone. He says in the cross-examination that one 'struggling' will not cause three automatic firings and that even if the struggle continues he would not expect three rounds to go off, but he qualifies his statement by adding that this may happen if the person holding the revolver "co-operates so far as the reflex of his finger is concerned", to pull the trigger. He further elaborates the same idea by saying that a certain kind of reflex co-operation is required for pulling the trigger and that this reflex pull could be either conscious or unconscious. This answer is strongly relied upon by learned counsel for the accused in support of his contention of accidental firing. He argues that by unconscious reflex pull of the trigger three times by the accused three shots could have gone off the revolver. But the possibility of three rounds going off by three separate reflexes of the finger of the person holding the trigger is only a theoretical possibility, and that too only on the assumption of a fairly long struggle. Such unconscious reflex pull of the finger by the accused three times within a space of a few seconds during the struggle as described by the accused is highly improbable, if not impossible. We shall consider the evidence of this witness on the question of ricocheting of bullets when we deal with individual injuries found on the body of the deceased.

102. This witness is not a doctor but has received training in Forensic Ballistics (Identification of Fire Arms) amongst other things in London and possesses certificates of competency from his tutors in London duly endorsed by the covering letter from the Education Department, High Commissioner's Office, and he is a Government Criminologist and has been doing this work for the last 22 years; he says that he has also gained experience by conducting experiments by firing on mutton legs. He stood the test of cross-examination exceedingly well and there is no reason to reject his evidence. He makes the following points: (1) Three used bullets, Exs. F-2, F-2a, and F-3, were shot from the revolver Ex. B. (2) The revolver can be fired only by pulling the trigger; and for shooting thrice, a person shooting will have to give a deep pull to the trigger thrice and release it thrice. (3) A pressure of 28 pounds is required to pull the trigger. (4) One "struggling" will not cause three automatic firings. (5) If the struggle continues and if the person who pulls the trigger co-operates by pulling the trigger three times, three shots may go off. (6) The bullet may be damaged by hitting a hard surface or a bone. As we have pointed out the fifth point is only a theoretical possibility based upon two hypothesis, namely, (i) the struggle continues for a considerable time, and (ii) the person holding the trigger co-operates by pulling it thrice by reflex action. This evidence, therefore, establishes that the bullets went off the revolver brought by the accused -

indeed this is not disputed - and that in the course of the struggle of a few seconds as described by the accused, it is not possible that the trigger could have been accidentally pulled three times in quick succession so as to discharge three bullets.

103. As regards the pressure required to pull the trigger of Ex. B, Triloksing, who is the Master Armourer in the Army, deposing as D.W. 11, does not accept the figure given by the Bhanagay and he would put it at 11 to 14 pounds. He does not know the science of ballistics and he is only a mechanic who repairs the arms. He had not examined the revolver in question. He admits that a double-action revolver requires more pressure on the trigger than single-action one. While Major Burrard in his book on Identification of Fire-arms and Forensic Ballistics says that the normal trigger pull in double-action revolvers is about 20 pounds, this witness reduces it to 11 to 14 pounds; while Major Burrard says in his book that in all competitions no test other than a dead weight is accepted, this witness does not agree with him. His opinion is based on the experiments performed with spring balance. We would prefer to accept the opinion of Bhanagay to that of this witness. But, on the basis of the opinion of Major Burrard, we shall assume for the purpose of this case that about 20 pounds of pressure would be required to pull the trigger of the revolver Ex. B.

104. Before considering the injuries in detail, it may be convenient to ascertain from the relevant text-books some of the indications that will be found in the case of injuries caused by shooting. The following passage from authoritative text-books may be consulted:

105. Snyder's Homicide Investigation, P. 117:

Beyond the distance of about 18 inches or 24 at the most evidence of smudging and tattooing are seldom present.
106. Merkeley on Investigation of Death, P. 82:

"At a distance of approximately over 18" the powder grains are no longer carried forward and therefore the only effect produced on the skin surface is that of the bullet."
107. Legal Medicine Pathology and Toxicology by Gonzales, 2nd Edn., 1956:

The powder grains may travel 18 to 24 inches or more depending on the length of barrel, calibre and type of weapon and the type of ammunition.
108. Smith and Glaister, 1939 Edn., P. 17

"In general with all types of smokeless powder some traces of blackening are to be seen but it is not always possible to recognize unburnt grains of powder even at ranges of one and a half feet."
109. Glaister in his book on Medical Jurisprudence and Toxicology, 1957 Edn., makes a statement that at a range of about 12 inches and over as a rule there will not be marks of

carbonaceous tattooing or powder marks. But the same author in an earlier book from which we have already quoted puts it at 18 inches. In the book "Recent Advances in Forensic Medicine" 2nd Edn., p. 11, it is stated:

At ranges beyond 2 to 3 feet little or no trace of the powder can be observed.
110. Dr. Taylor's book, Vol. 1, 11th edn., p. 373, contains the following statement:

In revolver and automatic pistol wounds nothing but the grace ring is likely to be found beyond about two feet.
111. Bhanagay, P.W. 4, says that charring around the would could occur with the weapon of the type Ex. B within about 2 to 3 inches from the muzzle of the weapon, and the blackening round about the wound could be caused from such a weapon up to about 6 to 8 inches from the muzzle. Dr. Jhala, P.W. 18, says that carbonaceous tattooing would not appear if the body was beyond 18 inches from the mouth of the muzzle.

112. Dr. Baliga, D.W. 2, accepts the correctness of the statement found in Glaister's book, namely, "when the range reaches about 6 inches there is usually an absence of burning although there will probably be some evidence of bruising and of powder mark, at a range of about 12 inches and over the skin around the wound does not as a rule show evidence of powder marks." In the cross-examination this witness says that he does not see any conflict in the authorities cited, and tries to reconcile the various authorities by stating that all the authorities show that there would not be powder marks beyond the range of 12 to 18 inches. He also says that in the matter of tattooing, there is no difference between that caused by smokeless powder used in the cartridge in question, and black powder used in other bullets, though in the case of the former there may be greater difficulty to find out whether the marks are present or not in a wound.

113. Having regard to the aforesaid impressive array of authorities on Medical Jurisprudence, we hold, agreeing with Dr. Jhala, that carbonaceous tattooing would not be found beyond range of 18 inches from the mouth of the muzzle of the weapon. We also hold that charring around the wound would occur when it is caused by a revolver like Ex. B within about 2 or 3 inches from the muzzle of the revolver.

114. The presence and nature of the abrasion collar around the injury indicates the direction and also the velocity of the bullet. Abrasion collar is formed by the gyration of the bullet caused by the rifling of the barrel. If a bullet hits the body perpendicularly, the wound would be circular and the abrasion collar would be all around. But if the hit is not perpendicular, the abrasion collar will not be around the entire wound (See the evidence of Dr. Jhala and Dr. Baliga).

115. As regards the injuries found on the dead-body, two doctors were examined, Dr. Jhala, P.W. 18, on the side of the prosecution, and Dr. Baliga, D.W. 2, on the side of the defence. Dr. Jhala is the Police Surgeon, Bombay, for the last three years. Prior to that he

was a Police Surgeon in Ahmedabad for six years. He is M.R.C.P. (Edin.), D.T.M. and H. (Lond.). He conducted the postmortem on the dead-body of Ahuja and examined both external and internal injuries on the body. He is, therefore, competent to speak with authority on the wounds found on the dead-body not only by his qualifications and experience but also by reason of having performed the autopsy on the dead-body. Dr. Baliga is an F.R.C.S. (England) and has been practising as a medical surgeon since 1933. His qualifications and antecedents show that he is not only an experienced surgeon but also has been taking interest in extra-surgical activities, social, political and educational. He says that he has studied medical literature regarding bullet injuries and that he is familiar with medico-legal aspect of wounds including bullet wounds. He was a Causality Medical Officer in the K.E.M. Hospital in 1928. He had seen bullet injuries both as Causality Medical Officer and later on as a surgeon. In the cross-examination he says:

I have never fired a revolver, nor any other fire-arm. I have not given evidence in a single case of bullet injuries prior to this occasion though I have treated and I am familiar with bullet injuries. The last that I gave evidence in Medico-legal case in a murder case was in 1949 or 1950 or thereabout. Prior to that I must have given evidence in a medico-legal case in about 1939. I cannot off hand tell how many cases of bullet injuries I have treated till now, must have been over a dozen. I have not treated any bullet injuries case for the last 7 or 8 years. It was over 8 or 9 years ago that I have treated bullet injuries on the chest and the head. Out of all these 12 bullet injuries cases which I have treated up to now there might be 4 or 5 which were bullet injuries on the head. Out of these 4 or 5 cases probably there were three cases in which there were injuries both on the chest as well as on the head..... I must have performed about half a dozen post-mortems in all my career.

116. He further says that he was consulted about a week before he gave evidence by Mr. Khandalawala and Mr. Rajani Patel on behalf of the accused and was shows the post-mortem report of the injuries; that he did not have before him either the bullets or the skull; that he gave his opinion in about 20 minutes on the basis of the post-mortem report of the injuries that the said injuries could have been caused in a struggle between the accused and the deceased. This witness has come to the Court to support his opinion based on scanty material. We are not required in this case to decide upon the comparative qualifications or merits of these two doctors of their relative competency as surgeons, but we must say that so far as the wounds on the dead-body of the deceased are concerned, Dr. Jhala, who has made the post-mortem examination, is in a better position to help us to ascertain whether shooting was by accident or by intention than Dr. Baliga, who gave his opinion on the basis of the post-mortem report.

117. Now we shall take injury No. 1. This injury is a punctured one of dimensions 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound. The internal examination showed that the bullet, after causing the punctured wound in the chest just below the inner end of the right collor bone, struck the sternum and after striking it, it slightly deflected in its course

and came behind the shoulder bone. In the course of its journey the bullet entered the chest, impacted the soft tissues of the lung, the aorta and the left lung, and ultimately damaged the left lung and got lodged behind the scapula. Dr. Jhala describes the wound as ellipsoid and oblique and says that the abrasion collar is missing on the left side. On the injury there is neither charring nor carbonaceous tattooing. The prosecution version is that this wound was caused by intentional shooting, while the defence suggestion is that it was caused when the accused and the deceased were struggling for the possession of the revolver. Dr. Jhala, after describing injury No. 1, says that it could not have been received by the victim during a struggle in which both the victim and the assailant were in each other's grip. He gives reasons for his opinion, namely, as there was no carbonaceous tattooing on the injury, it must have been caused by the revolver being fired from a distance of over 18 inches from the tip of the mouth of the muzzle. We have earlier noticed that, on the basis of the authoritative text-books and the evidence, there would not be carbonaceous tattooing if the target was beyond 18 inches from the mouth of the muzzle. It is suggested to him in the cross-examination that the absence of tattooing may be due to the fact that the bullet might have first hit the fingers of the left palm causing all or any of injuries Nos. 2, 4 and 5, presumably when the deceased placed his left palm against the line of the bullet causing carbonaceous tattooing on the said fingers and thereafter hitting the chest. Dr. Jhala does not admit the possibility of the suggestion. He rules out this possibility because if the bullet first had an impact on the fingers, it would get deflected, lose its direction and would not be able to cause later injury No. 1 with abrasion collar. He further explains that an impact with a solid substance like bones of fingers will make the bullet lose its gyratory movement and thereafter it could not cause any abrasion collar to the wound. He adds, "assuming that the bullet first hit and caused the injury to the web between the little finger and the ring finger, and further assuming that it had not lost its gyrating action, it would not have caused the injury No. 1, i.e., on the chest which is accompanied by internal damage and the depth to which it had gone."

118. Now let us see what Dr. Baliga, D.W. 2 says about injury No. 1. The opinion expressed by Dr. Jhala is put to this witness, namely, that injury No. 1 on the chest could not have been caused during the course of a struggle when the victim and the assailant were in each other's grip, and this witness does not agree with that opinion. He further says that it is possible that even if the bullet first caused injury in the web, that is, injury No. 2, and thereafter caused injury No. 1 in the chest, there would be an abrasion collar such as seen in injury No. 1. Excepting this of the suggestion possibility, he has not controverted the reasons given by Dr. Jhala why such an abrasion collar could not be caused if the bullet had hit the fingers before hitting the chest. We will presently show in considering injuries Nos. 2, 4 and 5 that the said injuries were due to the hit by one bullet. If that be so, a bullet, which had caused the said three injuries and then took a turn through the little and the ring finger, could not have retained sufficient velocity to cause the abrasion collar in the chest. Nor has Dr. Baliga controverted the reasons given by Dr. Jhala that even if after causing the injury in the web the bullet could cause injury No. 1,

it could not have caused the internal damage discovered in the post-mortem examination. We have no hesitation, therefore, to accept the well reasoned view of Dr. Jhala in preference to the possibility envisaged by Dr. Baliga and hold that injury No. 1 could not have been caused when the accused and the deceased were in close grip, but only by a shot fired from a distance beyond 18 inches from the mouth of the muzzle.

119. The third injury is a lacerated ellipsoid wound oblique in the left parietal region with dimensions 1 1/8" x 1/4" and skull deep. Dr. Jhala in his evidence says that the skull had a gutter fracture of the outer table and a fracture of the inner table and the brain showed subarachnoid haemorrhage over the left parieto-occipital region accompanying the fracture of the vault of the skull. The injury was effected in a "glancing way", that is, at a tangent, and the injury went upward and to the front. He is of the opinion that the said injury to the head must have been caused by firing of a bullet from a distance of over 18 inches from the mouth of the muzzle and must have been caused with the back of the head of the victim towards the assailant. When it was suggested to him that the said wound could have been caused by a ricocheted bullet, he answered that though a ricocheted bullet coming from the same line of direction could have caused the said injury, it could not have caused the intracranial haemorrhage and also could not have caused the fracture of the inner table of the skull. He is definite that injury No. 3 could not have been inflicted from "front to back" as the slope of the gutter fracture was from the back to the front in the direction of the "grazing" of the bullet. He gives a further reason that as a rule the fracture would be broader in the skull where the bullet has the first impact and narrower where it emerges out, which is the case in respect of injury No. 3. He also relies upon the depth of the fracture at the two points and its slope to indicate the direction in which the bullet grazed. He further says that it is common knowledge that the fracture of both the tables accompanied by haemorrhage in the skull requires great force and a ricocheted bullet cannot cause such an injury. He opines that, though a ricocheted bullet emanating from a powerful fire-arm from a close range can cause injury to a heavy bone, it cannot be caused by a revolver of the type Ex. B.

120. Another suggestion made to him is that the bullet might have hit the glass pane of the window in the bathroom first and then ricocheted causing the injury on the head. Dr. Jhala, in his evidence, says that if the bullet had hit the glass pane first, it would have caused a hole and fallen on the other side of the window, for ricocheting is not possible in the case of a bullet directly hitting the glass. But on the other hand, if the bullet first hit a hard substance and then the glass pane, it would act like a pebble and crack the glass and would not go to the other side. In the present case, the bullet must have hit the skull first and then the glass pane after having lost its velocity, and fallen down like a pebble inside the bathroom itself. If, as the defence suggests, the bullet had directly hit the glass pane, it would have passed through it to the other side, in which case four bullets must have been fired from the revolver Ex. B, which is nobody's case.

121. The evidence, of Dr. Jhala is corroborated by the evidence of the ballistics expert Bhanagay, P.W. 4, when he says that if a bullet hits a hard substance and gets flattened and damaged like the bullets Exs. F-2 and F-2a, it may not enter the body and that even if it enters the body, the penetration will be shallow and the injury caused thereby will be much less as compared to the injury caused by a direct hit of the bullet. Dr. Baliga, on the other hand, says that injury No. 3 could be caused both ways, that is, from "front backward" as well as from "back forward". He also contradicts Dr. Jhala and says "back that in the type of the gutter fracture caused in the present case the wound is likely to be narrower at the entry than at the exit. He further says that assuming that the gutter fracture wound was caused by a ricocheted bullet and assuming further that there was enough force left after rebound, a ricocheted bullet could cause a fracture of even the inner table and give rise to intra-cranial haemorrhage. He asserts that a bullet that can cause a gutter fracture of the outer table is capable of fracturing the inner table also. In short, he contradicts every statement of Dr. Jhala; to quote his own words, "I do not agree that injury No. 3, i.e., the gutter fracture, cannot be inflicted from front to back for the reason that the slope of the gutter fracture was behind forward direction of the grazing of the bullet; I also do not agree with the proposition that if it would have been from the front then the slope of the gutter wound would have been from the front backward; I have not heard of such a rule and that at the near end of the impact of a bullet the gutter fracture is deeper than where it files off; I do not agree that the depth of the fracture at two points is more important factor in arriving at the conclusion of the point of impact of the bullet." He also contradicts the opinion of Dr. Jhala that injury No. 3 could not be caused in a struggle between the victim and the assailant. Dr. Baliga has been cross-examined at great length. It is elicited from him that he is not a ballistics expert and that his experience in the matter of direction of bullet injuries is comparatively less than his experience in other fields. His opinion that the gutter fracture injury could be and was more likely to be caused from an injury glancing front backwards is based upon a comparison of the photograph of the skull shown to him with the figure 15 in the book "Recent Advances in Forensic Medicine" by Smith and Glaister, p. 21. The said figure is marked as Ex. Z in the case. The witness says that the figure shows that the narrower part of the gutter is on the rear and the wider part is in front. In the cross-examination he further says that the widest part of the gutter in figure Ex. Z is neither at the front and nor at the rear end, but the rear end is pointed and tailed. It is put to this witness that figure Ex. Z does not support his evidence and that he deliberately refused to see at it correctly, but he denies it. The learned Judges of the High Court, after seeing the photograph Ex. Z with a magnifying glass, expressed the view that what Dr. Baliga called the pointed and tailed part of the gutter was a crack in the skull and not a part of the gutter. This observation has not been shown to us to be wrong. When asked on what scientific principle he would support his opinion, Dr. Baliga could not give any such principle, but only said that it was likely - he puts emphasis on the word "likely" - that the striking end was likely to be narrower and little broader at the far end. He agrees that when a conical bullet hits a hard bone it means that the hard bone is protruding in the path of the projectile and also agrees that after the initial impact the bullet adjusts itself

in the new direction of flight and that the damage caused at the initial point of the impact would be more than at any subsequent point. Having agreed so far, he would not agree on the admitted hypothesis that at the initial point of contract the wound should be wider than at the exist. But he admits that he has no authority to support his submission. Finally, he admits that generally the breadth and the depth of the gutter wound would indicate the extensive nature of the damage. On this aspect of the case, therefore, the witness has broken down and his assertion is not based on any principle or on sufficient data.

122. The next statement he makes is that he does not agree that the fracture of the inner table shows that the initial impact was from behind; but he admits that the fracture of the inner table is exactly below the backside of the gutter, though he adds that there is a more extensive crack in front of the anterior end of the gutter. He admits that in the case of a gutter on the skull the bone material which dissociates from the rest of the skull is carried in the direction in which the bullet flies but says that he was not furnished with any information in that regard when he gave his opinion.

123. Coming to the question of the ricocheting, he says that a ricocheting bullet can produce depressed fracture of the skull. But when asked whether in his experience he has come across any bullet hitting a hard object like a wall and rebounding and causing a fracture of a hard bone or whether he has any text-book to support his statement, he says that he cannot quote any instance nor an authority. But he says that it is so mentioned in several books. Then he gives curious definitions of the expressions "likely to cause death", "necessarily fatal" etc. He would go to the extent of saying that in the case of injury No. 3, the chance of recovery is up to 80 per cent.; but finally he modifies that statement by saying that he made the statement on the assumption that the haemorrhage in the subarachnoid region is localised, but if the haemorrhage is extensive his answer does not hold good. Though he asserts that at a range of about 12 inches the wound does not show as a rule evidence of powder mark, he admits that he has no practical experience that beyond a distance of 12 inches no powder mark can be discovered as a rule. Though text-books and authorities are cited to the contrary, he still sticks to his opinion; but finally he admits that he is not a ballistics expert and has no experience in that line. When he is asked if after injury No. 3, the victim could have continued the struggle, he says that he could have, though he adds that it was unlikely after the victim had received both injuries Nos. 1 and 3. He admits that the said injury can be caused both ways, that is, by a bullet hitting either on the front of the head or at the back of the head. But his reasons for saying that the bullet might have hit the victim on the front of the head are neither supported by principle nor by the nature of the gutter wound found in the skull. Ex. Z relied upon by him does not support him. His theory of a ricocheted bullet hitting the skull is highly imaginary and cannot be sustained on the material available to us: firstly, there is no mark found in the bathroom wall or elsewhere indicating that the bullet struck a hard substance before ricocheting and hitting the skull, and secondly, it does not appear to be likely that such a ricocheted bullet ejected from Ex. B could have caused such an extensive injury to the head of the deceased as found in this case.

124. Mr. Pathak finally argues that the bullet Ex. F-2a has a "process", i.e., a projection which exactly fits in the denture found in the skull and, therefore, the projection could have been caused only by the bullet coming into contract with some hard substance before it hit the head of the deceased. This suggestion was not made to any of the experts. It is not possible for us to speculate as to the manner in which the said projection was caused.

125. We, therefore, accept, the evidence of the ballistics expert, P.W. 4, and that of Dr. Jhala, P.W. 18, in preference to that of Dr. Baliga.

126. Now coming to injuries Nos. 2, 4 and 5, injury No. 4 is found on the first joint of the crease of the index finger on the back side of the left palm and injury No. 5 at the joint level of the left middle finger dorsal aspect, and injury No. 2 is a punctured wound in the web between the ring finger and the little finger of the left hand communicating with a punctured wound on the palmer aspect of the left knukle level between the left little and the ring finger. Dr. Jhala says that all the said injuries are on the back of the left palm and all have corbonaceous tattooing and that the injuries should have been caused when his left hand was between 6 and 18 inches from the muzzle of the revolver. He further says that all the three injuries could have been caused by one bullet, for, as the postmortem discloses, the three injuries are in a straight line and therefore it can clearly be inferred that they were caused by one bullet which passed through the wound on the palmer aspect. His theory is that one bullet, after causing injuries Nos. 4 and 5 passed between the little and ring finger and caused the punctured wound on the palmar aspect of the left hand. He is also definitely of the view that these wounds could not have been received by the victim during a struggle in which both of them were in each other's grip. It is not disputed that injury No. 1 and injury No. 3 should have been caused by different bullets. If injuries Nos. 2, 4 and 5 were caused by different bullets, there should have been more than three bullets fired, which is not the case of either the prosecution or the defence. In the circumstances, the said wounds must have been caused only by one bullet, and there is nothing improbable in a bullet touching three fingers on the back of the palm and taking a turn and passing through the web between the little and ring finger. Dr. Baliga contradicts Dr. Jhala even in regard to these wounds. He says that these injuries, along with the others, indicate the probability of a struggle between the victim and the assailant over the weapon; but he does not give any reasons for his opinion. He asserts that one single bullet cannot cause injuries Nos. 2, 4 and 5 on the left hand fingers, as it is a circuitous course for a bullet to take and it cannot do so without meeting with some severe resistance. He suggests that a bullet which had grazed and caused injuries Nos. 4 and 5 could then have inflicted injury No. 3 without causing carbonaceous tattooing on the head injury. We have already pointed out that the head injury was caused from the back, and we do not see any scope for one bullet hitting the fingers and thereafter causing the head injury. If the two theories, namely, that either injury No. 1 or injury No. 3 could have been caused by the same bullets that might have caused injury No. 2 and injuries

Nos. 4 and 5 were to be rejected, for the aforesaid reasons, Dr. Baliga's view that injuries Nos. 2, 4 and 5 must have been caused by different bullets should also be rejected, for to accept it, we would require more than three bullets emanating from the revolver, whereas it is the common case that more than three bullets were not fired from the revolver. That apart in the cross-examination this witness accepts that the injury on the first phalangeal joint of the index finger and the injury in the knuckle of the middle finger and the injury in the web between the little and the ring finger, but not taking into account the injury on the palmar aspect would be in a straight line. The witness admits that there can be a deflection even against a soft tissue, but adds that the soft tissue being not of much thickness between the said two fingers, the amount of deflection is negligible. But he concludes by saying that he is not saying this as an expert in ballistics. If so, the bullet could have deflected after striking the web between the little and the ring finger. We, therefore, accept the evidence of Dr. Jhala that one bullet must have caused these three injuries.

127. Strong reliance is placed upon the nature of injury No. 6 found on the back of the deceased viz, a vertical abrasion in the right shoulder blade of dimensions 3" x 1" just outside the spine, and it is said that the injury must have been caused when the accused pushed the deceased towards the door of the bath room. Nanavati in his evidence says that he "banged" him towards the door of the bathroom, and after some struggle he again pushed the deceased into the bathroom. It is suggested that when the accused "banged" the deceased towards the door of the bathroom or when he pushed him again into the bathroom, this injury might have been caused by his back having come into contract with the frame of the door. It is suggested to Dr. Jhala that injury No. 6 could be caused by the man's back brushing against a hard substance like the edge of the door, and he admits that it could be so. But the suggestion of the prosecution case is that the injury must have been caused when Ahuja fell down in the bathroom in front of the commode and, when falling, his back may have caught the edge of the commode or the bath-tub or the edge of the door of the bathroom which opens inside the bathroom to the left of the bath-tub. Shelat, J., says in his judgment:

If the abrasion was caused when the deceased was said to have been banged against the bathroom door or its frame, it would seem that the injury would be more likely to be caused, as the deceased would be in a standing position, on the shoulder blade and not inside the right shoulder. It is thus more probable that the injury was caused when the deceased's back came into contact either with the edge of the door or the edge of the bath-tub or the commode when he slumped.
128. It is not possible to say definitely how this injury was caused, but it could have been caused when the deceased fell down in the bathroom.

129. The injuries found on the dead-body of Ahuja are certainly consistent with the accused intentionally shooting him after entering the bed-room of the deceased; but

injuries Nos. 1 and 3 are wholly inconsistent with the accused accidentally shooting him in the course of their struggle for the revolver.

130. From the consideration of the entire evidence the following facts emerge: The deceased seduced the wife of the accused. She had confessed to him of her illicit intimacy with the deceased. It was natural that the accused was enraged at the conduct of the deceased and had, therefore, sufficient motive to do away with the deceased. He deliberately secured the revolver on a false pretext from the ship, drove to the flat of Ahuja, entered his bed-room unceremoniously with a loaded revolver in hand and in about a few seconds thereafter came out with the revolver in his hand. The deceased was found dead in his bathroom with bullet injuries on his body. It is not disputed that the bullets that caused injuries to Ahuja emanated from the revolver that was in the hand of the accused. After the shooting, till his trial in the Sessions Court, he did not tell anybody that he shot the deceased by accident. Indeed, he confessed his guilt to the Chowkidar Puransingh and practically admitted the same to his colleague Samuel. His description of the struggle in the bathroom is highly artificial and is devoid of all necessary particulars. The injuries found on the body of the deceased are consistent with the intentional shooting and the main injuries are wholly inconsistent with accidental shooting when the victim and the assailant were in close grips. The other circumstances brought out in the evidence also establish that there could not have been any fight or struggle between the accused and the deceased.

131. We, therefore, unhesitatingly hold, agreeing with the High Court, that the prosecution has proved beyond any reasonable doubt that the accused has intentionally shot the deceased and killed him.

132. In this view it is not necessary to consider the question whether the accused had discharged the burden laid on him under s. 80 of the Indian Penal Code, especially as learned counsel appearing for the accused here and in the High Court did not rely upon the defence based upon that section.

133. That apart, we agree with the High Court that, on the evidence adduced in this case, no reasonable body of persons could have come to the conclusion which the jury reached in this case. For that reason also the verdict of the jury cannot stand.

134. Even so, it is contended by Mr. Pathak that the accused shot the deceased while deprived of the power of self-control by sudden and grave provocation and, therefore, the offence would fall under Exception 1 to s. 300 of the Indian Penal Code. The said Exception reads:

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

135. Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with: (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

136. The first question raised is whether Ahuja gave provocation to Nanawati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.

137. Learned Attorney-General argues, that though a confession of adultery by a wife may in certain circumstances be provocation by the paramour himself, under different circumstances it has to be considered from the standpoint of the person who conveys it rather than from the standpoint of the person who gives it. He further contends that even if the provocation was deemed to have been given by Ahuja, and though the said provocation might have been grave, it could not be sudden, for the provocation given by Ahuja was only in the past.

138. On the other hand, Mr. Pathak contends that the act of Ahuja, namely, the seduction of Sylvia, gave provocation though the fact of seduction was communicated to the accused by Sylvia and that for the ascertainment of the suddenness of the provocation it is not the mind of the person who provokes that matters but that of the person provoked that is decisive. It is not necessary to express our opinion on the said question, for we are satisfied that, for other reasons, the case is not covered by Exception 1 to s. 300 of the Indian Penal Code.

139. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In Mancini v. Director of Public Prosecutions L.R. (1942) A.C. 1, Viscount Simon, L.C., states the scope of the doctrine of provocation thus:

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death..... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini [1914] 3 K.B. 1116, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval

has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

140. Viscount Simon again in Holmes v. Director of Public Prosecutions L.R. (1946) A.C. 588 elaborates further on this theme. There, the appellant had entertained some suspicious of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it will ease your mind, I have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't - at Mrs. X.'s". With this appellant lost his temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to Mancini's case L.R. (1942) A.C. 1, proceeded to state thus:

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.

141. Goddard, C.J., Duffy's case [[1949] 1 All. E.R. 932] defines provocation thus:

Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind..... What matters is whether this girl (the accused) had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shall not kill.' That is what matters. Similarly,.....circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation. Provocation being,.....as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is, whether there was what is sometimes called time for cooling, that is, for passing to cool and for reason to regain dominion over the mind..... Secondly in considering whether provocation has or has not been made out, you must consider the retaliation in provocation - that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given.

142. A passage from the address of Baron Parke to the jury in R. v. Thomas (1837) 7 C. & P. 817 extracted in Russell on Crime, 11th ed., Vol. I at p. 593, may usefully be quoted:

But the law requires two things: first that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.

143. The passages extracted above lay down the following principles: (1) Except in circumstances of most extreme and exceptional character, a mere confession of adultery is not enough to reduce the offence of murder to manslaughter. (2) The act of provocation which reduced the offence of murder to manslaughter must be such as to cause a sudden and temporary loss of self-control; and it must be distinguished from a provocation which inspires an actual intention to kill. (3) The act should have been done during the continuance of that state of mind, that is, before there was time for passion to cool and for reason to regain dominion over the mind. (4) The fatal blow should be clearly traced to the influence of passion arising from the provocation.

144. On the other hand, in India, the first principle has never been followed. That principle has had its origin in the English doctrine that mere words and gestures would not be in point of law sufficient to reduce murder to manslaughter. But the authors of the Indian Penal Code did not accept the distinction. They observed:

It is an indisputable fact, that gross insults by word or gesture have as great tendency to move many persons to violem passion as dangerous or painful bodily in juries; nor does it appear to us that passio-excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart.

145. Indian courts have not maintained the distinction between words and acts in the application of the doctrine of provocation in a given case. The Indian law on the subject may be considered from two aspects, namely, (1) whether words or gestures unaccompanied by acts can amount to provocation and (2) what is the effect of the time lag between the act of provocation and the commission of the offence. In Empress v. Khogayi I.L.R (1879). 2 Mad. 122, a division bench of the Madras High Court held, in the circumstances of that case, that abusive language used would be a provocation sufficient to deprive the accused of self-control. The learned Judges observed:

What is required is that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind and was addressed to man already enraged by the conduct of deceased's son.

146. It will be seen in this case that abusive language of the foulest kind was held to be sufficient in the case of man who was already enraged by the conduct of deceased's son. The same learned Judge in a later decision in Boya Munigadu v. The Queen I.L.R(1881).

3 Mad. 33 upheld plea of grave and sudden provocation in the following circumstances: The accused saw the deceased when she had cohabitation with his bitter enemy; that night he had no meals; next morning he went to the ryots to get his wages from them, and at that time he saw his wife eating food along with her paramour; he killed the paramour with a bill-hook. The learned Judges held that the accused had sufficient provocation to bring the case within the first exception to s. 300 of the Indian Penal Code. The learned Judges observed:

..... If having witnessed the act of adultery, he connected this subsequent conduct as he could not fail to connect it, with that act, it would be conduct of a character highly exasperating to him, implying as it must, that all concealment of their criminal relations and all regard for his feelings were abandoned and that they purposed continuing their course of misconduct in his house. This, we think, amounted to provocation, grave enough and sudden enough to deprive him of his self-control, and reduced the offence from murder to culpable homicide not amounting to murder.

147. The case illustrates that the state of mind of the accused, having regard to the earlier conduct of the deceased, may be taken into consideration in considering whether the subsequent act would be a sufficient provocation to bring the case within the exception. Another division bench of the Madras High Court in In re Murugian [I.L.R. [1957] Mad. 805] held that, where the deceased not only committed adultery but later on swore openly in the face of the husband that she would persist in such adultery and also abused the husband for remonstrating against such conduct, the case was covered by the first exception to s. 300 of the Indian Penal Code. The judgment of the Andhra Pradesh High Court in In re C. Narayan [A.I.R. 1958 A.P. 235] adopted the same reasoning in a case where the accused, a young man, who had a lurking suspicion of the conduct of his wife, who newly joined him, was confronted with the confession of illicit intimacy with, and consequent pregnancy by another, strangled his wife to death, and held that the case was covered by Exception 1 to s. 300 of the Indian Penal Code. These two decisions indicate that the mental state created by an earlier act may be taken into consideration in ascertaining whether a subsequent act was sufficient to make the assailant to lose his self-control.

148. Where the deceased led an immoral life and her husband, the accused, upbraided her and the deceased instead of being repentant said that she would again do such acts, and the accused, being enraged struck her and, when she struggled and beat him, killed her, the Court held the immediate provocation coming on top of all that had gone before was sufficient to bring the case within the first exception to s. 300 of the Indian Penal Code. So too, where a woman was leading a notoriously immoral life, and on the previous night mysteriously disappeared from the bedside of her husband and the husband protested against her conduct, she vulgarly abused him, whereupon the husband lost his self-control, picked up a rough stick, which happened to be close by and struck her resulting in her death, the Labour High Court, in Jan Muhammad v. Emperor I.L.R. [1929]

Lah 861, held that the case was governed by the said exception. The following observations of the court were relied upon in the present case:

In the present case my view is that, in judgment the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman..... As stated above, the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.

149. A division bench of the Allahabad High Court in Emperor v. Balku I.L.R. [1938] All. 789 invoked the exception in a case where the accused and the deceased, who was his wife's sister's husband, were sleeping on the same cot, and in the night the accused saw the deceased getting up from the cot and going to another room and having sexual intercourse with his (accused's) wife, and the accused allowed the deceased to return to the cot, but after the deceased fell asleep, he stabbed him to death. The learned Judges held:

When Budhu (the deceased) came into intimate contact with the accused by lying beside him on the charpai this must have worked further on the mind of the accused and he must have reflected that 'this man now lying beside me had been dishonouring me a few minutes ago'. Under these circumstances we think that the provocation would be both grave and sudden.

150. The Allahabad High Court in a recent decision, viz., Babu Lal v. State MANU/UP/0047/1960: AIR1960All223 applied the exception to a case where the husband who saw his wife in a compromising position with the deceased killed the latter subsequently when the deceased came, in his absence, to his house in another village to which he had moved. The learned Judges observed:

The appellant when he came to reside in the Government House Orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was absent. This could certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden.

151. All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery of the wife's infidelity and the subsequent act of her operated as a grave and sudden provocation on his disturbed mind.

152. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

153. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to s. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

154. Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self-control. But if his version is true - for the purpose of this argument we shall accept that what he has said is true - it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self-control, but on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bed-room of Ahuja and shot him dead. Between 1-30 P.M., when he left his house, and 4-20 P.M., when the murder took place, three hours had elapsed, and therefore there was sufficient time for him to regain his self-control, even if he had not regained it earlier. On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. Even if any conversation took place between the accused and the deceased in the manner described by the accused - though we do not believe that - it does not affect the question, for the accused entered the bed-room of the deceased to shoot him. The mere fact that before the shooting the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for

the murder. We, therefore, hold that the facts of the case do not attract the provisions of Exception 1 to s. 300 of the Indian Penal Code.

155. In the result, conviction of the accused under s. 302 of the Indian Penal Code and sentence of imprisonment for life passed on him by the High Court are correct, and there are absolutely no grounds for interference. The appeal stands dismissed.

156. Appeal dismissed.

MANU/SC/0080/1963

Back to Section 304A of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 3 of 1962

Decided On: 31.07.1963

Cherubin Gregory Vs. The State of Bihar

Hon'ble Judges/Coram:
B.P. Sinha, C.J., J.C. Shah and N. Rajagopala Ayyangar, JJ.

JUDGMENT
N. Rajagopala Ayyangar, J.

1. This is an appeal by special leave against the judgment of the High Court of Patna dismissing an appeal by the appellant against his conviction and the sentence passed on him by the Sessions Judge, Champaran.

2. The appellant was charged with an offence under section 304A of the Indian Penal Code for causing the death of one Mst. Madilen by contact with an electrically charged naked copper wire which he had fixed up at the back of his house with a view to prevent the entry of intruders into his latrine. The deceased Madilen was an inmate of a house near that of the accused. The wall of the latrine of the house of the deceased had fallen down about a week prior to the day of the occurrence - July 16, 1959, with the result that her latrine had become exposed to public view. Consequently the deceased, among others, started using the latrine of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective and it was for this reason that on the facts, as found by the courts below, the accused wanted to make entry into his latrine dangerous to the intruders.

3. Though some of the facts alleged by the prosecution were disputed by the accused, they are now concluded by the findings of the courts below and are no longer open to challenge and, indeed, learned Counsel for the appellant did not attempt to controvert them. The facts, as found, are that in order to prevent the ingress of persons like the deceased into his latrine by making such ingress dangerous (1) the accused fixed up a copper wire across the passage leading up to his latrine, (2) that this wire was naked and uninsulated and carried current from the electrical wiring of his house to which it was connected, (3) there was no warning that the wire was live, (4) the deceased managed to pass into the latrine without contacting the wire but that as she came out her hand happened to touch it and she got a shock as a result of which she died soon after. On

these facts the Courts below held that the accused was guilty of an offence under section 304A of the Indian Penal Code which enacts:

"304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with both."
4. The accused made a suggestion that the deceased had been sufficiently warned and the facts relied on in this connection were two: (1) that at the time of the accident it was past day break and there was therefore enough light, and (2) that an electric light was burning some distance away. But it is manifest that neither of these could constitute warning as the conditions of the wire being charged with electric current could not obviously be detected merely by the place being properly lit.

5. The voltage of the current passing through the naked wire being high enough to be lethal, there could be no dispute that charging it with current of that voltage was a 'rash act' done in reckless disregard of the serious consequences to people coming in contact with it.

6. It might be mentioned that the accused was also charged before the learned Sessions Judge with an offence under section 304 of the Indian Penal Code but on the finding that the accused had no intention to cause the death of the deceased he was acquitted of that charge.

7. The principal point of law which appears to have been argued before the learned Judges of the High Court was that the accused had a right of private defence of property and that the death was caused in the course of the exercise of that right. The learned Judges repelled this defence and in our opinion, quite correctly. The right of private defence of property which is set out in section 97 of the Indian Penal Code is, as that section itself provides, subject to the provisions of section 99 of the Code. It is obvious that the type of injury caused by the trap laid by the accused cannot be brought within the scope of section 99, nor of course of section 103 of the Code. As this defence was not pressed before us with any seriousness it is not necessary to deal with this at more length.

8. Learned Counsel, however, tried to adopt a different approach. The contention was that the deceased was a trespasser and that there was no duty owed by an occupier like the accused towards the trespasser and therefore the latter would have had no cause of action for damages for the injury inflicted and that if the act of the accused was not a tort, it could not also be a crime. There is no substance in this line of argument. In the first place, where we have a Code like the Indian Penal Code which defines with particularity the ingredients of a crime and the defences open to an accused charged with any of the offences there set out we consider that it would not be proper or justifiable to permit the invocation of some Common Law principle outside that Code for the purpose of treating what on the words of the statute is a crime into a permissible or other than unlawful act.

But that apart, learned Counsel is also not right in his submission that the act of the accused as a result of which the deceased suffered injuries resulting in her death was not an actionable wrong. A trespasser is not an outlaw, a caput lupinum. The mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser. Thus in England it has been held that one who sets spring-guns to shoot at trespassers is guilty of a tort and that the person injured is entitled to recover. The laying of such a trap, and there is little difference between the spring-gun which was the trap with which the English Courts had to deal and the naked live wire in the present case, is in truth "an arrangement to shoot a man without personally firing a shot". It is, no doubt true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. As we pointed out earlier, the voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property. The position as to the obligation of occupiers towards trespassers has been neatly summarised by the Law Reform Committee of the United Kingdom in the following words:
"The trespasser enters entirely at his own risk, but the occupier must not set traps designed to do him bodily harm or to do any act calculated to do bodily harm to the trespasser whom he knows to be or who to his knowledge is likely to be on his premises. For example, he must not set man-traps or spring guns. This is no more than ordinary civilised behaviour."

9. Judged in the light of these tests, it is clear that the point urged is wholly without merit.

10. The appeal fails and is dismissed.

11. Appeal dismissed.

MANU/SC/0125/1961

Back to Section 307 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 177 of 1959

Decided On: 24.04.1961

Om Parkash Vs. The State of Punjab

Hon'ble Judges/Coram:
K. Subba Rao and Raghubar Dayal, JJ.

JUDGMENT
Raghubar Dayal, J.

1. This appeal, by special leave, is against the order of the Punjab High Court dismissing the appellant's appeal against his conviction under s. 307, Indian Penal Code.

2. Bimla Devi, P.W. 7, was married to the appellant in October, 1951. Their relations got strained by 1953 and she went to her brother's place and stayed there for about a year, when she returned to her husband's place at the assurance of the appellant's maternal uncle that she would not be maltreated in future. She was, however, ill-treated and her health deteriorated due to alleged maltreatment and deliberate under-nourishment. In 1956, she was deliberately starved and was not allowed to leave the house and only sometimes a morsel or so used to be thrown to her as alms are given to beggars. She was denied food for days together and used to be given gram husk mixed in water after five or six days. She managed to go out of the house in April 1956, but Romesh Chander and Suresh Chander, brothers of the appellant, caught hold of her and forcibly dragged her inside the house where she was severely beaten. Thereafter, she was kept locked inside a room.

3. On June 5, 1956, she happened to find her room unlocked, her mother-in-law and husband away and availing of the opportunity, went out of the house and managed to reach the Civil Hospital, Ludhiana, where she met lady Doctor Mrs. Kumar, P.W. 2 and told her of her sufferings. The appellant and his mother went to the hospital and tried their best to take her back to the house, but were not allowed to do so by the lady Doctor. Social workers got interested in the matter and informed the brother of Bimla Devi, one Madan Mohan, who came down of Ludhiana and, after learning all facts, sent information to the Police Station by letter on June 16, 1956. In his letter he said:

"My sister Bimla Devi Sharma is lying in death bed. Her condition is very serious. I am told by her that deliberate attempt has been made by her husband, mother-in-law and

brother-in-law and sister-in-law. I was also told that she was kept locked in a room for a long time and was beaten by all the above and was starved.

I therefore request that a case may be registered and her statement be recorded, immediately."

4. The same day, at 9-15 p.m., Dr. Miss Dalbir Dhillon sent a note to the police saying 'My patient Bimla Devi is actually ill. She may collapse any moment'.

5. Shri Sehgal, Magistrate, P.W. 9, recorded her statement that night and stated in his note:

"Blood transfusion is taking place through the right forearm and consequently the right hand of the patient is not free. It is not possible to get the thumb impression of the right hand thumb of the patient. That is why I have got her left hand thumb-impression."
6. The impression formed by the learned Judge of the High Court on seeing the photographs taken of Bimla Devi a few days later, is stated thus in the judgment:

"The impression I formed on looking at the two photographs of Bimla was that at time she appeared to be suffering from extreme emaciation. Her cheeks appeared to be hollow. The projecting bones of her body with little flesh on them made her appearance skeletal. The countenance seemed to cadaverous."
7. After considering the evidence of Bimla Devi and the Doctors, the learned Judge came to the conclusion:

"So far as the basic allegations are concerned, which formed the gravamen of the offence, the veracity of her statement cannot be doubted. After a careful scrutiny of her statement, I find her allegations as to starvation, maltreatment, etc., true. The exaggerations and omissions to which my attention was drawn in her statement are inconsequential."
8. After considering the entire evidence on record, the learned Judge said:

"After having given anxious thought and careful consideration to the facts and circumstances as emerge from the lengthy evidence on the record, I cannot accept the argument of the learned counsel for the accused, that the condition of acute emaciation in which Bimla Devi was found on 5th of June, 1956, was not due to any calculated starvation but it was on account of prolonged illness, the nature of which was not known to the accused till Dr. Gulati had expressed his opinion that she was suffering from tuberculosis."
9. He further stated:

"The story of Bimla Devi as to how she was ill-treated, and how, her end was attempted to be brought about or precipitated, is convincing, despite the novelty of the method in which the object was sought to be achieved.... The conduct of the accused and of his

mother on 5th June, 1956, when soon after Bimla Devi's admission in the hospital they insisted on taking her back home, is significant and almost tell-tale. It was not for better treatment or for any treatment that they wanted to take her back home. Their real object in doing so could be no other than to accelerate her end."

10. The appellant was acquitted of the offence under s. 342, Indian Penal Code, by the Additional Sessions Judge, who gave him the benefit of doubt, though he had come to the conclusion that Bimla Devi's movements were restricted to a certain extent. The learned Judge of the High Court considered this question and came to a different conclusion. Having come to these findings, the learned Judge considered the question whether on these facts an offence under s. 307, Indian Penal Code, had been established or not. He held it proved.

11. Mr. Sethi, learned counsel for the appellant, has challenged the correctness of this view in law. He concedes that it is only when a person is helpless and is unable to look after himself that the person having control over him is legally bound to look after his requirements and to see that he is adequately fed. Such persons, according to him, are infants, old people and lunatics. He contends that it is no part of a husband's duty to spoon-feed his wife, his duty being simply to provide funds and food. In view of the finding of the Court below about Bimla Devi's being confined and being deprived of regular food in pursuance of a scheme of regularly starving her in order to accelerate her end, the responsibility of the appellant for the condition to which she was brought up to the 5th of June, 1956, is clear. The findings really go against any suggestion that the appellant had actually provided food and funds for his wife Bimla Devi.

12. The next contention for the appellant is that the ingredients of an offence under s. 307 are materially different from the ingredients of an offence under s. 511, Indian Penal Code. The difference is that for an act to amount to the commission of the offence of attempting to commit an offence, it need not be the last act and can be the first act towards the commission of the offence, while for an offence under s. 307, it is the last act which, if effective to cause death, would constitute the offence of an attempt to commit murder. The contention really is that even if Bimla Devi had been deprived of food for a certain period, the act of so depriving her does not come under s. 307, as that act could not, by itself, have caused her death, it being necessary for the period of starvation to continue for a longer period to cause death. We do not agree with this contention.

13. Section 307 of the Indian Penal Code reads:

"Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten year, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

14. Section 308 reads:

"Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

15. Both the sections are expressed in similar language. If s. 307 is to be interpreted as urged for the appellant, s. 308 too should be interpreted that way. Whatever may be said with respect to s. 307, being exhaustive or covering all the cases of attempts to commit murder and s. 511 not applying to any case of attempt to commit murder on account of its being applicable only to offences punishable with imprisonment for life or imprisonment, the same cannot be said with respect to the offence of attempt to commit culpable homicide punishable under s. 308. An attempt to commit culpable homicide is punishable with imprisonment for a certain period and therefore but for its being expressly made an offence under s. 308, it would have fallen under s. 511 which applies to all attempts to commit offences punishable with imprisonment where no express provisions are made by the Code for the punishment of that attempt. It should follow that the ingredients of an offence of attempt to commit culpable homicide not amounting to murder should be the same as the ingredients of an offence of attempt to commit that offence under s. 511. We have held this day in Abhayanand Mishra v. The State of Bihar MANU/SC/0124/1961: 1961CriLJ822 that a person commits the offence of attempting to commit a particular offence, when he intends to commit that particular offence and, having made preparations and with the intention to commit that offence does an act towards its commission and that such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing such offence. It follows therefore that a person commits an offence under s. 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under s. 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in s. 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression 'whoever attempts to commit an offence' in s. 511, can only mean 'whoever intends to do a certain act with the intent or knowledge necessary for the

commission of that offence'. The same is meant by the expression' whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder' in s. 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence or murder. The expression 'by that act' does not mean that the immediate effect of the act committed must be death. Such a result must be the result of the act whether immediately or after a lapse of time.

16. The word 'act' again, does not mean only any particular, specific, instantaneous act of a person, but denotes, according to s. 33 of the Code, as well, a series of acts. The course of conduct adopted by the appellant in regularly starving Bimla Devi comprised a series of acts and therefore acts falling short of completing the series, and would therefore come within the purview of s. 307 of the Code.

17. Learned counsel for the appellant has referred us to certain cases in this connection. We now discuss them.

18. The first is Queen Empress v. Niddhi MANU/UP/0057/1891: I.L.R(1892). 14 All. 38. Nidha, who had been absconding, noticing certain chowkidars arrive, brought up a sort of a blunderbuss he was carrying, to the hip and pulled the trigger. The cap exploded, but the charge did not go off. He was convicted by the Sessions Judge under Sections 299 and 300 read with s. 511, and not under s. 307, Indian Penal Code, as the learned Judge relied on a Bombay Case - Regina v. Francis Cassidy [(1867) Bom. H.C. Reps. 4(Crown Cases) - in which it was held that in order to constitute the offence of attempt to murder, under s. 307, the act committed by the person must be an act capable of causing, in the natural and ordinary course of events, death. Straight, J., both distinguished that case and did not agree with certain views expressed therein. He expressed his view thus, at p. 43:

"It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own set volition and purpose having been given effect to their full extent, a fact unknown to him and at variance with his own belief, intervened to prevent the consequences of that act which he expected to ensue, ensuing."
Straight, J., gave an example earlier which itself does not seem to fit in with the view expressed by him later. He said:

"No one would suggest that if A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, that he has committed the offence of attempting to fire the stack of B. But if he, having that intent, and having bought the box of matches, goes to

the stack of B and lights the match, but it is put out by a puff of wind, and he is so prevented and interfered with, that would establish in my opinion an attempt."
19. The last act, for the person to set fire to the stack, would have been his applying a lighted match to the stack. Without doing this act, he could not have set fire and, before he could do this act, the lighted match is supposed to have been put out by a puff of wind.

20. Illustration (d) to s. 307, itself shows the incorrectness of this view. The illustration is:

"A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's Table. A has committed the offence defined in this section."
21. A's last act, contemplated in this illustration, is not an act which must result in the murder of Z. The food is to be taken by Z. It is to be served to him. It may not have been possible for A to serve the food himself to Z, but the fact remains that A's act in merely delivering the food to the servant is fairly remote to the food being served and being taken by Z.

22. This expression of opinion by Straight, J., was not really with reference to the offence under s. 307, but was with reference to attempts to commit any particular offence and was stated, not to emphasize the necessity of committing the last act for the commission of the offence, but in connection with the culprit taking advantage of an involuntary act thwarting the completion of his design by making it impossible for the offence being committed. Straight, J., himself said earlier:

"For the purpose of constituting an attempt under s. 307, Indian Penal Code, there are two ingredients required, first, an evil intent or knowledge, and secondly, an act done."
23. In Emperor v. Vasudeo Balwant Gogte I.L.R(1932). 56 Bom. 434 a person fired several shots at another. No injury was in fact occasioned due to certain obstruction. The culprit was convicted of an offence under s. 307. Beaumont, C.J., said at p. 438:

"I think that what section 307 really means is that the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events".
24. This is correct. In the present case, the intervening fact which thwarted the attempt of the appellant to commit the murder of Bimla Devi was her happening to escape from the house and succeeding in reaching the hospital and thereafter securing good medical treatment.

25. It may, however, be mentioned that in cases of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect,

the offence under s. 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the cases are correct.

26. In Mi Pu v. Emperor (1909) 10 Cri. L.J. 363 a person who had put poison in the food was convicted of an offence under s. 328 read with s. 511, Indian Penal Code, because there was no evidence about the quantity of poison found and the probable effects of the quantity mixed in the food. It was therefore held that the accused cannot be said to have intended to cause more than hurt. The case is therefore of no bearing on the question under determination.

27. In Jeetmal v. State A.I.R. 1950 M B21 it was held that an act under s. 307, must be one which, by itself, must be ordinarily capable of causing death in the natural ordinary course of events. This is what was actually held in Cassidy's Case [(1867) Bom. H.C. Reps. Vol. IV, p. 17 (Crown Cases).] and was not approved in Nidha's Case I.L.R(1892). 14 All. 48 or in Gogte's Case I.L.R0(1932). 56 Bom. 434.

28. We may now refer to Rex v. White (1910) 2 K.B. 124. In that case the accused who was indicated for the murder of his mother, was convicted of attempt to murder her. It was held that the accused had put two grains of cyanide of potassium in the wine glass with the intent to murder her. It was, however, argued that there was no attempt at murder because 'the act of which he was guilty, namely, the putting the poison in the wine glass, was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once; it could not kill unless it were followed by other acts which he might never have done'. This contention was repelled and it was said:

"There seems no doubt that the learned judge in effect did tell the jury that if this was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would nonetheless be an attempt".
29. This supports our view.

30. We therefore hold that the conviction of the appellant under s. 307, Indian Penal Code, is correct and accordingly dismiss this appeal.

31. Appeal dismissed.

MANU/WB/0154/1933

Back to Section 312 of Indian Penal Code, 1860

Back to Section 511 of Indian Penal Code, 1860

IN THE HIGH COURT OF CALCUTTA

Decided On: 21.07.1933

Asgarali Pradhania Vs. Emperor

Hon'ble Judges/Coram:
John Lort Williams and G.D. McNair, JJ.

JUDGMENT

Authored By: John Lort Williams, G.D. McNair

John Lort Williams, J.

1. The appellant was convicted under Section 312/511, I.P.C., of an attempt to cause a miscarriage. The complainant was 20 years of age, and had been married but divorced by consent. She was living in her father's house, where she used to sleep in the cookshed. The appellant was a neighbour who had lent money to her father, and was on good terms with him. He was a married man with children. According to the complainant he gave her presents, and promised to marry her. As a result sexual intercourse took place and she became pregnant. She asked him to fulfil his promise, but he demurred and suggested that she should take drugs to procure a miscarriage. One night he brought her a bottle half full of a red liquid, and a paper packet containing a powder. After he had gone she tasted the powder, but finding it salty and strong, spat it out. She did not try the liquid. The following night the appellant came again and finding that she had not taken either the powder or the liquid, he pressed her to take them, but she refused saying that she was afraid for her own life, and that the powder irritated her tongue. Thereupon he asked her to open her mouth, and approached her with the bottle, and took hold of her chin. But she snatched the bottle from him and cried out loudly, and her father and some neighbours came, and the appellant fled. The police were informed, and upon analysis, sulphate of copper was detected in the powder, but the amount was not ascertained. No poison was detected in the liquid. According to the medical evidence, copper sulphate has no direct action on the uterus, and is not harmful unless taken in sufficiently large quantities, when it may induce abortion. One to three grains may be used as an astringent, two to ten grains as an emetic, one ounce would be fatal. According to Taylor's Medical Jurisprudence (Edn. 5), p. 166,

there is no drug or combination of drugs which will, when taken by the mouth, cause a healthy uterus to empty itself, unless it be given in doses sufficiently large to seriously endanger, by poisoning, the life of the woman who takes it or them.

2. The defence was a denial of all the facts, some suggestion that the complainant was of loose character, and a statement that the prosecution was due to enmity. Two-points have been raised on behalf of the appellant, one being that the complainant was an accomplice and that her evidence was not corroborated, that she was willing to destroy the foetus but was afraid of the consequences to herself. On the facts stated I am satisfied that the complainant cannot be regarded as an accomplice, and in any case there is some corroboration of her evidence, in the discovery of the drugs and the appellant's flight, which was observed by several witnesses. The other is a point of some importance, namely, that the facts proved do not constitute an attempt to cause miscarriage. This depends upon what constitutes an attempt to commit an offence, within the meaning of Section 511, I.P.C., which provides as follows:

Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall be punished etc.

Illustrations: (A) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section. (B) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

3. It is argued that as there was no evidence to show that either the liquid or the powder was capable of causing a miscarriage, the appellant cannot be convicted of an attempt to do so. This contention depends upon a correct definition of the word "attempt" within the meaning of the section. In R. v. McPherson (1857) D B 202, the prisoner was charged with breaking and entering the prosecutor's house and stealing therein certain specified chattels, and was convicted of attempting to steal those chattels. Unknown to him those chattels had been stolen-already. Cockburn, C.J., held that the conviction was wrong because

the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. An attempt must be to do that, which if successful, would amount to the felony charged, but here the attempt never could have succeeded.
4. In R. v. Cheeseman (1862) L C 140 Lord Blackburn said:

There is no doubt a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction had commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.
5. In R. v. Collins (1864) 33 LJM 177 Cockburn, C.J., following McPherson's case (1857) D B 202 held that if a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to

steal. Because an attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit. It is clear however from the illustrations to Section 511, that Lord Macaulay and his colleagues who drafted the Indian Penal Code, which was enacted in 1880, did not intend to follow these decisions, and I agree with the remarks upon this point made in Mac Crea's case (1893) 15 All 173. The Calcutta High Court in Empress v. Riasat Ali (1881) 7 Cal 352 held that the definitions in McPherson's case (1857) D B 202 and Cheeseman's case (1862) L C 140 were sound. In England the decisions were reconsidered in R. v. Brown (1889) 24 QBD 357 and R. v. Ring (1892) 17 Cox 491. The Judges expressed dissatisfaction with the decisions in R. v. Collins (1864) 33 LJM 177 and with that in R. v. Dodd (1877) Unreported which proceeded 'upon the view that a person could not be convicted of an attempt to commit an offence which he could not actually commit, and expressly overruled them saying that they were no longer law. The judgment in Brown's case (1889) 24 QBD 357 however has been criticised as unsatisfactory, and it has been contended that R. v. Brown (1889) 24 QBD 357 and R. v. Ring (1892) 17 Cox 491 have not completely overruled R. v. Collins (1864) 33 LJM C 177: Pritchard's Quarter Sessions (Edn. 2). In Amrita Bazar Patrika Press, Ltd. AIR 1920 Cal 478 the decision in R. v. Collins (1864) 33 LJM C 177 was again quoted with approval, apparently in ignorance of the fact that it had been expressly overruled in the English Courts. Mookerjee, J., held that in the language of Stephen (Digest of Criminal Law; Article 50):

An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing except for failure to consummate, all the elements of a substantive crime; in other words an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

6. The decision in McPherson's (1) and Collins cases (1864) 33 LJM 177 are clearly incompatible with illustrations to Section 511, and in my opinion are not law either in India or in England. Nevertheless, the statements of law to which I have referred are correct, so far as they go, and were not intended to be exhaustive or comprehensive definitions applicable to every set of facts which might arise. So far as the law in England is concerned, in the draft Criminal Code prepared by Lord Blackburn, and Barry, Lush, and Stephen, JJ., the following definition appears (Art. 74):

An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause.

Everyone who believing that a certain state of facts exists does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible.

7. To this definition the Commissioners appended a note to the effect that the passage between the asterisks "declares the law differently from R. v. Collins (1864) 33 LJM 177" which at the date of the drafting of the Code had not been overruled. The first part of this definition was accepted in R. v. Laitwood (1910) 4 C A R 252, and purporting to be in accordance with the latter part, it was held by Darling, J., that if a pregnant woman, believing that she is taking a "noxious thing" within the meaning of the offences against the Poison Act, 1861, Section 58, does with intent to procure her own abortion take a thing in fact harmless, she is guilty of attempting to commit an offence against the first part of that section: R. v. Brown (1899) 63 JP 790. In Russell on Crimes (Edn. 8), Vol. 1 at p. 145, two American definitions are quoted from Bishop:

Where the non-consummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such an impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed. Whenever the laws make criminal one step towards the accomplishment of an unlawful object done with the intent or purpose of accomplishing it; a person taking that step with that intent or purpose and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could be fully carried into effect in the particular instance.

8. So far as the law in India is concerned, it is beyond dispute that there are four stages in every crime, the intention to commit, the preparation to commit the attempt to commit, and if the third stage is successful, the commission itself. Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any act done towards the commission of the offence "is sufficient." Act done towards the commission of the offence are the vital words in this connexion.

9. Thus, if a man thrusts his hand into the pocket of another with intent to steal, he does an act towards the commission of the offence of stealing, though unknown to him the pocket is empty. He tries to steal, but is frustrated by a fact, namely the emptiness of the pocket, which is not in any way due to any act or omission on his part. He does an act towards the commission of the offence of pocket picking, by thrusting his hand into the pocket of another with intent to steal. Similarly, he may fail to steal the watch of another because the latter is too strong for him, or because the watch is securely fastened by a guard. Nevertheless he may be convicted of an attempt to steal. Blackburn, and Mellor, JJ.: R. v. Hensle 11 Cox 573.

10. But if one who believes in witchcraft puts a spall on another, or burns him in effigy, or curses him with the intention of causing him hurt, and believing that his actions will have that result, he cannot in my opinion be convicted of an attempt to cause hurt. Because what he does is not an act towards the commission of that offence, but an act towards the commission of something which cannot, according to ordinary human experience result in hurt to another, within the meaning of the Penal Code. His failure to cause hurt is due to his own act or omission, that is to say, his act was intrinsically useless, or defective, or inappropriate for the purpose he had in mind, owing to the undeveloped state of his intelligence, or to ignorance of modern science. His failure was due, broadly speaking, to his own volition. Similarly, if a man with intent to hurt another by administering poison prepares and administers some harmless substance, believing it to be poisonous, he cannot in my opinion, be convicted of an attempt to do so. And this was decided in Empress v. Mt. Rupsir Panku (1895) 9 CPL R 14, with which I agree. The learned Judicial Commissioner says:

In each of the illustrations to Section 511, there is not merely an act done with the intention to commit an offence which is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence,' that is to say the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do, by reason of circumstances independent of his own volition. It cannot be said that in the present case the prisoner did an act 'towards the commission of the offence.' The offence which she intended to commit was the administration of position to her husband. The act which she committed was the 'administration of a harmless substance'.

11. This reasoning is applicable to the case now under consideration. The appellant intended to administer something capable of causing a miscarriage. As the evidence stands, he administered a harmless substance. This cannot amount to an act towards the commission of the offence'' of causing a miscarriage. But if A, with intent to hurt B by administering poison, prepares a glass for him and fills it with poison, but while A's back is turned, C who has observed A's act, pours away the poison and fills the glass with water, which A in ignorance of what C has done, administers to B, in my opinion A is guilty, and can be convicted of an attempt to cause hurt by administering poison. His failure was not due to any act or omission of his own, but to the intervention of a factor independent of his own volition. This important distinction is correctly stated by Turner, J., in Ramsaran's case (1872) 4 NWP 48 where he observes that

to constitute an attempt there must be an act done with the intention o£ committing an offence and in attempting the commission. In each of the illustrations to Section 511 we find an act done with the intention of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition,

12. In Queen-Empress v. Luxman Narayan Joshi (1900) 2 Bom BLR 286 Sir Lawrence Jenkins, C.J., defined "attempt" as:

An intentional preparatory action which failed in object through circumstances independent of the person who seeks its accomplishment. 'And in Queen-Empress v, Vinayak Narayan (1900) 2 Bom BLR 304 the same learned Judge defined "attempt" as when a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstance independent of his own will'.

13. These also are good definitions so far as they go, but they fail to make clear that there must be something more than intention coupled with mere preparation. As was said in Raman Chettiar v. Emperor AIR 1927 Mad 77, at p. 96(of 28 Cr. L.J.):

The actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt." Here it is necessary to observe the distinction that 'an act to bear' is not the same thing as 'an act which has borne'.

14. In Empress v. Ganesh Balvant (1910) 34 Bom 378, it was said that:

some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence
is necessary to constitute an offence. "It does not matter that the progress was interrupted."

15. In Queen-Empress v. Gopala (1893) Rat Un Cri Cases 865, Parsons and Ranade, JJ., stated that, in their opinion, a person physically incapable of committing rape cannot be found guilty of an attempt to commit rape, because his acts would not be acts "towards the commission of the offence." In the American and English Encyclopedia of Law Vol. 3, p. 250, (Edn. 2) "attempt" is defined as

an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime."

16. In Russell on Crimes, (Edn. 8), Vol. 1, pp. 145 and 148, the following definitions are given:

No act is indictable as an attempt to commit felony or misdemeanour, unless it is a step towards the execution of the criminal purpose, and is an act directly approximating to, or immediately connected with, the commission of the offence which the person doing it has in view. There must be an overt act intentionally done towards the commission of some offence, one or more of a series of acts which would constitute the crime if the accused were not prevented by interruption, or physical impossibility, or did not fail, for some other cause, in completing his criminal purpose.

The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind.

17. I do not propose to embark upon the dangerous course of trying to state any general proposition, or to add to the somewhat confusing number of definitions of what amounts to an "attempt," within the meaning of Section 511, Penal Code, I will content myself with saying that, on the facts stated in this case, and for the reasons already given, the appellant cannot in law, be convicted of an attempt to cause a miscarriage. What he did was not an "act done towards the commission of the offence" of causing a miscarriage. Neither the liquid nor the powder being harmful, they could not have caused a miscarriage. The appellant's failure was not due to a factor independent of himself. Consequently, the conviction and sentence must be set aside and the appellant acquitted.

G.D. McNair, J.

18. I agree.

MANU/BH/0085/1957

Back to Section 320 of Indian Penal Code, 1860

IN THE HIGH COURT OF PATNA

Criminal Revn. No. 1315 of 1953

Decided On: 18.08.1955

Rameshwar Mahton and Ors. Vs. The State

Hon'ble Judges/Coram:
Satish Chandra Misra and Kamla Sahai, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: B.C. Ghose and A.C. Mitra, Advs.
For Respondents/Defendant: Standing Counsel

JUDGMENT
Authored By: Satish Chandra Misra, Kamla Sahai
Satish Chandra Misra, J.

1. This application in revision is directed against the order of a first class Magistrate at Purulia, convicting the petitioners under Section 126(2) of the Representation of the People Act, 1951. They were sentenced to pay a fine of Rs. 100/-each, in default to undergo simple imprisonment for one month each. The petitioners preferred an appeal against the conviction and sentence before the Sessions Judge of Manbhum-Singhbhum but the conviction was upheld, although the sentence -was reduced to a fine of Rs. 30/- each, in default to undergo simple imprisonment for 13 days.

2. The petitioners were proceeded against on the allegation that on the 4th of January, 1952, a public meeting was held at 8 p. m., in front Of the house of petitioner Rameshwar Mahton, in his Kuli, which was attended by about 100 persons. Petitioner No. 2, Baul Chandra Mahton, addressed the meeting and exhorted the people to cast their votes in the Engine Box, the engine being the symbol of the candidate of the Lok Sewak Sangh party.

It was at village Bara Urma. The Chowkidar, Tikaram Manjhi (P.W. 3), objected to the meeting as illegal as it would be ft contravention of Clause (1) of Section 126 of the Representation of the People Act. The meeting, however, continued in epite of his protest. Kalipada Mahton (P. W. 1), also attended the meeting on the Invitation of petitioner Rameshwar Mahton

It appears that he belonged to the Congress party and he sent a report of the meeting to the president of the Thana Congress Committee. He went to the Sub-Inspector of Police, also, on the 5th January, 1952, with the report and the Sub-Inspector, after investigation, recommended prosecution of the petitioners under Clause (2) of Section 126.

It may be stated that the elections for the State Legislature as well as Parliament were going on in the constituency in which Bara Urma lies and, in fact, there was polling booth in that village. If, therefore, it could be established that there was a public meeting at Bara Urma on the 4th of January, 1952, the persons convening, holding and attending the public meeting would be liable to the penalty provided in Clause (2) of that section.

It is also admitted that polling did take place at the Bara Urma polling booth on the 4th January, 1952, from 10 A.M. to 4. P. M. and that it was due also to take place on the 5th January, 1952.

3. The petitioner denied that there was any meeting. It was pleaded on their behalf that some people residing in the Kuli in front of the house of petitioner No. 1 Rameshwar Mahton gathered in the evening of the 4th January, 1952, for their evening chat and no speech was delivered by anyone in connection with the elections.

The whole story of the prosecution was concocted by Kalipada Mahton as the petitioners were working for the candidates set up by the Lok Sewak Sangh, whereas Kalipada Mahton and his father were working for the Congress candidates. They were hostile to Rameshwar Mahton and accordingly made a false report to the President of the Thana Congress Committee and the police with regard to the public meeting having been held at the instance of Rameshwar Mahton, petitioner No. 1.

The Courts below, however, on a consideration of the evidence, negatived the plea of the defence and accepted the prosecution story as well-founded.

4. Mr. B. C. Ghosh appearing for the petitioners in this Court contended that it should be held that there was no public meeting at the house of Rameshwar Mahton, as alleged by the prosecution. The gathering at the house of Rameshwar Mahton, in fact, was only that of his friends and people who were residing in the Kuli, in front of Rameshwar's house.

The meeting was not even held at a, public place and as such the gathering cannot come within the mischief of Section 126 of the Representation of the People Act. It seems to me, however, that this argument is one of fact pure and simple and the Courts below have gone into the question and held that, in fact, it was a gathering to which members of the public in general were invited, including the opponents of Rameshwar Mahton, and a speech was delivered by petitioner Baul Chandra Mahton exhorting the people assembled to cast their votes in the Engine Box,

Chowkidar Tikaram Manjhi has stated that he was present at the meeting and objected to its continuance as being illegal. In the result, it must be held that there is no substance in this contention that there was no public meeting, although it was held in front of the house of Rameshwar Mahton in the evening.

5. The next point raised by learned counsel was that we should hold that Section 126 of the Representation of the People Act, 1951 is ultra vires the Parliament of India, as it had no jurisdiction to make provision to that effect barring public meeting in general during the time of elections. Section 126 of the Representation of the People Act reads as follows:

"126 (1). No person shall convene, hold or at, tend any public meeting within any constituency on the date or dates on which a poll Is taken for an election in that constituency.

(2) Any person who contravenes the provisions of Sub-section (1) shall be punishable with fine which may expend to two hundred and fifty rupees."

Learned counsel referred in this connection to Articles 13 and 19 of the Constitution of India, Article 13, Clause (2) provides,

"The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void."
Both Articles 13 and 19 fall in the chapter on Fundamental Rights in the Constitution. Article 19(1)(b), so far as it is relevant, is all citizens shall have the right to assemble peaceably and without arms". It was contended that the right of peaceable assembly having been conferred in specific terms on all citizens in Article 19(1)(b), Section 126 of the Representation of the People Act passed by the Parliament shall be void, because it takes away the right conferred under this clause to hold public meetings. This follows from Clause (2) of Article 13. Learned counsel urged that Clause (3) of Article 19 provides in clear terms that

"nothing in Sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order..... reasonable restrictions on the exercise of the right conferred by the said sub-clause."
The law relating to regulation of public meetings is a law passed in the interests of public order. It has been held by this Court as well as the Supreme Court of India that a law regulating the holding of public meetings must be deemed to be one in the interests of public order. The expression "public order", however, falls in 7th Schedule, List II, Item No. 1 which is

"Public order (but not including the use of naval, military or air forces or any other armed fources of the Union in aid of civil power)."
Item No. 72 of List I of the 7th Schedule, which enumerates the subjects which are within the exclusive jurisdiction of the Union Legislature, provides

"Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-president; the Election Commission."
The Indian Parliament purported to legislate in regard to the elections in the shape of the Representation of the People Act in exercise of the powers conferred upon it under item No. 72 of List I of the 7th Schedule of the Constitution. Section 126 however, of the Act which prohibits the convening, holding or attending of public meetings within a constituency on the date or dates on which a poll is taken for election in that constituency must be held to be a provision in the interests of public order.

If that is so, it comes within item No. 1 of List II and not Item No. 72 of List I. Public order thus being a subject within the, exclusive jurisdiction of the State, it is only the State Legislature which should legislate on that subject, and not the Parliament of India. It must, therefore, be held that this section is beyond the competence of the Parliament.

Learned counsel conceded that there is no decision on this point of any High Court in India or their Lordships of the Supreme Court, but he contended that the position is clear in view of the two Articles 13 and 19 and the two relevant entries in the two Lists mentioned above. Learned Standing Counsel, who appeared to oppose the application, drew our attention to a single Judge decision of this Court in the case of Negendra. Mahto v. The State7 AIR 1954 Pat 356 (A),

In that case Sections 131(1)(b) and 136(1)(f) or the Representation of the People Act were challenged as ultra vires of the Constitution, as the subject-matter covered under ' those sections related to item No. 1 of the State List, namely, Public order, and the Parliament had no legislative competence in the matter. His Lordship; considered the matter with reference to Article 327 of the Constitution and items 72 and 93 of the Union List (List I) and held that the subject-matter of Sections 131(1)(b) and 136(1)(f) of the Representation of the People Act falls within Article 327 and Item 72 of List I and also under Item 93 of List I of the Constitution, and the Union Parliament had full competence to legislate in respect of election offences provided for under those sections.

It was contended on the footing of this judgment that it was decided that all election offences could be provided for 'by the Parliament by proper legislation and this would cover the subject-matter of Section 126 as well. Mr. B.C. Ghosh, however, urged in reply that this decision is no authority for the contention that the subject-matter of Section 126 also is covered by the decision of Ramaswami J., because it was confined only to specific offences under Section 131(1)(b) and 136(1)(f), and not Section 126 which covers offences of a different character.

It is true, no doubt, that it is so and also that Sections 126 to 138 deal with electoral offences and fall in Chapter III, Part VII, of the Act. It may be open to the petitioners to distinguish that case on the ground that the various offences provided for under that Chapter must be considered "independently of one another in so far as the question of competence of the Parliament to legislate is concerned.

Mr. Ghosh raised in that case also the identical question that the provisions of Sections 131(1)(b) and 136(1)(f) relate public order and hence Parliament could not legislate thereon. That contention no doubt, was negatived, but the present argument is that the subject-matter of Section 131(1)(b) refers to a person acting in a disorderly manner at any polling station and Section 136(1)(f) refers to destroying, taking, opening or otherwise interfering with any ballot-box, and both these have been made punishable under the above two sections, and the subject-matter of Section 126 although relating to an electoral offence is different from the matter covered in the decision of the above case.

But the fact remains that the question of public order was involved in that case also and it was contended that the above provisions also were in the interests of public order which was the subject covered in item 1 of List II of the 7th Schedule, and as such beyond the competence of the Parliament. The same argument is being urged in the present case as well in relation to the offences provided for in Section 126.

6. In the case of 'Debi Soren v. The State', MANU/BH/0091/1954: AIR 1954 Pat 254 (B), a Division Bench of this Court held that Sections 124A and 153A of the Indian Penal Code could not be held to be an infringement of the fundamental right of freedom of speech guaranteed to a citizen in Article 19(1)(a) of the Constitution of India. The restrictions contemplated under Sections 124A and 153A of the Indian Penal Code were of a reasonable character.

Mr. Ghosh, however, developed the point in this case in a slightly different manner. He stressed that an offence like the one provided for under Section 126 of the Representation of the People Act can be construed as having been made penal either in the interests of public order or in the interests of elections. If it is the former, it is bad on account of Parliament having encroached upon the field of the State Legislature,, and if it is the latter, it is bad because Clause (3) of Article 19 warrants reasonable restrictions on the right of peaceable assembly of the citizens of India only if the restrictions are placed in the interests of public order or morality.

If, therefore, the provision was made in the interests of elections, Clause (3) itself would not) warrant the imposition of a restriction on the right of peaceable assembly -and as such it will be void on that ground. Learned counsel urged that the pith and substance theory as explained in the judgment of the Federal Court, and which is now regarded as

a necessary canon in the interpretation of the constitutional statutes, cannot save the provisions of Section 126.

The pith and substance theory or what is called incidental encroachment by the State Legislature on the jurisdiction of, the Parliament, or encroachment by the latter upon the jurisdiction of the State Legislature, can be of no avail in upholding the validity of Section 128, because incidental encroachment should be confined to matters other than those which are provided for in the chapter on Fundamental Rights..

7. This contention of learned counsel, however, can be met with in this manner. Since it has been held by this Court that regulation of public meetings appertains to public order and is covered under that expression, and if the prohibition of convening, holding or attending a public meeting is a matter of public order, it must be held that such restrictions were imposed by the State in the interests of public order,

In that view the requirement' of Clause (3) of Article 19 of the Constitution are fulfilled inasmuch as that clause provides for enjoyment of the right guaranteed to a citizen under Article 19(1)(b) subject to reasonable restrictions being imposed by the State in the interests of public order or morality. "The State" has been defined in Article 12 as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India for the purpose of Part III of the Constitution.

The term "State" used in Clause (3) of Article 19 evidently refers to any of the authorities mentioned in Article 12, and the Representation of the People Act, 1951 was enacted by the Parliament of India and as such it comes within the meaning of the term "State" put in the above clause. There is no violation, therefore, of the fundamental rights guaranteed under Article 19(1)(b) in terms of Clause (3).

As a matter of fact, the guarantee relates to the right to assemble peaceably and without arms and the restrictions could be placed upon that right by the State which can enact the necessary legislation or the Government either of the Union or one of its units, the constituent States. No citizen can make a grievance that his fundamental right guaranteed in Article 19(1)(b) has been Infringed if, in fact, reasonable restrictions have been placed by any of the units mentioned therein

Mr. Ghosh, however, contended that the legislature must be a competent legislature for, if an, apparently reasonable restriction regulating public order is passed by the Legislature of a State in regard to the citizens of another State, it will evidently be bad law. But the crucial question is, whether there is any violation of the fundamental rights in terms of Clause (3) of Article 19 of the Constitution if, in fact, the terms of the clause have been fulfilled.

Mr. Ghosh, however, asked us to read Clause (3) together with the entries in the Lists in the 7th Schedule. I find it difficult to accede to this contention. The Lists in the 7th Schedule, no doubt, define the limits of the Union and the State Legislatures respectively and if, therefore, there is encroachment by the Parliament on a subject which is exclusively within the powers of the State Legislature to legislate upon, the law will be bad not because there is any violation of the fundamental rights, of a citizen but because it involves a question of competence of such Legislature as set out in Article 245 and the lists of the 7th Schedule.

Mr. Ghosh, however, invites us to read the schedules as part of the fundamental rights so that the term "State" in Clause (3) of Article 19 should be read along with Lists I, II and III. I find my self unable to accept this contention which would make the working of the Act impossible in many respects and the pith and substance theory of the interpretation of constitutional statutes would also fall to the ground.

The correct interpretation, therefore, as is now well-settled, is that whenever there is incidental encroachment by a State Legislature on the legislative field of the Parliament and by the latter on the legislative field of State Legislature, its validity must be judged in the light "of the pith and substance theory and the doctrine of incidental encroachment.

In my opinion, if the Parliament in the present case provided necessary safeguard for peaceful elections incorporating it in Section 126 of the Representation of the People Act, and if, in doing so, it touched upon that field of public order which is within the exclusive jurisdiction of the State Legislature, it must be taken only as incidental encroachment, and as such the provisions of Section 126 must be upheld as being within the competence of the Parliament. In the result, this contention fails and it must be held that Section 126 of the Representation of the People Act, 1951 was validly enacted by the Parliament for peacefully conducting the elections.

8. Mr. Ghosh urged further that assuming that the Parliament could incidentally encroach upon the field of the State Legislature so far as public order in the conduct of elections is concerned, still this provision must be held to be ultra vires because the restrictions are unreasonable and this Court is competent to pronounce upon the reasonableness or otherwise of the restrictions imposed upon the fundamental rights of" a citizen guaranteed in Article 19.

There is no doubt that the proper Court can scrutinize the restrictions imposed in a statute to see whether they are reasonable, but, in my opinion, there is nothing unreasonable herein. Mr. Ghosh contended that the restriction in Section 126 might be reasonable if it extended to the limit of prohibiting public meetings during the actual election hours which were 10 a. m. to 4 p. m., or in the neighbourhood of the polling booths; but under Section 126 public meetings are prohibited in the entire constituency, which in the present

case Includes the whole of South Manbhum and Dalthum, as also for all the days that the polling would go on, and public meetings of all kinds including religious and educational would, come within, the ambit of this section.

This Court should hold that restriction imposed in such wide terms must be unreasonable and in no way connected with the peaceful conduct of elections. The argument is without substance, because if the Legislature had allowed meetings in general to be held excepting those relating to elections, it might be difficult to distinguish meeting of one kind from another. In the garb of holding an educational or religious meeting, propaganda might be carried on in the interests of one candidate or another on the days that' the polling is afoot in a constituency.

It might likewise be difficult to confine the area of "prohibition to the polling booth and its neighbourhood, because meetings outside might be held to intimidate or cajole the voters on the day or days of the elections. Nor is there anything unreasonable in public meetings being prohibited on the day or days of the elections instead of confining the prohibition to the actual polling hours, 'because on the eve of election undue pressure might be brought, on the voters to vote for one candidate or another.

Taking all these circumstances into consideration, I am satisfied that the restrictions imposed on public meetings under Section 126 of the Representation of the People Act are reasonable and do not contravene the provisions of Clause (3) of Article 19 of the Constitution. The contentions thus raised having failed, the application must be dismissed.

Kamla Sahai, J.

9. I agree.

MANU/TN/0025/1919

Back to Section 325 of Indian Penal Code, 1860

IN THE HIGH COURT OF MADRAS
FULL BENCH

Decided On: 07.04.1919

In Re: Palani Goundan

JUDGMENT

1. The accused was convicted of murder by the Sessions Judge of Coimbatore. He appealed to this Court, which took a different view of the facts from that taken by the learned Sessions Judge and has referred to us the question whether on the facts as found by the learned Judges who composed it, the accused has in law committed the offence of murder. Napier, J., inclined to the view that he had: Sadasiva Aiyar, J., thought he had not. The facts as found are these; the accused struck his wife a blow on the head with a plough-share, which knocked her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her on a beam by a rope. In fact the first blow was not a fatal one and the cause of death was asphyxiation by hanging which was the act of the accused.

2. When the case came before us, Mr. Osborne, the Public Prosecutor, at once intimated that he did not propose to contend that the facts as found by the learned referring Judges constitute the crime of murder or even culpable homicide. We think that he was right in doing so: but as doubts have been entertained on the subject, we think it proper to state shortly the grounds for our opinion. By English Law this would clearly not be murder but manslaughter, on the general principles of the Common Law. In India every offence is defined, both as to what must be done and with what intention it must be done, by the section of the Penal Code which creates it a crime. There are certain general exceptions laid down in Chapter IV, but none of them fits the present case. We must therefore turn to the defining Section 299. Section 299 defines culpable homicide as the act of causing death with one of three intentions:

(a) of causing death,

(b) of causing such bodily injury as is likely to cause death,

(c) of doing something which the accused knows to be likely to cause death,

3. It. is not necessary that any intention should exist with regard to the particular person whose death is caused, as in the familiar example of a shot aimed at one person killing another, or poison intended for one being taken by another. 'Causing death' may be

paraphrased as putting an end to human life: and thus all three intentions must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed. No doubt if a man cuts the head off from a human body, he does an act which he knows will put an end to life, if it exists. But we think that the intention demanded by the section must stand in some relation to a person who either is alive, or who is believed by the accused to be alive. If a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of the accused must be judged not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide, if his intention was directed only to what he believed be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction, as in Queen Empress v. Khandu I.L.R. (1890) Bom. 194, or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in Gour Gobindo's case (1811) 6 W.R. CR 55 The facts as found here eliminate both these possibilities, and are practically the same as those found in The Emperor v. Dalu Sardar MANU/WB/0491/1914: 18 C.W.N. 1279. We agree with the decision ob the learned Judges in that case and with the clear intimation of opinion by Sergeant, C.J., in Queen Empress v. Kandu I.L.R. (1890) Bom. 194.

4. Though in our opinion, on the facts as found, the accused cannot be convicted either of murder or culpable homicide, he can of course be punished both for his original assault on his wife, and for his attempt to create false evidence by hanging her. These however are matters for the consideration and determination of the referring Bench.

MANU/SC/0428/2015

Neutral Citation: 2015/INSC/317

Back to Section 326 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 129 of 2006 (Under Article 32 of the Constitution of India)

Decided On: 10.04.2015

Laxmi Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
Madan B. Lokur and U.U. Lalit, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Colin Gonsalves, Sr. Adv., Aparna Bhat, Pukhrambam Ramesh Kumar, Tanima Kishore, Sumit Kumar, Shivangi Singh, Sumeeta Choudhary and Jyoti Mendiratta, Advs.

For Respondents/Defendant: S.P. Mishra, AG, A. Mariarputham, Vibha Datta Makhija, Sr. Advs., C.D. Singh, Arun Bhardwaj, Suryanarayana Singh, Shankar Chillarge, Jayant K. Sud, S.S. Shamshery, Rao Ranjit, AAGs, Jasleen Chahal, Asstt. AAG, S. Wasim A. Qadri, Gaurav Sharma, Meenakshi Grover, D.L. Chidananda, Sunita Sharma, Rashmi Malhotra, Shreekant N. Terdal, Ajay Sharma, Zaid Ali, Parthi K. Goswami, B.K. Prasad, Sudarshan Singh Rawat, D.S. Mahra, B.V. Balaram Das, Sushma Suri, Guntur Prabhakar, Anil Shrivastav, Rituraj Biswas, Riku Sarma, Vartika Sahay, Advs. for Corporate Law Group, Gopal Singh, Shubhra Rai, Rashmi Srivastava, Darpan Bhuyan, Charudatta Mahindrakar, A. Selvin Raja, Pratap Venugopal, Supriya Jain, Niharika, Advs. for K.J. John & Co., Bansuri Swaraj, Shreya Bhatnagar, Hemantika Wahi, Jesal Wahi, Puja Singh, Kiran Ahlawat, Ashwani K. Upadhyay, Kamal Mohan Gupta, Pragati Neekhra, Gopal Prasad, Jayesh Gaurav, Tapesh Kumar Singh, Waqas, Shilpa Dutta, Parikshit Angadi, V.N. Raghupathy, Sonia Shankar Chillarge, Aniruddha P. Mayee, Asha Gopalan Nair, Sapam Biswajit Meitei, Ashok Kumar Singh, Z.H. Isaac Haiding, K.N. Madhusoodhanan, M.J. George, Pragyan Sharma, Heshu Kayina, K. Enatoli Sema, Amit Kumar Singh, Balaji Srinivasan, S.S. Mishra, Naresh Bakshi, Amit Sharma, Sandeep Singh, Aruna Mathur, Yusuf Khan, K. Vijay Kumar, Advs. for Arputham Aruna & Co., M. Yogesh Kanna, J. Janani, Santha Kumaran, P. Venkat Reddy, Advs. for Venkat Palwai Law Associates, S. Udaya Kumar Sagar, Krishna Kumar Singh, Vikrant Yadav, Abhisth Kumar, Rani P. Mehrotra, Rajesh Kumar Maurya, Rajeev Dubey, Jatinder Kumar Bhatia, Mukesh Verma, Rachana Srivastava, Utkarsh Sharma, Anip Sachthey, Saakaar Sardana, Surabhi Sardana, Avijit Bhattacharjee, Upma Shrivastava, K.V. Jagdishvaran, G. Indira, Balasubramaniam, Vimla Singh, V.G. Pragasam, S. Joseph

Aristotle, Prabu Ramasubramanian, P. Parmeswaran, Sanjay R. Hegde, S. Thananjayan, Anil Katiyar, D. Mahesh Babu, Irshad Ahmad, Radha Shyam Jena, Gunnam Venkateswara Rao, Arun Kumar Sinha, Sunil Fernandes, Anuvrat Sharma, Ranjan Mukherjee, Sangram S. Saron, Shree Pal Singh, Ramesh Babu M.R. and Ruchi Kohli, Advs.

ORDER

1. Pursuant to our order dated 06.02.2015, the Ministry of Home Affairs has filed an affidavit dated 8th April, 2015.

2. We have heard learned Counsel for the parties in considerable detail.

3. A meeting was convened by the Secretary in the Ministry of Home Affairs, Government of India and the Secretary in the Ministry of Health and Family Welfare, Government of India with all the Chief Secretaries/their counterparts in the States/Union Territories on 14.03.2015.

4. From the affidavit, the provisional figures for 2014 indicate that there were 282 acid attacks in all the States. The majority of acid attacks were in the States of Uttar Pradesh (185), Madhya Pradesh (53) and Gujarat (11).

5. As far as the Union Territories are concerned, Delhi is the only Union Territory where acid attacks have taken place and the total number of such attacks in the year 2014 provisionally is 27.

6. In all, therefore, 309 acid attacks are said to have taken place provisionally in the year 2014.

7. As mentioned in our order dated 06.02.2015, with the amendment to the Indian Penal Code, nothing survives in the first prayer made by the Petitioner.

8. The second and third prayers relate to the cost of treatment of the acid attack victims and application of Section 357C of the Code of Criminal Procedure, 1973, which was inserted by an Amendment Act in 2013 with effect from 03.02.2013.

9. In the meeting convened by the Secretary in the Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare on 14.03.2015, it has been noted that a Victim Compensation Scheme has already been notified in almost all the States and Union Territories. However, we are told today that the Victim Compensation Scheme has been notified in all States and Union Territories.

10. We have gone through the chart annexed along with the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in Laxmi v. Union of India [MANU/SC/0756/2013: (2014) 4 SCC 427], the minimum compensation of Rs. 3,00,000/- (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed by this Court are complied with and a minimum of Rs. 3,00,000/- (Rupees three lakhs only) is made available to each victim of acid attack.

11. From the figures given above, we find that the amount will not be burdensome so far as the State Governments/Union Territories are concerned and, therefore, we do not see any reason why the directions given by this Court should not be accepted by the State Governments/Union Territories since they do not involve any serious financial implication.

12. We also direct the Member Secretary of the State Legal Services Authority to obtain a copy of the Victim Compensation Scheme from the concerned State/Union Territory and to give it wide and adequate publicity in the State/Union Territory so that each acid attack victim in the States/Union Territories can take the benefit of the Victim Compensation Scheme.

13. Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.

14. The decisions taken in the meeting read as follows:

• The States/UTs will take a serious note of the directions of the Supreme Court with regard to treatment and payment of compensation to acid attack victims and to implement these directions through the issue of requisite orders/notifications.

• The private hospitals will also be brought on board for compliance and the States/UTs will use necessary means in this regard.

• No hospital/clinic should refuse treatment citing lack of specialized facilities.

• First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.

• Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.

15. We expect the authorities to comply with these decisions.

16. Although it is not made clear in the meeting held on 14.03.2015, what we understand by free medical treatment is not only provision of physical treatment to the victim of acid attack but also availability of medicines, bed and food in the concerned hospital.

17. We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

18. We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.

19. In the event of any specific complaint against any private hospital or government hospital, the acid attack victim will, of course, be at liberty to take further action.

20. With regard to the banning of sale of acid across the counter, we direct the Secretary in the Ministry of Home Affairs and Secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from today. It appears that some States/Union Territories have already issued such a notification, but, in our opinion, all States and Union Territories must issue such a notification at the earliest.

21. The final issue is with regard to the setting up of a Criminal Injuries Compensation Board. In the meeting held on 14.03.2015, the unanimous view was that since the District Legal Services Authority is already constituted in every district and is involved in providing appropriate assistance relating to acid attack victims, perhaps it may not be necessary to set up a separate Criminal Injuries Compensation Board. In other words, a multiplicity of authorities need not be created.

22. In our opinion, this view is quite reasonable. Therefore, in case of any compensation claim made by any acid attack victim, the matter will be taken up by the District Legal

Services Authority, which will include the District Judge and such other co-opted persons who the District Judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes.

23. A copy of this order be sent to learned Counsel appearing for the Secretary in the Ministry of Home Affairs and the Secretary in the Ministry of Health and Family Welfare for onward transmission and compliance to the Chief Secretary or their counterparts in all the States and Union Territories.

24. The Chief Secretary will ensure that the order is sent to all the District Magistrates and due publicity is given to the order of this Court.

25. A copy of this order should also be sent to the Member Secretary of NALSA for onward transmission and compliance to the Member Secretary of the State Legal Services Authority in all the States and Union Territories. The Member Secretary of the State Legal Services Authority will ensure that it is forwarded to the Member Secretary of each District Legal Services Authority who will ensure that due publicity is given to the order of this Court.

26. The writ petition is disposed of in the above terms.

MANU/OR/0129/1977

Back to Section 341 of Indian Penal Code, 1860

IN THE HIGH COURT OF ORISSA

Decided On: 23.03.1977

Keso Sahu and Ors. Vs. Saligram Shah

Hon'ble Judges/Coram:
Sachidananda Acharya, J.

ORDER
Sachidananda Acharya, J.

1. The petitioners stand convicted Under Section 341, I. P. C., and each of them has been sentenced thereunder to pay a fine of Rs. 30/- ; in default to undergo R. I. for one month.

2. The complainant's case against the petitioners in short is that the complainant is a retail dealer of rice and he had two shops, one at Nuagan and another at Suajore, On 2-5-1973 he received 27 quintals of rice to be sold on control price from the F. C. I. godown at Nuagan. On 5-5-1973 very early in the morning, by about 4 A. M., the complainant was transporting 11 quintals of rice in 12 bags in two buffalo-carts through Baisakhu Bhokta (P. W. 3) from his Nuagan shop to his shop at Suajore. When the said bags of rice were being taken to Suajore from Nuagan, the petitioners armed with lathis surrounded the carts and the cart- men, did not allow them to proceed towards Suajore and wanted to take them forcibly to the Bihar boarder. P. W. 3 was accompanying the buffalo carts. As the petitioners behaved in the aforesaid manner, P. W. 3 came running to the complainant and informed him about the said illegal action of the petitioners. The complainant went to the place where the buffalo carts had been stopped by the petitioners, and when he accosted them he was threatened with dire consequences, The petitioners thereafter forcibly took away the buffalo carts to the Hatibari police out-post. The complainant explained the matter before the Police Officer at the said out-post and also lodged a complaint about the said incident before the local B. D. O. As no action was taken by any of them, the complainant filed this case against the petitioners.

3. The defence plea in short is that Dalapati Naik (D. W. 1), a constable of the Hatibari police out-post, who was on patrol duty in the Bihar and Orissa border line to check smuggling of rice out of Orissa, asked the petitioners to help him in performing his said job. Before dawn on the date of occurrence the petitioners along with the said constable and one choukidar were in the look out of persons smuggling rice out of Orissa, and at that time they found P. Ws. 1 and 4 carrying 12 bags of rice in two buffalo carts going towards Bihar border, So they with D. W. 1 halted the two carts, and D. W. 1 took them to the police outpost. The petitioners also went to the police out-post along with D. W. 1.

4. The court below has found that the petitioners restrained P. Ws. 1 and 4 from taking the rice to Suajore and voluntarily obstructed those persons in proceeding in their own directions and forcibly took them to the Hatibari police out-post. On the said finding the petitioners have been convicted of an offence Under Section 341, I. P. C. and have been sentenced thereunder as stated above.

As a non-appealable sentence has been passed against the petitioners, they have preferred this revision.

5. Mr. Mukherjee, the learned Counsel for the petitioners, contends that the judgment of conviction is illegal and incorrect in view of the fact that the court below has not considered the facts and circumstances of the case in the perspective of Sections 76 and 79, I. P. C., and the findings arrived at by the court below are against the weight of the evidence on record. He further contends that the court below on flimsy and unwarranted grounds discarded the evidence of D. W. 1 who in very clear and unequivocal terms has testified to the fact that the petitioners merely helped him in preventing smuggling of rice from Orissa to Bihar and that it was he who stopped the buffalo-carts carrying the rice bags in question and took the same to the outpost as he suspected that the said rice was being smuggled out of Orissa to Bihar.

6. P. Ws. 1, 3 and 4 were the three persons who were accompanying the buffalo carts with the rice bags thereon. Admittedly, the buffalo carts with the rice bags thereon were stopped at a short distance (about 400 yards according to P. W. 1) from Suajore at about 4 A. M, on the date of occurrence. The Bihar border, as it appears from the evidence of the prosecution witnesses themselves, is not very far from that place. P. W. 3 in cross-examination says that a bullock cart can be taken to the Bihar border through the paddy fields from the place of occurrence. The distance by road between Nuagan and Suajore is only 3 to 4 miles (P. W. 1). If the rice was intended to be sent to Suajore from Nuagan one would not generally take the trouble of transporting it at 3-4 A. M. Transport of rice at that hour might have aroused suspicion of smuggling in the minds of the people of that locality, especially because of the proximity of the Bihar border.

Rice undoubtedly is an essential commodity, and its movement by export and import was controlled Under Sections 3 and 4 of the Orissa Rice (Movement Control) Order, 1964 (hereinafter referred to as the 'Order'). The said order was passed Under Section 3 of the Essential Commodities Act (hereinafter referred to as the 'Act'). Under Section 4 of the Order, restrictions have been imposed for the transport or attempt to transport or abet the transport of rice to any place in the border area from any place in the State of Orissa outside that area, except under permits issued by the authorities mentioned therein or for transport of rice coming within the proviso to that Order. Contravention of the restrictions imposed by Sections 3 and 4 of the Order will come Under Section 3(2)(d) of the said Act and will be punishable Under Section 7(1)(a)(ii) of that Act. That offence is &

cognizable offence as shown in Sch. II of the Cr. P. C., as it is punishable with imprisonment extending up to 7 years as provided in Section 7(1)(a)(ii) of the Act. Accordingly, Under Section 54 of the Criminal P. C., D. W. 1, being a police officer, was legally authorised to arrest any person who was concerned with any such cognizable offence or against whom there was a reasonable suspicion that he was so concerned.

In the present case, the petitioners, while not denying the fact that they stopped the buffalo carts, state that they stopped the said two buffalo carts as desired by D. W. 1, the constable, who was in charge of patrol duty in that locality for checking smuggling of rice, and thereafter the said constable took the carts and the cartmen to the nearest police out-post and the petitioners also went with D. W. 1 to that out-post. The fact that D. W. 1 and the Choukidar of Nuagan were present with the petitioners at the place of occurrence was put to P. W. 3 in his cross-examination but he denied the same. The constable (D. W. 1) has been examined as a defence witness in this case, and he in unequivocal terms has stated that at the relevant time he was attached to the Hatibari outpost and he had been deputed to check smuggling of rice and other materials from Orissa to Bihar. He further states that on the date of occurrence while he was on patrol duty on command certificate, he found two buffalo carts carrying the rice bags in question proceeding towards village Odagan in Bihar, and so he stopped those carts. In that act the petitioners and the Choukidar of Nuagan helped him as he had called them for that purpose. From there, he took the carts and the cartmen to the out-post. Random suggestions of his complicity with the petitioners to share the sale proceeds of rice passing through that route were thrown at him which he stoutly denied. Nothing has been elicited from or could be placed on record to show that this public servant was in any way interested with the petitioners or was inimical to the complainant and his witnesses in this case. He has rather categorically stated that he bears no grudge or hostility against P. Ws. 1 to 4.

D. W. 1 was summoned as a defence witness and he has testified to as stated above. Except some uncorroborated, casual and haphazard suggestions, there is nothing on record to show as to why this police constable would come and depose in favour of the petitioners. One of the reasons on which the court below has discarded his evidence is that the defence took no steps to call for the personal diary of the said constable and the command certificate issued to him for that date. The courts below was not justified to entertain doubt on the evidence of D. W. 1 on the failure of the defence to call for the said documents. The defence is not expected to prove its case beyond all reasonable doubt. It is sufficient if the defence brings on record materials on which the defence case may appear to be reasonably probable or reasonable doubt can be entertained about the prosecution case. The testimony of D. W. 1 has not been successfully assailed. Nothing could be placed on record to discredit the unerring and straight forward evidence of this police man. The court below also incorrectly entertained doubt on the evidence of D.W. 1 on the wrong premises that the petitioners in their statements before the court did not state that D.W. 1 took the buffalo carts to the out-post. As stated above, most of the petitioners stated in court that with their help the constable (D.W. 1) stopped the buffalo

carts and he took the same to the out-post. I do not see any material contradiction between their statements and the testimony of D.W. 1. Further, his evidence gets ample strength and support from the complainant's admission that the rice in question was seized by the police at the out-post and a criminal case in that connection was started against him, and he was on bail in that case. He has further admitted that he went to the police out-post and the local B. D. O. and complained about the aforesaid affair, but nobody took any action in the matter.

On the unassailed evidence of D.W. I and on the above admitted facts, one reasonably feels inclined to accept the defence version of the case as true. That being so, if the petitioners merely helped D.W. 1 in stopping the buffalo carts and the cartmen at the place of occurrence as desired by D.W. 1, it cannot be said that they committed an offence of wrongful restraint punishable Under Section 341, I. P. C., as D. W. 1 was legally competent to stop those carts and their cartmen, and for that purpose was entitled to the assistance of the petitioners for that work.

7. Apart from that consideration, the buffalo carts as stated by D. W. 1, were stopped as it was suspected that the rice bags on the said carts were going to be smuggled out of Orissa to Bihar. So, for stopping the buffalo carts and the cartmen on the asking of D. W. 1 and on the suspicion that the said rice was being smuggled out of Orissa, the petitioners' case will also come within Section 79, I. P. C., which provides that nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith, believes himself to be justified by law in doing it. To bring one's case Under Section 79, I. P. C., it is not necessary to prove that the rice in question was actually being smuggled out of Orissa. To get the protection of that section it is sufficient if the accused persons can show to a reasonable extent that they in good faith believed that an offence of smuggling of rice was going to be committed by the cartmen, and with that suspicion they stopped the carts from proceeding further and also took part in taking the carts and the cartmen to the police out-post. Their said suspicion may ultimately prove to be incorrect, but that will amount to a mistake of fact, and if that act is committed in good faith, then the petitioners will get the protection of the said section.

8. On the above considerations I find that in the facts and circumstances disclosed by the evidence on record the court below was not justified in convicting the petitioners for an offence Under Section 341, I. P. C. Accordingly, the conviction of the petitioners and the sentence passed against them thereunder cannot be maintained, and are hereby set aside, and the petitioners are acquitted of the same.

The revision accordingly is allowed.

MANU/SC/0523/2004

Back to Section 354 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 33 of 1997 with SLP (Crl.) Nos. 1672-1673/2000

Decided On: 26.05.2004

Back to Section 375 of Indian Penal Code, 1860

Sakshi and Ors. Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
S. Rajendra Babu, C.J. and G.P. Mathur, J.

Counsels:
R.N. Trivedi, Additional Solicitor General, Fali Sam Nariman, Sr. Adv. (A.C.) (N.P.), Naina Kapur, Meenakshi Arora, Homa Chettri, Tara Chandra Sharma, P. Parmeswaran, Sujit Kumar Bhattacharya, Goodwill Indeevar, Shashi Kiran, Anil Katiyar, D.N. Goburdhan, Pinky Anand, Geeta Luthra, Syed Ali Ahmad, Syed Tanweer Ahmad, Girdhar G. Upadhyay and R.D. Upadhyay, Advs. for the appearing parties

JUDGMENT
Authored By: G.P. Mathur, G.P. Mathur
G.P. Mathur, J.

1. This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation, by Sakshi, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence intervention center. The respondents arrayed in the writ petition are (1) Union of India; (2) Ministry of Law and Justice; and (3) Commissioner of Police, New Delhi. The main reliefs claimed in the writ petition are as under:

A) Issue a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that "sexual intercourse" as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration;

B) Consequently, issue a writ, order or direction in the nature of a direction to the respondents and its servants and agents to register all such cases found to be truly on investigation, offences falling within the broadened interpretation of "sexual intercourse"

set out in prayer (A) aforesaid as offences under Section 375, 376 and 376A to 376D of the Indian Penal Code, 1860;

C) Issue such other writ order or direction as this Hon'ble Court may deem appropriate in the present facts and circumstances.

The petition is thus restricted to a declaratory relief and consequential directions.

2. It is set out in the writ petition that the petitioner has noticed with growing concern the dramatic increase of violence, in particular sexual violence against women and children as well as the implementation of the provisions of Indian Penal Code namely Sections 377, 375/376 and 354 by the respondent authorities. The existing trend of the respondent authorities has been to treat sexual violence, other than penile/vaginal penetration, as lesser offences falling under either Section 377 or 354 of the IPC and not as a sexual offence under Section 375/376 IPC. It has been found that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Section 375/376, have been treated as offences tailing under Section 354 of the IPC as outraging the modesty of a women or under Section 377 IPC as unnatural offenses.

3. The petitioner through the present petition contends that the narrow understanding and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution.

4. The petitioner submits that a plain reading of Section 375 would make it apparent that the term "sexual intercourse" has not been defined and is, therefore, subject to and is capable of judicial interpretation. Further the explanation to Section 375 IPC does not in any way limit the term penetration to mean penile/vaginal penetration. The definition of the term rape as contained in the Code is extremely wide and takes within its sweep various forms of sexual offenses. Limiting the understanding of "rape" to abuse by penile/vaginal penetration only, runs contrary to the contemporary understanding of sexual abuse law and denies majority of women and children access to adequate redress in violation of Article 14 and 21 of the Constitution. Statistics and figures indicate that sexual abuse of children, particularly minor girl, children by means and manner other than penile/vaginal penetration is common and may take the form of penile/anal penetration, penile/oral penetration, finger/vaginal penetration or object/ vaginal penetration. It is submitted that by treating such forms of abuse as offenses falling under Section 354 IPC or 377 IPC, the very intent of the amendment of Section 376 IPC by

incorporating Sub-section 2(f) therein is defeated. The said interpretation is also contrary to the contemporary understanding of sexual abuse and violence all over the world.

5. The petitioner submits that mere has for some time now been a growing body of feminist legal theory and jurisprudence which has clearly established rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration. Restricting an understanding of rape in terms sought to be done by the respondent authorities and its agents reaffirms the view that rapists treat rape as sex and not violence and thereby condone such behavior especially when it comes to sexual abuse of children.

6. In this regard, reference is invited to the observations of a renowned expert on the issue of sexual abuse:

"..... in rape.... the intent is not merely to "take", but to humiliate and degrade..... Sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male-on-female offence. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist's favourite weapon, his prime instrument of vengeance..... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the "natural" thing. And as men may invade women through other offices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?" (Susan Brownmiller, Against Our Will 1986).

7. The petitioner further submits that the respondent authorities and their agents have failed to take into consideration the legislative purpose of Section 377 IPC. Reference has also been made to The Law Commission of India Report (No. 42) of 1971 pp. 281. While considering whether or not to retain Section 377 IPC, the Commission found as under:

"There are, however, a few sound reasons for retaining the existing law in India. First it cannot be disputed that homosexual acts and tendencies on the pan of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has social justification. Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time..... Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals..... We are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private."

In view of the Commission's conclusions regarding the purview of Section 377 IPC, the said section was clearly intended to punish certain forms of private sexual relations perceived as immoral. Despite the same, the petitioner submits, the respondent authorities have, without any justification, registered those cases of sexual violence which would otherwise fall within the scope and ambit of Section 375/376 IPC, as cases of moral turpitude under Section 377 IPC. It is submitted that the respondent authorities and their agents have wrongly strained the language of Section 377 IPC intended to punish "homosexual" behavior to punish more serious cases of sexual violence against women and children when the same ought to be dealt with as sexual offences within the meaning of Section 375/376 IPC in violation of Articles 14 and 21 of the Constitution of India.

8. It is submitted that Article 15(3) of the Constitution of India allows for the State to make special provision for women and children. It follows that "special provision" necessarily implies "adequate" provision. Further, that the arbitrary and narrow interpretation sought to be placed by the respondent authorities and their agents on Section 375/376 renders the effectiveness of redress under the said Sections and in particular under Section 376(2)(f) meaningless in violation of Article 15(3) of the Constitution of India. The petitioner has also referred to the U.N. Right of Child Convention ratified by the respondent No. 1 on 11th December, 1993 as well as the U.N. Convention on the Elimination of Discrimination Against Women which was ratified in August 1993. In view of the ratification, the respondent No. 1 has created a legitimate expectation that it shall adhere to its International commitments as set out under the respective Conventions. In the present case, however, the existing interpretation of rape sought to be imposed by the respondent authorities and their agents is in complete violation of such International commitments as have been upheld by this Court.

9. By an order passed on 3.11.2000 the parties were directed to formulate issues which arise for consideration. Accordingly, the petitioner has submitted the following issues and legal propositions which require consideration by the Court:

(a) Given that modem feminist legal theory and jurisprudence look at rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration, whether the term "rape" should today be understood to include not only forcible penile/vaginal penetration but all forms of forcible penetration including penile/oral penetration, penile/anal penetration, object or finger/vaginal and object or finger/anal penetration.

(b) Whether all forms of non-consensual penetration should not be subsumed under Section 373 of the Indian Penal code and the same should not be limited to penile, vaginal penetration only.

(c) In particular, given the widespread prevalence of child sexual abuse and bearing in mind the provisions of the Criminal Law (Amendment) Act, 1983 which specifically

inserted Section 376(2)(f) envisaging the offence of "rape" of a girl child howsoever young below 12 years of age, whether the expression "sexual intercourse" as contained in Section 375 of the Indian Penal Code should correspondingly include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration; and whether the expression "penetration" should not be so clarified in the Explanation to Section 375 of the Indian Penal Code.

(d) Whether a restrictive interpretation of "penetration" in the Explanation to Section 375 (rape) defeats the very purpose and intent of the provision for punishment for rape under Section 376(2)(f) "Whosoever commits rape on a woman when she is under twelve years of age."

(e) Whether, penetration abuse of a child below the age of 12 should no longer be arbitrarily classified according to the 'type' of penetration (ignoring the 'impact' on such child) either as an "unnatural offence" under Section 377 IPC for penile/oral penetration and penile/anal penetration or otherwise as "outraging the modesty of a woman" under Section 354 for finger penetration or penetration with an inanimate object.

(f) Whether non-consensual penetration of a child under the age of 12 should continue to be considered as offences under Section 377 ("Unnatural Offences") on par with certain forms of consensual penetration (such as consensual homosexual sex) where a consenting party can be held liable as an abettor or otherwise.

(g) Whether a purposive/teleological interpretation of "rape" under Section 375/376 requires taking into account the historical disadvantage faced by a particular group (in the present case, women and children) to show that the existing restrictive interpretation worsens that disadvantage and for that reason fails the test of equality within the meaning of Article 14 of the Constitution of India.

(h) Whether the present narrow interpretation treating only cases of penile/vaginal penetration as rape, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of Constitution of India.

10. Counter affidavit on behalf of respondents No. 1 and 2 has been filed by Mrs. G. Mukerjee. Director in the Ministry of Home Affairs. It is stated therein that Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983. The same Act has also introduced several new Sections viz. 376A, 376B, 376C and 376D IPC. These sections have bean inserted with a view to provide special/adequate provisions for women and children. The term "rape" has been clearly defined under Section 375 IPC. Penetration other than penile/vaginal penetration are unnatural sexual offences. Stringent punishments are provided for such unnatural offences under Section 377. The punishment provided under Section 377 is imprisonment for life or

imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Section 377 deals with unnatural offences and provides for a punishment as severe as that provided for rape in Section 376. Section 354 and 506 have been framed with a view to punish lesser offence of criminal assault in the form of outraging the modesty of a woman, whereas Sections 376 and 377 provide stringent punishment for sexual offences. The types of several offences as mentioned by the petitioner i.e. penile/anus penetration, penile/oral penetration, finger/anile penetration, finger/vaginal penetration or object/vaginal penetration are serious sexual offences of unnatural nature and are to be covered under Section 377 which provides stringent punishment. therefore, the plea of petitioner that offences under Section 377 are treated as lesser offences is incorrect. It is also submitted in the counter affidavit that penetration of the vagina, anus or urethra of any person with any part of the body of another person other than penile penetration is considered to be unnatural and has to be dealt with under Section 377 IPC. Section 376(2)(f) provides stringent punishment for committing rape on a woman when she is under the age of 12 years. Child sexual abuse of any nature, other than penile penetration, is obviously unnatural and are to be dealt with under Section 377 IPC. It is further submitted that Section 354 IPC provides for punishment for assault or criminal force to woman to outrage her modesty. Unnatural sexual offences can not be brought under the ambit of this Section. Rape defined under Section 375 is penile/vaginal penetration and all other sorts of penetration are considered to be unnatural sexual offences. Section 377 provides stringent punishment for such offences. It is denied that provisions of Sections 375, 376 and 377 are violative of fundamental rights, under Articles 14, 15(3) and 21 of the Constitution of India. Sexual penetration as penile/anal penetration, finger/vaginal and finger/anal penetration and object and vaginal penetration are most unnatural forms of perverted sexual behavior for which Section 377 provides stringent punishment.

11. Ms. Meenakshi Arora, learned counsel for the petitioner has submitted that Indian Penal Code has to be interpreted in the light of the problems of present day and a purposive interpretation has to be given. She has submitted that Section 375 IPC should be interpreted in the current scenario, especially in regard to the fact that child abuse has assumed alarming proportion in recent times. Learned counsel has stressed that the words "sexual intercourse" in Section 375 IPC should be interpreted to mean all kinds of sexual penetration of any type of any orifice of the body and not the intercourse understood in the traditional sense. The words "sexual intercourse" having not been defined in the Penal Code, there is no impediment in the way of the Court to give it a wider meaning so that the various types of child abuse may come within its ambit and the conviction of an offender may be possible under Section 376 IPC, In this connection, she has referred to United Nations Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979 and also Convention On The Rights Of The Child adopted by the General Assembly of the United Nations on 20th February, 1989 and especially to Articles 17(e) and 19 thereof, which read as under:

Article 17

States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall --

(a)..... (Omitted as not relevant)

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18.

ARTICLE 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other persons who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

12. In support of her submission, learned counsel has referred to following passage of statutory interpretation by F.A.R. Bennion (Butterworths -- 1984) at page 355-357:

"While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed.

In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the Court so to construe the enactment as to minimise the adverse effects of the counter-mischief.

The ongoing Act. In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

In this connection, she has also referred to S. Gopal Reddy v. State of A.P. MANU/SC/0550/1996: 1996CriLJ3237 where the Court referred to the following words of Lord Denning in Seaford Court Estates Ltd. v. Asher (1949) 2 All ER 153:

"..... It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a detect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.....
A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."
And held that it is a well known rule of interpretation of Statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a Statute and that the Courts must look to the object which the Statute seeks to achieve while interpreting any of the provisions of the Act and a purposive approach is necessary. Accordingly, the words "at or before or after the marriage as consideration for the marriage" occurring in Section 2 of the Dowry Prohibition Act were interpreted to mean demand of dowry at the "negotiation stage" as a consideration for proposed marriage and "marriage" was held to include the "proposed marriage" that may not have taken place. Reference is also made to Directorate of Enforcement v. Deepak Mahajan and Anr. MANU/SC/0422/1994: 1994CriLJ2269, wherein it was held that a mere mechanical interpretation of the words devoid of concept or purpose will reduce most of legislation to futility and that it is a salutary rule, well established, that the intention of the legislature must be found by reading the Statute as a whole. Accordingly, certain provisions of FERA and Customs Act were interpreted keeping in mind that the said enactments were

enacted for the economic development of the country and augmentation of revenue. The Court did not accept the literal interpretation suggested by the respondent therein and held that Sub-section (1) and (2) of Section 167 Cr.P.C. are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that a Magistrate has jurisdiction under Section 167(2) Cr.P.C. to authorize detention of a person arrested by an authorised officer of the Enforcement Directorate under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA.

13. Ms. Meenakshi Arora has submitted that this purposive approach is being adopted in some of other countries so that the criminals do not go unscathed on mere technicality of law. She has placed strong reliance on some decisions of House of Lords to substantiate her contentions and the most notable being R v. R (1991) 4 All ER 481 where it was held as under:

"The rule that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances or that it is an incident of modern marriage that the wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. In Section 1(1) of the Sexual Offences (Amendment) Act, 1976, which defines rape as having 'unlawful' intercourse with a woman without her consent, the word 'unlawful' is to be treated as mere surplusage and not as meaning 'outside marriage', since it is clearly unlawful to have sexual intercourse with any woman without her consent."
The other decision cited by learned counsel is Regina v. Burstow and Regina v. Ireland 1997 (4) All ER 74 where a person accused of repeated silent telephone calls accompanied on occasions by heavy breathing to women was held guilty of causing psychiatric injury amounting to bodily harm under Section 42 of Offences against the Person Act, 1861. In the course of the discussion, Lord Steyn observed that the criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury and as a matter of current usage, the contextual interpretation of "inflict" can embrace the idea of one person inflicting psychiatric injury on another. It was further observed that the interpretation and approach should, so far as possible, be adopted which treats the ladder of offences as a coherent body of law. Learned counsel has laid emphasis on the following passage in the judgment:

"The proposition that the Victorian, legislator when enacting Sections 18, 20 and 47 of the Act 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant enquiry is as to the sense of the words in the context in which they are used. Moreover the Act of 1861 is a statute of the "always speaking" type: the statute must be

interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury."
It has thus been contended that the words "sexual intercourse" occurring in Section 375 IPC must be given a larger meaning than as traditionally understood having regard to the monstrous proportion in which the cases of child abuse have increased in recent times. She has also referred to a decision of Constitutional Court of South Africa in the National Coalition for Gay and Lesbian Equality and Ors. v. The Minister of Home Affairs and Ors. -- Case CCT 10/99 wherein it was held that Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by Section 9 of the Constitution and their right to dignity under Section 10. It was further held that it would not be an appropriate remedy to declare the whole of Section 25(5) invalid. Instead, it would be appropriate to read in, after the word "spouse" in the section, the words "or partner, in a permanent same-sex life partnership".

14. Ms. Meenakshi Arora has also placed before the Court the judgments rendered on 10th December, 1998 and 22nd February, 2001 by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Under Article 5 of the Statute of the International Tribunal, rape is a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of the war or an act of genocide, if the requisite elements are met and may be prosecuted accordingly. The Trial Chamber after taking note of the fact that no definition of rape can be found in international law, proceeded on the following basis:

"Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of a mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person."

In the second judgment of the Trial Chamber dated 22nd February, 2001, the interpretation which focussed on serious violations of a sexual autonomy was accepted.

15. Shri R.N. Trivedi, learned Additional Solicitor General appearing for the respondents, has submitted that International Treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights but only in absence of municipal laws as held in Vishaka v. State of Rajasthan MANU/SC/0786/1997: AIR1997SC3011 and Lakshmi Kant Pandey v. Union of India MANU/SC/0054/1984: [1984]2SCR795. When laws are already existing, subsequent ratification of International Treaties would not render existing municipal laws ultra vires of Treaties in case of inconsistency. In such an event the State through its legislative wing can modify the law to bring it in accord with Treaty obligations. Such matters are in the realm of State policy and are, therefore, not enforceable in a Court of law. He has further submitted that in International law, ratified Treaties can be deemed interpreted in customary law unless the former are inconsistent with the domestic laws or decisions of its judicial Tribunals. The decision of the International Tribunal for the Crimes committed in the Territory of the Former Yugoslavia cannot be used for interpretation of Section 354 and 375 IPC and other provisions. Even decisions of International Court of Justice are binding only on the parties to a dispute or interveners in view of Articles 92, 93 and 94 of the UN Charter and Articles 59 and 63 of the IJC Statutes. Learned counsel has also submitted that no writ of mandamus can be issued to the Parliament to amend any law or to bring it in accord with Treaty obligations. He has also submitted that Sections 354 and 375 IPC have been interpreted in innumerable decisions of various High Courts and also of the Supreme Court and the consistent view is that to hold a person guilty of rape, penile penetration is essential. The law on the point is similar both in England and USA. In State of Punjab v. Major Singh MANU/SC/0295/1966: 1967CriLJ1 it was held that if the hymen is ruptured by inserting a finger, it would not amount to rape. Lastly, it has been submitted that a writ petition under Article 32 of the Constitution would not lie for reversing earlier decisions of the Court on the supposed ground that a restrictive interpretation has been given to certain provisions of a Statute.

16. In support of his submission Shri Trivedi has placed reliance on Volume 11(1) of Halsbury's Laws of England para 514 (Butterworths --1990) wherein unlawful sexual intercourse with woman without her consent has been held to be an essential ingredient of rape. Reference has also been made to Volume 75 Corpus Juris Secundum para 10, wherein it is stated that sexual penetration of a female is a necessary element of the crime of rape, but the slightest penetration of the body of the female by the sexual organ of the male is sufficient. Learned counsel has also referred to Principles Of Public International Law by Ian Brownlie, where the learned author, after referring to some decisions of English Courts has expressed an opinion that the clear words of a Statute bind the Court even if the provisions are contrary to international law and that there is no such thing as a standard of international law extraneous to the domestic law by a Kingdom and that international law as such can confer no rights cognizable in the municipal courts. Learned counsel has also referred to Dicey and Morris on The Conflict of Laws wherein in the Chapter on the enforcement of foreign law, following Rule has been stated:

"English Courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."
With regard to penal law, it has been stated as under:

"The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed.... Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: 'The Courts of no country execute the penal laws of another'."
17. This Court on 13.1.1998 referred the matter to the Law Commission of India for its opinion on the main issue raised by the petitioner, namely, whether all forms of penetration would come within the ambit of Section 375 IPC or whether any change in statutory provisions need to be made, and if so, in what respect? The Law Commission had considered some of the matters in its 156th Report and the relevant extracts of the recommendation made by it in the said Report, concerning the issue involved, were placed before the Court. Para 9.59 of the Report reads as under:

"9.59 Sexual-child abuse may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assaults. The cases involving penile penetration into vagina are covered under Section 375 of the IPC. If there is any case of penile oral penetration and penile penetration into anus, Section 377 IPC dealing with unnatural offences, i.e., carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed Section 354 IPC whereunder a more severe punishment is also prescribed can be invoked and as regards the male child, the penal provisions of the IPC concerning 'hurt', 'criminal force' or 'assault' as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract Section 354 IPC within the ambit of 'rape' which is a distinct and graver offence with a definite connotation. It is needless to mention that any attempt to commit any of these offences is also punishable by virtue of Section 511 IPC. therefore, any other or more changes regarding this law may not be necessary."
Regarding Section 377 IPC, the Law Commission recommended that in view of the ongoing instances of sexual abuse in the country where unnatural offences is committed on a person under age of eighteen years, there should be a minimum mandatory sentence of imprisonment for a term not less than two years but may extend to seven years and fine, with a proviso that for adequate and special reasons to be recorded in the judgment, a sentence of less than two years may be imposed. The petitioner submitted the response on the recommendations of the Law Commission. On 10/18.2.2000, this Court again

requested the Law Commission to consider the comments of representative organisations (viz. SAKSHI, IFSHA and AIDWA).

18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375 IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375 uses the expression "sexual intercourse" but the said expression has not been defined. The dictionary meaning of the word "sexual intercourse" is heterosexual intercourse involving penetration of the vagina by the penis. The Indian Penal Code was drafted by the First Indian Law Commission of which Lord Mecaulay was the President. It was presented to the Legislative Council in 1856 and was passed on October 6, 1860. The Penal Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman (which in view of Section 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376A to 376D were inserted by Criminal Law (Amendment) Act, 1983 but Sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of 'rape' as given in Section 375 IPC. Similarly, Section 354 which deals with assault or criminal force to woman with intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment.

19. It is well settled principle that the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Principles of Statutory Interpretation by Justice G.P. Singh p.58 and 751 Ninth Edition).

20. Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one and a half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375 IPC so that the same may become an offence

punishable under Section 376 IPC has neither been considered nor accepted by any Court in India so far. Prosecution of an accused for an offence under Section 376 IPC on radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

21. The decision of Constitutional Court of South Africa cited by learned counsel for the petitioner does not commend to us as the Court there treated "Gays and Lesbian in permanent same sex life partnerships" at par with "spouses" and took upon itself the task of Parliament in holding that in Section 25(5) of the Aliens Control Act, after the word "spouse", the words "or partner in a permanent same sex life partnership" should be read. The decision of House of Lords in R. v. R. was given on its own facts which deserve notice. Here the wife had left her matrimonial home with her son on 21st October, 1989 and went to live with her parents. She had consulted solicitors about matrimonial problems and had left a letter for the husband informing him that she intended to petition for divorce. On 23rd October, 1989 the husband spoke to his wife on telephone indicating that it was his intention also to seek divorce. In the night of 12th November, 1989 the husband forced his way into the house of his wife's parents, who were out at that time and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. On the facts of the case the conviction of the husband may not be illegal. It is very doubtful whether the principle laid down can be of universal application. In Regina v. Burstow psychiatric injury was held to be bodily harm under Section 20, having regard to the meaning of the word in the usage of the present day. In our opinion the judgment of the International Tribunal can have no application here as Tribunal itself noted that no definition of rape can be found in International law and it was dealing with prosecution of persons responsible for serious violations of International Humanitarian Law committed in the Territory of former Yugoslavia. The judgment is not at all concerned with interpretation of any provision of domestic law in peace time conditions. The decisions cited by the learned counsel for the petitioner, therefore, do not persuade us to enlarge the definition of rape as given in Section 375 IPC which has been consistently so understood for over a century through out the country.

22. It may be noted that ours is a vast and big country of over 100 crore people. Normally, the first reaction of a victim of crime is to report the incident at the police station and it is the police personnel who register a case under the appropriate Sections of the Penal Code. Such police personnel are invariably not highly educated people but they have studied the basic provisions of the Indian Penal Code and after registering the case under the appropriate sections, further action is taken by them as provided in Code of Criminal Procedure. Indian Penal Code is a part of the curriculum in the law degree and it is the existing definition of "rape" as contained in Section 375 IPC which is taught to every

student of law. A criminal case is initially handled by a Magistrate and thereafter such cases as are exclusively triable by Court of Session are committed the Court of Session. The entire legal fraternity of India, lawyers or Judges, have the definition as contained in Section 375 IPC engrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large.

23. Stare decisis is a well known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by court of competent jurisdiction authorised to construe if, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a Court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the Courts and should be followed in similar cases. It is a wholesome doctrine which gives certainty to law and guides the people to mould their affairs in future.

24. In Mishri Lal v. Dhierendra Nath MANU/SC/0241/1999: [1999]2SCR453 importance of this doctrine was emphasised for the purpose of avoiding uncertainty and confusion and paras 14, 15, 16 and 21 of the Reports read as under:

"14. This Court in Muktul v. Manbhari MANU/SC/0146/1958: [1959]1SCR1099 explained the scope of the doctrine of stare decisis with reference to Haralsbury's Laws of England and Corpus Juris Secundum in the following manner:

"The principle of stare decisis is thus stated in Halsbury's Laws of England, 2nd Edn.:

'Apart from any question as to the courts being of coordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the Supreme Appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake."

The same doctrine is thus explained in Corpus Juris Secundum -

'Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable.'"
15. Be it noted however that Corpus Juris Secundum adds a rider that

"previous decisions should not be followed to the extent that grievous wrong may result; and, accordingly, the courts ordinarily will not adhere to a rule of principle established by previous decisions which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result."
16. The statement though deserves serious consideration in the event of a definite finding as to the perpetration of a grave wrong but that by itself does not denude me time-tested doctrine of stare decisis of its efficacy. Taking recourse to the doctrine would be an imperative necessity to avoid uncertainty and contusion. The basic feature of law is its certainty and in the event of there being uncertainty as regards the state of law - the society would be in utter confusion the resultant effect of which would bring about a situation of chaos - a situation which ought always to be avoided.

21. In this context reference may also be made to two English decisions:

(a) in Admiralty Commrs. v. Valverda (Owners) 1938 AC 173 (AC at p. 194) wherein the House of Lords observed that even long established conveyancing practice, although not as authoritative as a judicial decision, will cause the House of Lords to hesitate before declaring it wrong, and

(b) in Button v. Director of Public Prosecution 1966 AC 591 the House of Lords observed:

"In Corpus Juris Secundum, a contemporary statement of American Law, the stare decisis rule has been stated to be a principle of law which has become settled by a series of decisions generally, is binding on the courts and should be followed in similar cases. It has been stated that this rule is based on expediency and public policy and should be strictly adhered to by the courts. Under this rule courts are bound to follow the common law as it has been judicially declared in previously adjudicated cases and rules of substantive law should be reasonably interpreted and administered. This rule has to preserve the harmony and stability of the law and to make as steadfast as possible judicially declared principles affecting the rights of property, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and declared should be considered as settled and closed to further

argument. It is a salutary rule, entitled to great weight and ordinarily should be strictly adhered to by the courts. The courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one, or equitable considerations might suggest, a different result and although it has been erroneously applied in a particular case. The rule represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations, but it is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience."

25. It may be noticed that on July 26, 1966, the House of Lords made a departure from its past practice when a statement was made to the following effect:

"Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will boar in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House."

26. While making the above statement a rule of caution was sounded that while departing from a previous decision when it appears right to do so, the especial need for certainty as to criminal law shall be borne in mind. There is absolutely no doubt or confusion regarding the interpretation of provisions of Section 375 IPC and the law is very well settled. The inquiry before the Courts relate only to the factual aspect of the matter which depends upon the evidence available on the record and not on the legal aspect. Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to a serious confusion in the minds of prosecuting agency and the Courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of "rape" as contained in Section 375 IPC

by a process of judicial interpretation as is sought to be done by means of the present writ petition.

27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect:

(i) permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person),

(ii) allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross examination of a minor should only be carried out by the judge based on written questions submitted by the defense upon perusal of the testimony of the minor

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273 Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice, cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The Law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect: "Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.".

29. Ms. Meenakshi Arora has referred to a decision of the Canadian Supreme Court in Her Majesty The Queen, Appellant v. D.O.L., Respondent and the Attorney General of Canada, etc. (1993) 4 SCR 419, wherein the constitutional validity of Section 715. 1 of the Criminal Code was examined. This section provides that in any proceeding relating to certain sexual offences in which the complainant was under age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence in which the complainant describes the act complained of, is admissible in evidence, if the complainant while testifying adopts the contents of the

videotape. The Court of Appeal had declared Section 715. 1 unconstitutional on the ground that the same contravened Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms and could not be sustained under Section 1. The Supreme Court took note of some glaring features in such type of cases viz. the innate power imbalance which exists between abuser and the abused child; a failure to recognise that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age; and that the Court cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions without the criminal justice system which hold stereotypical and biased views about the victimisation of women. The Court accordingly held that the procedures set out in Section 715. 1 are designed to diminish the stress and trauma suffered by child complainants as a by product of their role in the criminal justice system. The "system induced trauma" often ultimately serves to re-victimize the young complainant. The Section was intended to preserve the evidence of the child and to remove the need for them to repeat their story many times. It is often repetition of the story that results in the infliction of trauma and stress upon a child who is made to believe that she is not being believed and that her experiences are not validated. The benefits such a provision would have in limiting the strain imposed on child witness who are required to provide detailed testimony about confusing, embarrassing and frightful incidents of abuse in an intimidating, confrontational and often hostile court room atmosphere. Another advantage afforded by the Section is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand. The videotape testimony enables the Court to hear a more accurate account of what the child was saying about the incident at the time it first came to light and the videotape of an early interview if used in evidence can supplement the evidence of a child who is inarticulate or forgetful at the trial. The Section also acts to remove the pressure placed on a child victim of sexual assault when the attainment of "truth" depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. The Court also observed that the rules of evidence have not been constitutionalised into unaltered principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time. The Court accordingly reversed the judgment of Court of Appeal and upheld the constitutionality of Section 715. 1.

30. We will briefly refer to the statutory provisions governing the situation. Section 273 Cr.P.C. lays down that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. Sub-section (1) of Section 327 Cr.P.C. lays down that any Criminal Court enquiring into or trying any offence shall be deemed to be open Court to which the public generally may

have access, so, far as the same can conveniently contain them. Sub-section (2) of the same Sections says that notwithstanding anything contained in Sub-section (1) the inquiry into the trial of rape or an offence under Section 376, Section 376A, Section 376B, Section 376C or Section 376D of the Indian Penal Code shall be conducted in camera. Under the proviso to this sub-section the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court. It is rather surprising that the legislature while incorporating Sub-section (2) to Section 327 by amending Act 43 of 1983 failed to take note of offences under Section 354 and 377 IPC and omitted to mention the aforesaid provisions. Deposition of the victims of offences under Section 354 and 377 IPC can at times be very embarrassing to them.

31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B Desai MANU/SC/0268/2003: 2003CriLJ2033. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC.

33. In State of Punjab v. Gurmit Singh MANU/SC/0366/1996: 1996CriLJ1728 this Court had highlighted the importance of provisions of Section 327(2) and (3) Cr.P.C. and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in camera. It was also pointed out that such a trial in camera would enable the victim of crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady Judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

(1) The provisions of Sub-section (2) of Section 327 Cr.P.C. shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in State of Punjab v. Gurmit Singh.

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.

36. Before parting with the case, we must place it on record that Ms. Meenakshi Arora put in lot of efforts and hard labour in placing the relevant material before the Court and argued the matter with commendable ability.

G.P. Mathur, J.

37. For the reasons given in WP(Crl.) No. 33 of 1997 decided today, Special Leave Petitions are dismissed.

MANU/SC/1298/2017

Neutral Citation: 2017/INSC/1030

Back to Section Section 375 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 382 of 2013 (Under Article 32 of the Constitution of India)

Decided On: 11.10.2017

Independent Thought Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Madan B. Lokur and Deepak Gupta, JJ.

Counsels:

For Appearing Parties: Rana Mukherjee, Sr. Adv., Gaurav Agrawal, Abhikalp Pratap Singh, Abhay Anturkar, Vikram Srivastava, Binu Tamta, Shailender Saini, Sadhana Sandhu, B.V. Balaram Das, Gurmeet Singh Makker, Daisy Hannah, Kasturika Kaumudi, B. Krishna Prasad, Jayna Kothari, Disha Chaudhari, Anindita Pujari and Kavita Bharadwaj, Advs.

JUDGMENT

Authored By: Madan B. Lokur, Deepak Gupta

Madan B. Lokur, J.

1. The issue before us is limited but one of considerable public importance - whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the Indian Penal Code) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the Indian Penal Code creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the

artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

The writ petition

3. The Petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights. The society provides technical and hand-holding support to non-governmental organizations as also to government and multilateral bodies in several States in India. It has also been involved in legal intervention, research and training on issues concerning children and their rights. The society has filed a petition Under Article 32 of the Constitution in public interest with a view to draw attention to the violation of the rights of girls who are married between the ages of 15 and 18 years.

4. According to the Petitioner, Section 375 of the Indian Penal Code prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the Indian Penal Code, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the Indian Penal Code, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the Indian Penal Code.

5. Learned Counsel for the Petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual

intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the Indian Penal Code is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the Indian Penal Code in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

Law Commission of India - 84th Report

6. Learned Counsel for the Petitioner drew our attention to the 84th report of the Law Commission of India (LCI) presented on 25th April, 1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in paragraph 2.18, 2.19 and 2.20 of the report. The view is that since the Child Marriage Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and the Indian Penal Code should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. These paragraphs read as follows:

2.18. Section 375, fifth clause. - The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse without consent. The fifth Clause of Section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.

2.19. History. - The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows:

Year	Age of consent Under Section 375, 5th clause, I.P.C.	Age mentioned in the Exception to Section 375, I.P.C.	Minimum age of marriage under the Child Marriage Restraint Act, 1929
1860.....	10 years	10 years	
1891 (Act 10 of 1891) (after the amendment of I.P.C.	12 years	12 years	__
1925 (after the amendment of I.P.C.)	14 years	13 years	__
1929 (after the passing of the Child Marriage Act)	14 years	13 years	14 years
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 years	15 years	15 years
1978.....	16 years	15 years	18 years
[as of 2017]* *The bracketed portion	[Age of consent under	[15 years]	[Minimum age of marriage under the
in this row has been inserted by us.	Sec. 375, Sixthly of the IPC - 18 years]		PCMA, 2006 - 18(F)/21(M) years]

2.20. Increase in minimum age. - The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant Clause of Section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.

Law Commission of India - 172nd Report

7. The issue was re-considered by the LCI in its 172nd report presented on 25th March, 2000. In that report, it is recommended that an exception be added to Section 375 of the Indian Penal Code to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved.

8. Apparently at the stage of discussions, the recommendation of the LCI (still at the stage of proposal) did not find favour with an NGO called Sakshi who suggested deletion of the exception. According to the NGO, "where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law." Therefore, there is no reason why a concession should be made in the matter of an offence of rape/sexual assault only because the wife happens to be above 15/16 years of age. The LCI did not agree with the NGO and the reason given is that if the exception that is recommended is deleted, it "may amount to excessive interference with the marital relationship." In other words, according to the LCI the husband of a girl child who is not below 16 years of age can sexually assault and even rape his wife and the assault or rape would not be punishable-and if it is made punishable, then it would amount to excessive interference with the marital relationship. (It may be mentioned that Exception 2 to Section 375 of the Indian Penal Code has not increased the age to 16 years from 15 years as recommended by the LCI but has retained it at 15 years. According to the counter affidavit filed on behalf of the Union of India, the age of 15 years has been kept to give protection to the husband and the wife against criminalizing the sexual activity between them).

Counter affidavit of the Union of India

9. Since we have adverted to the counter affidavit filed by the Union of India opposing the writ petition, we propose to make a very brief reference to it. A somewhat more detailed reference is made to the counter affidavit of the Union of India at a later stage.

10. For the present, the counter affidavit of the Union of India refers to the National Family Health Survey - 3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can petition for a divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow

'legitimized' by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

Documentary material

11. Apart from but in addition to the legal issue, learned Counsel for the Petitioner and learned Counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life.

(a) Reference was made to a report "Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms". This report was prepared in March 2011 under the supervision of UNICEF India.

(b) Reference was also made to a report "Reducing Child Marriage in India: A Model to Scale up Results". This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India. The report contains statistics of widowed, separated and divorced girls who were married between 10 and 18 years of age based on Census 2011.

(c) Reference was also made to a useful study "Economic Impacts of Child Marriage: Global Synthesis Report" released in June 2017. This report is a collaborative effort by the International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment; (iv) labour force participation, earnings and welfare, and (v) women's decision-making and other impacts. The economic cost of child marriages and implications has also been discussed in detail in the report. A child marriage is defined as a marriage or union taking place before the age of 18 years and this definition has been arrived at by relying on a number of conventions, treaties and international agreements as well as resolutions of the UN Human Rights Council and the UN General Assembly.

(d) Another extremely useful report referred to is "A Statistical Analysis of Child Marriage in India based on Census 2011". This report is prepared by a collaborative

organization called Young Lives and the National Commission for the Protection of Child Rights and was released quite recently in June 2017.

12. This refers to the consequences of child marriage in Chapter 5. Broadly, it is stated:

Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights." .....

The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.

Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalization. The impact of early marriage on girls-and to a lesser extent on boys-is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities-they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there

is very little research evidence to capture the long term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged.

Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being reproductive health and educational opportunity along with consequences described earlier.

13. There is a specific discussion in the Statistical Analysis on the impact of early child birth on health in which it is stated that "girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes." It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

14. There is also a useful discussion on violence, neglect and abandonment; psychosocial disadvantage; low self-esteem; low education and limited employability; human trafficking and under-nutrition, all of which are of considerable importance for the well-being of a girl child.

We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by learned Counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age.

In-depth Study on all forms of violence against women