is must. Section 53A Sub- section (2) as well as Section 164(A) Sub- section (2) are to the following effect:

Section 53A. Examination of person accused of rape by Medical Practitioner.-

(1)... ... ...

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

Section 164A. Medical Examination of the victim of rape.-

(1)... ... ...

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

215. This Court had the occasion to consider various aspects of DNA profiling and DNA reports. K.T. Thomas, J. in Kamti Devi (Smt.) and Anr. v. Poshi Ram MANU/SC/0335/2001 : (2001) 5 SCC 311, observed:

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. ...

216. In Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh MANU/SC/1306/2009 : (2009) 14 SCC 607, a two- Judge Bench had explained as to what is DNA in the following manner:

41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken.

42. Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross- examination, PW 46 had stated as under:

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.

217. In Santosh Kumar Singh v. State Through CBI MANU/SC/0801/2010 : (2010) 9 SCC 747, which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held thus:

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the Appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.

218. In Inspector of Police, Tamil Nadu v. John David MANU/SC/0461/2011 : (2011) 5 SCC 509, a young boy studying in MBBS Course was brutally murdered by his senior. The torso and head were recovered from different places which were identified by the father of the deceased. For confirming the said facts, the blood samples of the father and mother of the deceased were taken which were subject to DNA test. From the DNA, the identification of the deceased was proved. Paragraph 60 of the decision is reproduced below:

60. ... The said fact was also proved from the DNA test conducted by PW 77. PW 77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of P.W. 1 and Baby Ponnusamy was found in the recovered parts of the body and that therefore they should belong to the only missing son of PW 1.

219. In Krishan Kumar Malik v. State of Haryana MANU/SC/0718/2011 : (2011) 7 SCC 130, in a gang rape case when the prosecution did not conduct DNA test or analysis and matching of semen of the Appellant- accused with that found on the undergarments of the prosecutrix, this Court held that after the incorporation of Section 53- A in Code of Criminal Procedure, it has become necessary for the prosecution to go in for DNA test in such type of cases. The relevant paragraph is reproduced below:

44. Now, after the incorporation of Section 53- A in the Code of Criminal Procedure w.e.f. 23.06.2006, brought to our notice by the learned Counsel for the Respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the

prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Code of Criminal Procedure the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.

220. In Surendra Koli v. State of Uttar Pradesh and Ors. MANU/SC/0119/2011 : (2011) 4 SCC 80, the Appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl. Para 12 is reproduced below:

12. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The doctors at AIIMS have put the parts of the deceased girls which have been recovered by the doctors of AIIMS together. These bodies have been recovered in the presence of the doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible Under Section 27 of the Evidence Act.

221. In Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra MANU/SC/0681/2012 : (2012) 9 SCC 1, the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay. The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. The Court observed:

333. It is seen above that among the articles recovered from Kuber were a number of blankets, shawls and many other items of clothing. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA profiling and, excepting Imran Babar (deceased Accused 2), Abdul Rahman Bada (deceased Accused 5), Fahadullah (deceased Accused 7) and Shoaib (deceased Accused 9), the rest of six accused were connected with various articles found and recovered from the Kuber. The Appellant's DNA matched the DNA profile from a sweat stain detected on one of the jackets. A chart showing the matching of the DNA of the different accused with DNA profiles from stains on different articles found and recovered from the Kuber is annexed at the end of the judgment as Schedule III.

222. In Sandeep v. State of Uttar Pradesh MANU/SC/0422/2012 : (2012) 6 SCC 107, the facts related to the murder of pregnant paramour/girlfriend and unborn child of the accused. The DNA report confirmed that the Appellant was the father of the unborn child. The Court, relying on the DNA report, stated as follows:

67. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the Appellant Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the Appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said

submission. The circumstance, namely, the report of DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused.

223. In Rajkumar v. State of Madhya Pradesh MANU/SC/0136/2014 : (2014) 5 SCC 353, the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the Appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (P.W. 1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the Appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having Appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the Appellant.

224. In Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr. MANU/SC/0006/2014 : (2014) 2 SCC 576, the Appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the Appellant was not the biological father of the child. The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate. The pertinent observations are extracted below:

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the Appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.

20. As regards the authority of this Court in Kamti Devi, this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non- access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act." The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of

legitimacy of the child Under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the Respondents.

From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non- acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.

225. In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA, fingerprint and bite mark analysis.

226. Various samples, for the purpose of DNA profiling, were lifted from the person of the prosecutrix; the informant; the accused, their clothes/articles; the dumping spot; the iron rods; the ashes of partly burnt clothes; as well as from the offending bus. P.W. 45, Dr. B.K. Mohapatra, analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt.

227. After establishing the identities of each of the accused persons, the informant and the prosecutrix through DNA analysis, the DNA profiles generated from the remaining samples, where the identity of biological material found thereon needed to be ascertained, were matched with the DNA profiles of the prosecutrix, the informant and the accused, generated earlier from known samples. Such an analysis cogently linked each of the accused with the victims as also with the crime scene. A summary of the findings in the report submitted by P.W. 45, Dr. B.K. Mohapatra, is as under:

228. Further, a summary of the DNA analysis of the biological samples lifted from the material objects such as the bus, the iron rods, and the ash and unburnt pieces of clothes is also worth producing here:

229. P.W. 45, Dr. B.K. Mohapatra, has clearly testified in his cross- examination that all the experiments conducted by him confirmed to the guidelines and methodology documented in the Working Procedure Manuals of the laboratory which have been validated and recommended for use in the laboratory. He further added that once a DNA profile is generated, its accuracy is 100%. The trial court and the High Court have consistently noted that the counsel for the defence did not raise any substantial ground to challenge the DNA report during the cross- examination of P.W. 45. In such circumstances, there is no reason to declare the DNA report as inaccurate, especially when it clearly links the accused persons with the incident.

230. Mr. Sharma, learned Counsel appearing for Appellants - Mukesh and Pawan Kumar Gupta, submitted that in the instant case, the DNA test cannot be treated to be accurate, for there was blood transfusion as the prosecutrix required blood and when there is mixing of blood, the DNA profiling is likely to differ. It is seemly to note, nothing had been put to the expert in his cross-examination in this regard. As the authorities relating to DNA would show, if the quality control is maintained, it is treated to be quite accurate and as the same has been established, we are compelled to repel the said submission of Mr. Sharma.

The evidence relating to finger print analysis:

231. Next aspect that is required to be adverted is the evidence of fingerprint analysis adduced by the prosecution to establish the identity of the accused persons. By virtue of the finger print analysis, the prosecution has tried mainly to establish the presence of the accused in the offending bus. On 17.12.2012 and 18.12.2012, a team of experts from the CFSL had lifted chance finger prints from the concerned bus, Ex. P- 1, at Thyagraj Stadium. On 28.12.2012, P.W. 78, Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL for taking digital palm prints and foot prints of all the accused persons vide his letter Ex. P.W. 46/C. Pursuant to the said request made by P.W. 78, Inspector Anil Sharma, the CFSL on 31.12.2012 took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, P.W. 46, Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI, submitted his report, Ex. P.W. 46/D.

232. As per the report, Ex. P.W. 46/D, the result of the aforesaid examination of the Finger Print Division of the CFSL, CBI, New Delhi was that the chance prints of accused Vinay Sharma were found on the bus in question. The relevant portion of the report is as under:

RESULT OF EXAMINATION:

I. The chance print marked as Q.1 is identical with left palmprint specimen of Vinay Sharma S/o. Sh. Hari Ram Sharma marked here as LPS- 28 on the slip marked here as S.28 (Matching ridge characteristics have been found in their relative positions in the chance palmprint and specimen palm print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure- 1)

II. The chance print marked as Q.4 is identical with right thumb impression of Vinay Sharma S/o. Sh. Hari Ram Sharma marked here as RTS- 23 on the slip marked here as S.23 (Matching ridge characteristics have been found in their relative positions in the chance print and specimen finger print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure- 2).

The above report incontrovertibly proves that accused Vinay was present in the bus at the time of the incident. Be it noted, the other chance prints were found to be unfit for comparison or different from specimen print.

The Odontology report

233. Now, we shall analyse the Odontology report. In today's world, Odontology is a branch of forensic science in which dental knowledge is applied to assist the criminal justice delivery system. S. Keiser- Nielsen, an authority on Forensic Odontology defines the basic concept of Forensic Odontology in the following words:

A. Forensic odontology is that branch of odontology which in the interests of justice deals with the proper handling and examination of dental evidence and with the proper evaluation and presentation of dental findings. Only a dentist can handle and examine dental evidence with any degree of accuracy; therefore, this field is above all a dental field.

234. Professor Neilsen, elaborating on Forensic Odontology, further states:

B. There are three reasons for considering forensic odontology a well- defined and more or less independent subject:1) it has objectives different from those at which conventional dental education aims; 2) forensic dental work requires investigations and considerations different from those required in ordinary dental practice; and 3) forensic dental reports and statements have to be presented in accordance with certain legal formalities in order to be of value to those requesting aid.

The area of forensic odontology consists of three major fields of activity: 1) the examination and evaluation of injuries to teeth, jaws, and oral tissues from various causes: 2) the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator; and 3) the examination of dental remains (whether fragmentary or complete, and including all types of dental restoration) from unknown persons or bodies for the purpose of identification.

235. In the instant case, the prosecution has relied upon the odontology report, i.e., bite mark analysis report prepared by P.W. 71, Dr. Ashith B. Acharya, to link the incident with the accused persons. The Odontology report links accused Ram Singh and accused Akshay with the crime in question.

236. Dr. K.S. Narayan Reddy, in his book, Medical Jurisprudence and Toxicology (Law, Practice and Procedure), Third Edition, 2010, Chapter VIII page 268, has extensively dealt with human bites, their patterns, the manner in which they should be lifted with a swab and moistened with sterile water and the manner in which such swabs need to be handled is delineated along with their usefulness in identification. The High Court has also referred to the same. It is as follows:

They are useful in identification because the alignment of teeth is peculiar to the individual. Bite marks may be found in materials left at the place of crime e.g., foodstuffs, such as cheese, bread, butter, fruit, or in humans involved in assaults, when either the victim or the accused may show the marks, usually on the hands, fingers, forearms, nose and ears.

237. After making the aforesaid observations, the author dwells upon the various methods used for bite mark analysis including the photographic method, which method was utilized in the instant case. The photographic method is described as under:

Photographic method: The bite mark is fully photographed with two scales at right angle to one another in the horizontal plane. Photographs of the teeth are taken by using special mirrors which allow the inclusion of all the teeth in the upper or lower jaws in one photograph. The photographs of the teeth are matched with photographs or tracings of the teeth. Tracings can be made from positive casts of a bite impression, inking the cutting edges of the front teeth. These are transferred to transparent sheets, and superimposed over the photographs, or a negative photograph of the teeth is superimposed over the positive photograph of the bite. Exclusion is easier than positive matching.

238. In the present case, the photographs of bite marks taken by P.W. 66, Shri Asghar Hussein, of different parts of the body of the prosecutrix were examined by P.W. 71, Dr. Ashith B. Acharya. The photographs depicted the bite marks on the body of the prosecutrix. The said bite marks found on the body of the victim were compared with the dental models of the suspects. The analysis showed that at least three bite marks were caused by accused Ram Singh, whereas one bite mark has been identified to have been most likely caused by accused Akshay. An excerpt from the report, Ex. P.W. 71/C, of P.W. 71, Dr. Ashith B. Acharya, has been extracted by the High Court. It reads thus:

..... There is absence of any unexplainable discrepancies between the bite marks on Photograph No. 4 and the biting surfaces of one of the accused person's teeth, namely Ram Singh. Therefore, there is reasonable medical certainty that the teeth on the dental models of the accused person named Ram Singh caused the bite marks visible on Photograph No. 4; also the bite marks on Photograph Nos. 1 and 2 show some degree of specificity to this accused person's teeth by virtue of a sufficient number of concordant points, including some corresponding unconventional/individual characteristics. Therefore, the teeth on the dental models of the accused person with the name Ram Singh probably also caused the bite marks visible on Photograph Nos. 1 and 2.....

x x x x x The comparison also shows that there is a concordance in terms of general alignment and angulation of the biting surfaces of the teeth of the lower jaw on the dental models of the accused person with the name Akshay and the corresponding bite marks visible on Photograph No. 5. In particular, the comparison revealed concordance between the biting surface of the teeth on the lower jaw of the dental models of the accused person with the name Akshay and the bite mark visible on Photograph No. 5 in relation to the rotated left first incisor whose mesial surface pointed towards the tongue. Overall, the bite mark shows some degree of specificity to the accused person's teeth by virtue of a number of concordant points, including one corresponding unconventional/individual characteristic. There is an absence of any unexplainable discrepancies between the bite mark and the biting surfaces of this accused person's teeth. Therefore, the teeth on the dental models of the accused person with the name Akshay probably caused the bite marks visible on Photograph No. 5.

239. Be it noted, the present is a case where the victim's body contained various white bite marks. Bite mark analysis play an important role in the criminal justice system. Advanced development of technology such as laser scanning, scanning electron microscopy or cone beam computed tomography in forensic odontology is utilized to identify more details in bite marks and in the individual teeth of the bite. Unlike fingerprints and DNA, bite marks lack the specificity and durability as the human teeth may change over time. However, bite mark evidence has other advantages in the criminal justice system that links a specific individual to the crime or victim. For a bite mark analysis, it must contain abundant information and the tooth that made the mark must be quite distinctive.

240. Bite marks in skin are photographed in cases where the suspect is apprehended. A thorough dental combination is administered after dental examination of the suspect. Final comparison of the details of the original mark with the dentation of the suspect is done by experts.

241. The bite marks generally include only a limited number of teeth. The teeth and oral structure of the accused are examined by experts and, thereafter, bite marks are compared and reports are submitted. Forensic Odontology is a science and the most common application of Forensic Odontology is for the purpose of identification of persons from their tooth structure.

242. Forensic Odontology has established itself as an important and indispensable science in medico- legal matters and expert evidence through various reports which have been utilized by courts in the administration of justice. In the case at hand, the report is wholly credible because of matching of bite marks with the tooth structure of the accused persons and there is no reason to view the same with any suspicion. Learned Counsel for the Appellants would only contend that the whole thing has been stage- managed. We are not impressed by the said submission, for the evidence brought on record cogently establish the injuries sustained by the prosecutrix and there is consistency between the injuries and the report. We are not inclined to accept the hypothesis that bite marks have been managed.

Acceptability of the plea of alibi

243. Presently, we shall deal with the plea of alibi as the same has been advanced with immense conviction. It is well settled in law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. In this context, we may usefully reproduce a few paragraphs from Binay Kumar Singh v. State of Bihar MANU/SC/0088/1997 : (1997) 1 SCC 283:

22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

The question is whether A committed a crime at Calcutta on a certain date. The fact that, on that date, A was at Lahore is relevant.

23. The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter- evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. ...

[underlining is ours]

244. The said principle has been reiterated in Gurpreet Singh v. State of Haryana MANU/SC/0770/2002 : (2002) 8 SCC 18, Shaikh Sattar v. State of Maharashtra

MANU/SC/0649/2010 : (2010) 8 SCC 430, Jitender Kumar v. State of Haryana MANU/SC/0532/2012 : (2012) 6 SCC 204 and Vijay Pal (supra).

245. We had earlier indicated that in their Section 313 Code of Criminal Procedure statements, the accused have advanced the plea of alibi. Accused Pawan Kumar Gupta @ Kaalu has taken the plea of alibi stating, inter alia, that throughout the evening of 16.12.2012 till late night, he was in the DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi, watching a musical event organised in connection with Christmas Celebration and that he was never in the bus, Ex. P1, and had not committed any offence with the prosecutrix or with the informant.

246. Before coming to the defence evidence led by him, we may refer to the answers given by him in response to the questions put to him in his statement Under Section 313 Code of Criminal Procedure wherein he has admitted that mobile No. 9711927157 belongs to him. He further stated that he had consumed liquor in the evening of 16.12.2012 and had accompanied accused Vinay Sharma to the musical event at DDA District Park where he took more liquor and fell unconscious and was later brought to his house by his father and uncle. He stated that he went out in the evening of 16.12.2012 and saw a quarrel between accused Vinay Sharma and accused Ram Singh (since deceased). Then he returned to his jhuggi. After sometime, he came out of his jhuggi and saw accused Vinay Sharma, his sister, mother and others going to a musical party and so, he also went with them and took more liquor in the party and even lost his mobile phone. Strangely enough, in his supplementary statement recorded on 16.08.2013 Under Section 313 Code of Criminal Procedure, he stated that he was present in the said party with his family members and friends and that a video clip was prepared by one Ram Babu, DW- 13, and that he does not remember if he had accompanied accused Vinay Sharma to the said park on that evening. It is in contradiction to the stand taken by him in his earlier statement recorded Under Section 313 Code of Criminal Procedure.

247. Accused Pawan examined his father, DW- 2, Shri Hira Lal Ram, who deposed that on 16.12.2012 about 7:15 p.m., when he came to his house, he was informed by his daughter that accused Pawan had gone to DDA District Park, Hauz Khas. It is in contradiction to the deposition made by the other defence witnesses who have said that accused Vinay Sharma and his family members had left Ravi Dass Camp, Sector- 3, R.K. Puram, New Delhi, about 8:00/8:30 p.m. and that accused Pawan had accompanied them. Accused Pawan also said so in his initial statement Under Section 313 Code of Criminal Procedure.

248. DW- 4, Shri Gyan Chand, the maternal uncle of accused Pawan, deposed that he brought accused Pawan Gupta @ Kaalu to the jhuggi from the DDA District Park and saw one Ram Charan warming his hands on a bonfire just outside his jhuggi who came and asked him about the well-being of accused Pawan. Ram Charan, DW- 3, however, deposed that about 8:30/9:00 p.m., he was sitting inside his jhuggi with its door open and he saw accused Pawan being brought by his uncle in drunken state. This is yet again in contradiction to what has been deposed by the other defence witnesses who said that accused Pawan Gupta and accused Vinay Sharma had rather left

Ravi Dass Camp, Sector- 3, R.K. Puram, New Delhi about 8:00/8:30 p.m. for the DDA District Park.

249. DW- 16, a shopkeeper of the locality, had deposed that he had seen the vehicle of Shri Gyan Chand about 9:00/9:30 p.m. on 16.12.2012 when accused Pawan Gupta was brought in drunken condition and was taken to his jhuggi. Initially, he failed to mention if Shri Hira Ram was accompanying Shri Gyan Chand.

250. Though the witnesses have also deposed about the taking away of accused Pawan by 3/4 persons on 17.12.2012, yet that plea too is in contradiction to the arrest memo Ex. P.W. 60/A wherein the accused is stated to have been arrested on 18.12.2012 about 1:15 p.m. at the instance of accused Ram Singh (since deceased).

251. Hence, there exist contradictions in the statements of the defence witnesses produced on behalf of accused Pawan Gupta (a): qua the timing when the accused had left his jhuggi at Ravi Dass Camp on the fateful night of 16.12.2012 inasmuch as some of the witnesses deposed that accused Pawan left for DDA District Park at 8:00/8:30 p.m. and some others deposed that they saw him being brought to his jhuggi about 8:30/9:00 p.m.; (b) qua the fact if DW- 2 had gone with DW- 1 to the park to fetch his son; and (c) qua the fact if accused Pawan went to the park with accused Vinay Sharma or not.

252. Accused Akshay Kumar Singh @ Thakur, in his statement Under Section 313 Code of Criminal Procedure, stated that he was not in Delhi on the fateful night and that on 15.12.2012, he had left Delhi for his village in Mahabodhi Express on the ticket of his brother, Abhay, along with his brother's wife and nephew. He produced certain witnesses in his defence. DW- 11, Shri Chavinder, an auto driver from his village, deposed that he had brought accused Akshay Kumar Singh @ Thakur and his family members from Anugrah Narayan Railway Station, District Aurangabad, Bihar to his native village Karmalahang, P.S. Tandwa, in his own auto on 16.12.2012 at 10:00 a.m. It is interesting to note that he does not remember about any other passenger/native who shared his auto on that day. DW- 13, Sh. Raj Mohan Singh, the father- in- law of the accused, deposed that when he reached accused Akshay's house, he found his son- in- law being implicated in a rape case allegedly committed on 16.12.2012. It probably shows that DW- 13 had gone to meet Akshay Kumar Singh @ Thakur only when he had come to know about his implication in the rape case and when accused Akshay Kumar Singh @ Thakur was on the run. It is an admitted fact that the Chowkidar of P.S. Tandwa had met father- in- law of the accused on 20.12.2012 and had informed him about the implication of accused Akshay for the first time. If it was so, then DW- 13, Shri Raj Mohan, must have visited the house of accused Akshay Kumar Singh @ Thakur either on 20.12.2012 or on 21.12.2012.

253. DW- 12, DW- 14 and DW- 15 are all relatives of accused Akshay Kumar Singh @ Thakur and, as observed by both the courts, they tried to wriggle him out of the messy situation, as is the

natural instinct of the family members. However, it is to be seen that during the evidence of DW-14, wife of accused Akshay Kumar Singh @ Thakur, she was interrupted from answering by accused Akshay from behind on more than one occasion. Similarly, DW- 15, the sister- in- law of the accused, who had allegedly accompanied the accused to her native village, mysteriously, was not aware as to why her husband Abhay who was to accompany her on 15.12.2012 to the native village did not accompany her. She was not aware of the reason which made her husband stay behind in Delhi. Being the wife, she was expected to know this, at least.

254. While weighing the plea of 'alibi', the same has to be weighed against the positive evidence led by the prosecution, i.e., not only the substantive evidence of P.W. 1 and the dying declarations, Ex. P.W. 27/A and Ex. P.W. 30/D- 1, but also against the scientific evidence, viz., the DNA analysis, finger print analysis and bite marks analysis, the accuracy of which is scientifically acclaimed. Considering the inconsistent and contradictory nature of the evidence of 'alibi' led by the accused against the positive evidence of the prosecution, including the scientific one, we hold that the accused have miserably failed to discharge their burden of absolute certainty qua their plea of 'alibi'. The plea taken by them appears to be an afterthought and rather may be read as an additional circumstance against them.

255. In response to the questions put to him in his statement Under Section 313 Code of Criminal Procedure, accused Vinay had admitted that mobile No. 8285947545, Ex. D.W. 10/1, belongs to his mother and its SIM was lost prior to 16.12.2012 and that on 16.12.2012, at 9:30 p.m., his friend Vipin had taken his phone to the DDA District Park and had returned it the next morning without SIM card and memory card.

256. In response to question No. 221, he stated that about 8:00/8:30 p.m., he went to see accused Ram Singh and he had a scuffle/exchange of fist blow and then he returned to his jhuggi. Thereafter, he left for musical party with his sister, mother and others. He did not say if his father had accompanied them. He also told that about 11:30 p.m., he had returned to his jhuggi.

257. It is worthy to note that the prosecution had proved the Call Detail Record, Ex. P.W. 22/B, of the phone of accused Vinay Sharma, having SIM No. 8285947545, admittedly in the name of his mother, Smt. Champa Devi, but in the possession of accused Vinay Sharma in the evening of 16.12.2012 and allegedly snatched by one Vipin in the said music party and returned to him in the morning of 17.12.2012 without SIM card and memory card. The Call Detail Record Ex. P.W. 22/B does show that the accused had been making calls to one particular number, viz., 8601274533 from 15.12.2012 till 20:19:37 of 17.12.2012. The authenticity of the CDR is proved Under Section 65- B of the Indian Evidence Act. If the accused was not having a SIM card in his phone No. 8285947545, then how could he have called from this SIM on 15.12.2012, then on 16.12.2012 and in the morning of 17.12.2012 till about 8:23:42 p.m.

258. The accused rather said that his SIM and memory card were not in his phone when it was returned by his friend Vipin and that the phone was not with him at 9:55:21 when it registered a call for 58 seconds and when his location was found near IGI Airport, i.e., the road covered by the Route Map, Ex. P.W. 80/H, where the bus, Ex. P1, was moving on that night. Further, if as per accused Vinay Sharma he had no memory card and SIM card in his mobile phone, then the question of making of a video clip from his mobile phone by his friend DW- 10, Shri Ram Babu, does not arise. Even his personal search memo Ex. P.W. 60/D does not show that the said mobile phone, when seized, had any memory card in it. The intention of the accused appears to be to wriggle himself out of explaining the receipt of call on his mobile at 9:55 p.m. on 16.12.2012.

259. After referring to the decision in Ram Singh and Ors. v. Col. Ram Singh MANU/SC/0176/1985 : 1985 (Supp.) SCC 611, the trial Court has held that accused Vinay had miserably failed to prove the authenticity of the video clip in terms of the above judgment. The accused had failed to show if DW- 10, Ram Babu, aged 15 years, was ever competent to record the clip and how such device was preserved. Admittedly by him, the memory card was not in the phone when returned to him by his friend, Vipin. It is also not shown in the seizure memo Ex. P.W. 60/D that the mobile, Ex. DW- 10/1, was seized along with memory card. Thus, it raises a doubt as to how and by whom this memory card was later inserted in his phone, Ex. DW- 10/1, and how and when the video clip was taken and whether there was any tampering, etc. and thus, the compliance of Section 65- B of the Indian Evidence Act was mandatory in these circumstances to ensure the purity of the evidence and in its absence, it would be difficult to rely upon such evidence.

260. Even otherwise, in the alternative, the properties of mobile Ex. DW- 10/1 show the timing of the video clip as 8:16 p.m. of 16.12.2012 which is patently false because as per the defence witnesses, accused Vinay Sharma with his family had left Ravi Dass Camp at 8:00/8:30 p.m. and as per Smt. Champa Devi, DW- 5, it takes about one hour on foot to reach the DDA District Park and, thus, even if we believe their theory, then also accused Vinay Sharma and accused Pawan Gupta @ Kaalu were not in the park at 8:16 p.m. on 16.12.2012.

261. Vinay Sharma's mother, Smt. Champa Devi, DW- 5, deposed that her son, accused Vinay Sharma, had gone to meet accused Ram Singh (since deceased), about 8:00 p.m. on 16.12.2012 and he had a quarrel with Ram Singh, he was beaten and then the accused returned to his jhuggi. Thereafter, accused Vinay Sharma accompanied her to DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi to watch a musical programme and stayed in the park till late in the night. His mother does not speak if her husband had also accompanied her to the said DDA District Park but DW- 6 deposed that his son had returned about 8:00 p.m. after the quarrel and then they had gone to the said DDA District Park. DW- 7, Shri Kishore Kumar Bhat, also deposed that about 8:00/8:30 p.m., he was in his jhuggi when the father of accused Vinay Sharma with his children came to his jhuggi and they all went to DDA District Park. He has also stated that a musical programme was organized by St. Thomas Church, Sector- 2, R.K. Puram, New Delhi, in the said DDA District Park, Hauz Khas, on that night.

262. DW- 9, Shri Manu Sharma, deposed that he went with accused Vinay Sharma to reason with accused Ram Singh (since deceased) but accused Vinay Sharma had stated that his brother had accompanied him to meet accused Ram Singh (since deceased). Further, DW- 9, Manu Sharma, stated that he had accompanied accused Vinay Sharma to the musical event but accused Vinay Sharma did not say so.

263. Hence, as per the statement of accused Vinay Sharma (Under Section 313 Code of Criminal Procedure) and as per the statements of the defence witnesses, accused Vinay Sharma and his family with accused Pawan Gupta @ Kaalu had left Ravi Dass Camp about 8:15 p.m. to 8:30 p.m. and as per DW- 5, Smt. Champa Devi, it takes about an hour to reach the DDA District Park, Hauz Khas, on foot, so even according to them, they allegedly reached the park about 9:15 p.m. or 9:30 p.m. Thus, from this angle too, the video clip showing the accused in the park on 16.12.2012 about 8:16 p.m. appears to have been tampered.

264. P.W. 83, Shri Angad Singh, the Deputy Director (Horticulture), DDA, had deposed that no such permission was ever granted by any authority to organize any such function in the evening of 16.12.2012 in the said DDA District Park, Hauz Khas, New Delhi and that no function was ever organized in the park on 16.12.2012 by anyone. P.W. 84, Father George Manimala of St. Thomas Church, as also P.W. 85, Brother R.P. Samual, Secretary, Ebenezer Assembly Church, deposed that their Church(es) never organized any musical programme/event in the DDA District Park, Hauz Khas, in the evening of Sunday, i.e., on 16.12.2012. Rather, they deposed that on Sundays, there is always a mass prayer in the church and there is no question of organizing any programme outside the Church premises and that even otherwise, they have their own space/lawn within the Church premises where they can hold such type of programmes/functions.

265. Though Shri Singh, learned Counsel for the respective Appellants, tried to press upon a document, Ex. P.W. 84/B, a programme pamphlet of St. Thomas Church wherein it was mentioned that the Church was holding programmes of "Carol Singing" from 10.12.2012 to 23.12.2012 at 7:00 p.m. at public places, yet in view of the categorical denial by P.W. 84 and P.W. 85 that any such programme was organized by the Church on 16.12.2012 in the DDA District Park, opposite IIT Gate, Hauz Khas, New Delhi, the plea has no substance.

266. It is settled in law that while raising a plea of 'alibi', the burden squarely lies upon the accused person to establish the plea convincingly by adducing cogent evidence. The plea of 'alibi' that accused Vinay Sharma and accused Pawan Gupta @ Kaalu had attended the alleged musical programme in the evening of 16.12.2012 in the DDA District Park, Hauz Khas, opposite IIT Gate, New Delhi, has been rightly rejected by the trial court which has been given the stamp of approval by the High Court.

Criminal conspiracy

267. The next aspect that we intend to address pertains to criminal conspiracy. The accused persons before us were charge- sheeted for the offence of criminal conspiracy within the meaning of Section 120A Indian Penal Code apart from other offences. The trial court found all the accused guilty of the offence Under Section 120B Indian Penal Code and awarded life imprisonment alongwith a fine of Rs. 5,000/- to each of the convicts. The High Court has also affirmed their conviction Under Section 120B after recording concurrent findings.

268. Before analysing the present facts with reference to Section 120A Indian Penal Code in order to find out whether the charge of criminal conspiracy is proved in respect of each of the accused, it is pertinent to note the actual nature and purport of Section 120A Indian Penal Code and allied provisions. Section 120A Indian Penal Code as contained in Chapter V- A defines the offence of criminal conspiracy. The provision was inserted in the Indian Penal Code by virtue of Criminal Law (Amendment) Act, 1913. Section 120A Indian Penal Code 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.

269. Section 120B being pertinent is reproduced below:

120B. Punishment of criminal conspiracy- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

270. The underlying purpose for the insertion of Sections 120A and 120B Indian Penal Code was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means

punishable under law. The criminal thoughts in the mind when take concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means than even if nothing further is done an agreement is designated as a criminal conspiracy. The proviso to Section 120A engrafts a limitation 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.

271. By insertion of Chapter V- A in Indian Penal Code, the understanding of criminal conspiracy in the Indian context has become akin to that in England. The illegal act may or may not be done in pursuance of an agreement but the mere formation of an agreement is an offence and is punishable. The law relating to conspiracy in England has been put forth in Halsbury's Laws of England (vide 5th Ed. Vol. 25, page 73) as under:

73. Matters common to all conspiracies. There are statutory common law offences of conspiracy. The essence of the offences of both statutory and common law conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.

272. The English law on 'conspiracy' has been succinctly explained by Russell on Crimes (12th Ed. Vol. 1 page 202) in the following passage:

The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough.

273. Coleridge J. in R. v. Murphy (1837) 173 ER 508 explained 'conspiracy' in the following words:

... I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so to carry it into execution. This is not necessary, because in any cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to

draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'had they this common design, and did they pursue it by these common means the design being unlawful?

274. Lord Brampton of the House of Lords in Quinn v. Leatham (1901) AC 495 had aptly defined conspiracy which definition was engrafted in Sections 120A and 120B Indian Penal Code. Following was stated by the House of Lords:

'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and punishable if for a criminal object, or for the use of criminal means'.

275. A perusal of the above shows that in order to constitute an offence of criminal conspiracy, two or more persons must agree to do an illegal act or an act which if not illegal by illegal means. This Court on several occasions has explained and elaborated the element of conspiracy as contained in our penal law. In Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra MANU/SC/0157/1970 : AIR 1971 SC 885, this Court has observed:

Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107, Indian Penal Code. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence.

276. In E.G. Barsay v. State of Bombay MANU/SC/0123/1961 : AIR 1961 SC 1762, the following was stated:

.....The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

277. A three- Judge Bench in Yash Pal Mittal v. State of Punjab MANU/SC/0169/1977 : (1977) 4 SCC 540 had noted the ingredients of the offence of criminal conspiracy and held:

10. The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia, are preparation or causing to be prepared spurious passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation, as we find, the other offences described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the Appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge Under Section 120- B Indian Penal Code as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court.

11. The principal object of the criminal conspiracy in the first charge is thus "cheating by personation", and without achieving that goal other acts would be of no material use in which any person could be necessarily interested. That the Appellant himself does not personate another person is beside the point when he is alleged to be a collaborator of the conspiracy with that object. We have seen that some persons have been individually and specifically charged with cheating by personation Under Section 419 Indian Penal Code. They were also charged along with the Appellant Under Section 120- B Indian Penal Code. The object of criminal conspiracy is absolutely clear and there is no substance in the argument that the object is merely to cheat simpliciter Under Section 417, Indian Penal Code.

278. Certainly, entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is essential to the offence of criminal conspiracy as has been rightly emphasized by this Court in Kehar Singh and Ors. v. State (Delhi Administration) MANU/SC/0241/1988 : (1988) 3 SCC 609. In the said case, the court further stressed upon the relevance of circumstantial evidence in proving conspiracy as direct evidence in such cases is almost impossible to adduce.

279. In the said case, K. Jagannatha Shetty, J., in his concurring opinion, has also elaborated the concept of conspiracy to the following effect:

274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120- A and 120- B Indian Penal Code would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition:

Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties 'actually came together and agreed in terms' to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was 'a tacit understanding between conspirators as to what should be done'.

276. I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard.

280. In Saju v. State of Kerala MANU/SC/0688/2000 : (2001) 1 SCC 378, explaining the concept of conspiracy, this Court stated the following:

7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120- B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available...

10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established.

281. In Mir Nagvi Askari v. Central Bureau of Investigation MANU/SC/1412/2009 : (2009) 15 SCC 643, this Court reiterated the various facets of 'criminal conspiracy' and laid down as follows:

60. Criminal conspiracy, it must be noted in this regard, is an independent offence. It is punishable separately. A criminal conspiracy must be put to action; for so long as a crime is generated in the mind of the accused, the same does not become punishable. Thoughts even criminal in character, often involuntary, are not crimes but when they take a concrete shape of an agreement to do or caused to be done an illegal act or an act which is not illegal, by illegal means then even if nothing further is done, the agreement would give rise to a criminal conspiracy.

61. The ingredients of the offence of criminal conspiracy are:

(i) an agreement between two or more persons;

(ii) an agreement must relate to doing or causing to be done either (a) an illegal act; (b) an act which is not illegal in itself but is done by illegal means.

Condition precedent for holding the accused persons to be guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of the fact which must be established by the prosecution viz. meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means.

62. The courts, however, while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same. The manner and circumstances in which the offences have been committed and the accused persons took part are relevant. For the said purpose, it is necessary to prove that the propounders had expressly agreed to it or caused it to be done, and it may also be proved by adduction of circumstantial evidence and/or by necessary implication. (See Mohd. Usman Mohammad Hussain Maniyar v. State of Maharashtra MANU/SC/0180/1981 : (1981) 2 SCC 443.)

282. In Pratapbhai Hamirbhai Solanki v. State of Gujrat and Anr. MANU/SC/0854/2012 : (2013) 1 SCC 613, this Court explained the ingredients of 'criminal conspiracy' as under:

21. At this stage, it is useful to recapitulate the view this Court has expressed pertaining to criminal conspiracy. In Damodar v. State of Rajasthan MANU/SC/0726/2003 : (2004) 12 SCC 336, a two- Judge Bench after referring to the decision in Kehar Singh v. State (Delhi Admn.) and State of Maharashtra v. Som Nath Thapa MANU/SC/0451/1996 : (1996) 4 SCC 659, has stated thus:

15. ... The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (sic*-) sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or a series of acts, he would be held guilty Under Section 120- B of the Penal Code, 1860.

22. In Ram Narayan Popli v. CBI MANU/SC/0017/2003 : (2003) 3 SCC 641 while dealing with the conspiracy the majority opinion laid down that:

342. ... The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act.

It has been further opined that:

342. ... The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. ... no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co- conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all

its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.

The two- Judge Bench proceeded to state that:

342. ... For an offence punishable Under Section 120- B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

23. In the said case it has been highlighted that in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

283. As already stated, in a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the sine qua non but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, it is also relevant to note that conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity. In K.R. Purushothaman v. State of Kerala MANU/SC/1518/2005 : (2005) 12 SCC 631, the Court has made the following observations with regard to the formation and rescission of an agreement constituting criminal conspiracy:

To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain

of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.

284. After referring to a catena of judicial pronouncements and authorities, a three- Judge Bench of this Court in State through Superintendent of Police, CBI/SIT v. Nalini and Ors. MANU/SC/0945/1999 : (1999) 5 SCC 253 summarised the principles relating to criminal conspiracy as under:

Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120A Indian Penal Code offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella- spoke enrollment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy

in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the graham of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co- conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

285. The rationale of conspiracy is that the required objective manifestation of disposition of criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interest of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co- conspirators. An agreement of this kind can rarely be shown by direct proof; it must be inferred from the circumstantial evidence of co- operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that they would together accomplish the unlawful object of the conspiracy. [See: Firozuddin Basheeruddin and Ors. v. State of Kerala MANU/SC/0471/2001 : (2001) 7 SCC 596]

286. In Suresh Chandra Bahri v. State of Bihar MANU/SC/0500/1994 : 1995 Supp (1) SCC 80, this Court reiterated that the essential ingredient of criminal conspiracy is the agreement to commit an offence. After referring to the judgments in Noor Mohd. Mohd. Yusuf Momi (supra) and V.C. Shukla v. State (Delhi Admn.) MANU/SC/0545/1980 : (1980) 2 SCC 665, it was held in S.C. Bahri (supra) as under:

[A] cursory look to the provisions contained in Section 120- A reveals that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case

where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120- B read with the proviso to Sub- section (2) of Section 120- A Indian Penal Code, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction Under Section 120- B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in Section 120- B since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because otherwise the whole purpose may be frustrated and it is common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn.

287. From the law discussed above, it becomes clear that the prosecution must adduce evidence to prove that:

(i) the accused agreed to do or caused to be done an act;

(ii) such an act was illegal or was to be done by illegal means within the meaning of Indian Penal Code;

(iii) irrespective of whether some overt act was done by one of the accused in pursuance of the agreement.

288. In the case at hand, the prosecution has examined P.W. 82 to prove the charges of conspiracy and for further identification of all the accused persons in the bus on the date of the incident. He has also been presented to support the prosecution case that immediately preceding the fateful incident, all the accused persons had, in execution of their conspiracy, been robbing/merry-making with passengers on the road.

289. The defence has controverted the testimony of P.W. 82 on several aspects which has already been discussed before. It has been alleged that Ram Adhar, P.W. 82, is a planted witness who was brought in by the investigators to fill the lacunae, if any, in their investigation and to further make a strong case against the accused persons. The defence has further denied the presence of accused Mukesh at the scene of the crime. Accused Vinay and accused Akshay have also raised the plea

of alibi which has been dealt with separately by us. Regardless of the fact that we have found the testimony of P.W. 82 to be creditworthy, even if the same is not taken into account for the purpose of establishing that the accused acted in concert with each other to commit heinous offences against the victim, the testimony of P.W. 1 coupled with the dying declarations of the prosecutrix irrefragably establish the charge Under Section 120B against all the accused persons.

290. First of all, in order to prove the presence of all the accused on board the bus where the entire incident took place, the prosecution has relied upon the testimony of P.W. 1, P.W. 82, P.W. 16 and, most importantly, the dying declarations of the prosecutrix.

291. As per the records, P.W. 82 has testified to the effect that on the date of the incident, about 8:30 p.m., he had boarded the concerned bus from Munirka Bus Stand, New Delhi, on noticing that the conductor of the bus sought commuters for Khanpur. However, he was later informed that he would be dropped at Nehru Place instead of Khanpur. When P.W. 82 tried to get down the bus, he was wrongfully confined, attacked by the persons inside the bus who robbed him of his belongings, viz., Rs. 1500/- in cash and a mobile phone, and he was then thrown out of the moving bus. During the trial, P.W. 82 has identified all the four accused persons, viz., Akshay Kumar Singh @ Thakur, Pawan Gupta, Vinay Sharma and accused Mukesh, present in the concerned bus at the time of the incident. P.W. 82 had lodged the complaint on 18.12.2012 on the basis of which FIR No. 414 of 2012 was registered at P.S. Vasant Vihar, New Delhi Under Sections 365, 397, 342 Indian Penal Code.

292. Learned Senior Counsel for the State, Mr. Luthra, has submitted that P.W. 82 had been examined to establish the conduct of the accused on the aspect of conspiracy and also to establish the identity of the accused persons before the trial court. It was further submitted that P.W. 82, Ram Adhar, identified all the four accused in the court, namely, Akshay Kumar Singh @ Thakur, Pawan Gupta, Vinay Sharma and Mukesh besides two others present inside the bus and also identified Mukesh as driving the bus and stated that others took him inside the bus and robbed him and attacked him.

293. The contention of the Appellants is that the testimony of P.W. 82 is not bereft of doubt for several reasons, namely, a) delay in lodging FIR, b) non- examination of Sanjiv Bhai as a witness, c) he has stated that he heard the person with the burnt hand say "Mukesh, tez chalao", d) apart from that, he does not mention that he heard the names of any of the accused, and e) he had not visited a doctor/hospital despite stating that he had injuries on his face which prevented him from registering an FIR.

294. Regarding the alleged incident of attack on P.W. 82 by the accused, it was submitted that the said case against the accused ended in conviction and the same is pending in appeal. In respect of the credibility of the testimony of P.W. 82 as to the commission of the offence, we are not inclined to take into account the evidence of P.W. 82 except on one limited aspect, that is, the

presence of the accused in the bus, Ex. P1, on the night of 16.12.2012 since P.W. 82's presence in the bus on the night of 16.12.2012 is admitted. In his statement Under Section 313 Code of Criminal Procedure, Mukesh- A2 admitted that P.W. 82 had boarded the offending bus prior to the boarding of the bus by the informant and the victim. The relevant portion of his statement is extracted as under:

Q.211: It is in evidence against you that P.W. 82 Shri Ram Adhar deposed that on 16.12.2012 after finishing his carpenter's work at a shop at Munirka till about 8:30 PM, he boarded a white colour bus from sabji Market across the road of my work place. The helper of the bus was calling the passenger by saying "khanpur- khanpur". As P.W. 82 boarded the bus, one of the occupants told him that the bus is going to Nehru Place. As P.W. 82 tried to get down, one person whose one limb was having burn injuries, gave beating to him. The other person pulled him inside the bus towards the back side and they all gave beating to him and removed his belongings i.e. one mobile with two sims and Rs. 1500/- . The sim card numbers were 9999095739 and 9971612554. What do you have to say?

Ans: It is correct that P.W. 82 Shri Ram Adhar had boarded the bus Ex. P1 on 16.12.2012 prior to the boarding of the bus Ex. P1 by the complainant and the victim. He boarded the bus from Sabji Mandi at Sector- 4 on the main road. He went on the back side of the bus but after sometime he was made to deboard the bus at IIT flyover by accused Akshay as he had no money to pay the fare. At that time accused Akshay, accused Ram Singh, since deceased, accused Vinay accused Pawan along with JCL were present in the bus and I was driving it.

[underlining added]

The presence of P.W. 82 in Ex. P1 bus prior to the boarding of the bus by the informant, P.W. 1, and the victim and the presence of all the accused in the bus is, thus, established by the prosecution.

295. The evidence of P.W. 81, Dinesh Yadav, the owner of the offending bus, indicates accused Ram Singh, A- 1, (since deceased) as the driver of the bus and Akshay Kumar as the cleaner of the bus which is further shown in the attendance register of the bus exhibited as Ex. P.W. 80/K. The evidence of P.W. 81, Dinesh Yadav, is corroborated by the entries made in the attendance register where in the driver's page at Sl. No. 5, the name of accused Ram Singh (since deceased) is written against bus No. 0149 and at Sl. No. 15, the name of Akshay is written as helper against bus No. 0149. As stated earlier, the bus bearing Registration No. DL- 1PC- 0149 was one of the buses hired by Birla Vidya Niketan School, Pushp Vihar, New Delhi and the fact that the driver of the bus at the relevant time was Ram Singh is sought to be proved by the prosecution through the testimony of P.W. 16, Rajeev Jakhmola, Manager (Administration) of the said school. The said witness has testified that one Dinesh Yadav, P.W. 81, had provided seven buses to the school including bus bearing No. DL- 1PC- 0149 for the purpose of ferrying the children of the school.

The driver of this bus was one Ram Singh, son of Mange Lal. The documents relating to the bus including the photocopies of the agreement between the school and the bus contractor, copy of the driving licence of Ram Singh, A- 1, and the letter of termination dated 18.12.2012 with "Yadav Travels" were furnished to the Investigating Officer, SI Pratibha Sharma, vide his letter dated 25.12.2012, exhibited as Ex. P.W. 16/A (colly.). From the evidence of P.W. 16, Rajeev Jakhmola, it stands proved that the bus in question was routinely driven by Ram Singh (since deceased). The statement of P.W. 16, Rajeev Jakhmola, is corroborated by the testimony of P.W. 81, Dinesh Yadav. Significantly, P.W. 81, Dinesh Yadav, further testified:

This bus was being parked by accused Ram Singh near his house because this bus was attached with the school and also with an office as a chartered bus and that the accused used to pick up the students early in the morning.

296. The testimony of P.W. 13, Brijesh Gupta, who was an auto driver and also resident of jhuggi at Ravi Dass Camp from where the offending bus was seized is also relevant to prove the presence of the accused in the bus. He stated in his evidence that A- 1, Ram Singh (since deceased), is the brother of A- 2, Mukesh, and that both resided in the jhuggi at Ravi Dass camp and that Ram Singh used to drive the said bus and park it in the night near his jhuggi. P.W. 13, in his evidence, deposed that on the night of 16.12.2012, about 11:30 p.m., when he returned to his jhuggi after plying his auto, he saw accused Mukesh, A- 2, taking water in some can inside a white colour bus and washing it from inside. He also noticed some clothes and pieces of curtains being burnt in the fire.

297. In his questioning Under Section 313 Code of Criminal Procedure, Mukesh, A- 2, has admitted that he and A- 1, Ram Singh (since deceased), are brothers. He has also admitted that on the night of 16.12.2012, he was driving the bus and that accused Pawan and Vinay Sharma were seated on the backside of the driver's seat, whereas Akshay and Ram Singh were sitting in the driver's cabin. The relevant portion of his statement Under Section 313 Code of Criminal Procedure reads as under:

Q2. It is in evidence against you that P.W. 1 further deposed that they inquired from 4- 5 auto rickshaw- walas to take them to Dwarka, but they all refused. At about 9 PM they reached at Munirka bus stand and found a white colour bus on which "Yadav" was written. A boy in the bus was calling for commuters for Dwarka/Palam Mod. P.W. 1 noticed yellow and green line/strips on the bus and that the entry gate of the bus was ahead of its front tyre, as in luxury buses and that the front tyre was not having a wheel cover. What do you have to say?

Ans: I was driving the bus while my brother Ram Singh, since deceased and JCL, Raju was calling for passengers by saying "Palam/Dwarka Mod".

Q4: It is in evidence against you that during the course of his deposition, complainant, P.W. 1 has identified you accused Mukesh to be the person who was sitting on the driver's seat and was driving the bus; P.W. 1 further identified your co- accused Ram Singh (since deceased), and Akshay Kumar to be the person who were sitting in the driver's cabin alongwith the driver; P.W. 1 had also identified your co- accused Pawan Kumar who was sitting in front of him in two seats row of the bus; P.W. 1 had also identified your co- accused Vinay Sharma to be the person who was sitting in three seats row just behind the Driver's cabin, when P.W. 1 entered the bus; P.W. 1 has also deposed before the court that the conductor who was calling him and his friend/prosecutrix to board the bus Ex. P1 was not among the accused person being tried in this Court.

Ans: Accused Pawan and accused Vinay Sharma were sitting on my back side of the driver's seat and whereas accused Akshay was sitting in the driver's cabin while my brother Ram Singh, since deceased was asking for passengers.

Q5: It is in evidence against you that after entering the bus P.W. 1 noticed that seats cover of the bus were of red colour and it had yellow colour curtains and the windows of the bus had black film on it. The windows were at quite a height as in luxury buses. As P.W. 1 sat down inside the bus, he noticed that two of you accused were sitting in the driver's cabin were coming and returning to the driver's cabin. P.W. 1 paid an amount of Rs. 20/- as bus fare to the conductor i.e. Rs. 10/- per head. What do you have to say?

Ans: It is correct that the windows of the bus Ex. P1 were having black film on it but I cannot say if the seats of the bus were having red covers or that the curtains were of yellow colour as my brother Ram Singh, since deceased, only used to drive the bus daily and that on that day since he was drunk heavily so I had gone to Munirka to bring him to my house and hence, I was driving the bus on that day. I had gone to Munirka with my nephew on my cycle to fetch Ram Singh since deceased and that the other boys alongwith Ram Singh had already taken the bus from R.K. Puram. I was called by Ram Singh on phone to come at Munirka.

298. A- 3, Akshay @ Thakur, in his statement Under Section 313 Code of Criminal Procedure, has admitted that he was working with A- 1, Ram Singh (since deceased), in the offending bus, Ex. P1, as a helper. He has also admitted therein that he had joined A- 1, Ram Singh (since deceased), on 03.11.2012. The relevant portion of his statement Under Section 313 Code of Criminal Procedure is extracted hereunder:

Q.210: It is in evidence against you that P.W. 81 Shri Dinesh Yadav is the owner of the bus Ex. P1 and that he has employed accused Ram Singh, since deceased, as the driver of the bus in the month of December, 2012 and you accused Akshay was working as helper in the said bus. Further, he deposed that on 25.12.2012 he had handed over the documents relating to the bus to the investigating officer, seized vide memo Ex. P.W. 80/K. The copy of the challan and copy of

the notice are collectively Ex. P- 81/1 and the register on which "Yadav Travels 2012" is written is Ex. P- 81/2. He also identified the driving license Ex. P- 74/1 of his driver, accused Ram Singh, since deceased. He further deposed that the bus Ex. P1 used to ply in Birla Vidya Niketan as well as chartered bus and used to take the office- goers from Delhi and drop them at Noida every morning and evening. What do you have to say?

Ans: It is correct that I was working as a helper in the bus Ex. P1. I joined Ram Singh, since deceased as helper on 3.11.2012 but I left the company of Ram Singh on 15.12.2012 at about 10.30 AM and I left for my village at 11:30 am and I went to New Delhi Railway Station and I left Delhi in the train at about 2:30 P.M.

299. DW- 5, Smt. Champa Devi, is the mother of Vinay Sharma, A- 4. She has stated in her evidence that her son, Vinay Sharma, A- 4, who returned home at 4:00 p.m. on 16.12.2012, went in search of A- 1 on hearing about the misbehaviour of A- 1, Ram Singh (since deceased), with his sister and was able to trace him by 8:00 p.m. and that her son Vinay Sharma, A- 4, had quarreled with Ram Singh, A- 1. She has deposed in her evidence that her son Vinay Sharma returned bleeding from his mouth and after some time they had left to the DDA District Park to attend a musical programme where they had met A- 5, Pawan alias Kaalu, alongwith two others.

300. The prosecution has, thus, established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy is established by the sequence of events and the conduct of the accused. An important facet of the law of conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. Section 10 of the Indian Evidence Act which reads as under is relevant in this context:

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 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.

301. Section 10 of the Indian Evidence Act begins with the phrase "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence" which implies that if prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common intention is admissible against all. In the facts of the present case, the prima facie evidence of the existence of conspiracy is well established.

302. The informant, P.W. 1, has also deposed as to the clarity of the entire incident. He has identified all the accused to be present in the bus when he had boarded the same with the prosecutrix. He has maintained that he saw three persons sitting in the driver's cabin who were moving in and out of the cabin. Both the informant and the prosecutrix had sensed some sort of hostility and strangeness in the behavior of the accused. But, as they had paid for the ticket, they quietly kept sitting. Soon they found that the lights in the bus were put off and the accused Ram Singh (since deceased) and accused Akshay came near them to ask where P.W. 1 was heading with the prosecutrix at that odd time of the evening. P.W. 1, on objecting to such a query, was beaten and pinned down by the accused. Thereafter, all the accused, one after the other, committed rape and unnatural sex on the prosecutrix using iron rods which has been explicitly described by the prosecutrix herself in her dying declarations recorded by P.W. 27, Sub-Divisional Magistrate, and P.W. 30, Metropolitan Magistrate. The relevant portion of the second dying declaration of the prosecutrix as contained in Ex. P.W. 27/A is as under:

Q.09 Iske baad kya hua? Kripya vistaar se bataiye.

Ans. 09 Paanch minute baad jab bus Malai Mandir ke pul par chadi toh conductor ne bus ke darwaze bandh kar diye aur andar ki batiya bujha di aur mere dost ke paas akar galiyan dene lage aur marne lage. Usko 3- 4 logo ne pakad liya aur mujh ko baki log mujhe bus ke peechey hisey mein le gaye aur mere kapde faad diye aur bari- 2 se rape kiya. Lohey ki rod se mujhe mere paet par maara aur poore shareer par danto se kata. Is se pehle mere dost ka saman - mobile phone, purse, credit card & debit card, ghadi aadi cheen liye. But total chhey (6) log the jinhoney bari- bari se oral (oral) vaginal (through vagina) aur pichhey se (anal) balatkar kiya. In logo ne lohe ki rod ko mere shareer ke andar vaginal/guptang aur guda (pichhey se) (through rectum) dala aur phir bahar bhi nikala. Aur mere guptango haath aur lohe ki rod dal kar mere shareer ke andruni hisson ko bahar nikala aur chot pahunchayi. Chhey logo ne bari- bari se mere saath kareeb ek ghante tak balatkar kiya. Chalti huyi bus mein he driver badalta raha taaki woh bhi balatkar kar sake.

303. The chain of events described by the prosecutrix in her dying declarations coupled with the testimonies of the other witnesses clearly establish that as soon as the informant and the prosecutrix boarded the bus, the accused persons formed an agreement to commit heinous offences against the victim. Forcefully having sexual intercourse with the prosecutrix, one after the other, inserting iron rod in her private parts, dragging her by her hair and then throwing her out of the bus all establish the common intent of the accused to rape and murder the prosecutrix. The trial court has rightly recorded that the prosecutrix's alimentary canal from the level of duodenum upto 5 cm of anal sphincter was completely damaged. It was beyond repair. Causing of damage to the jejunum is indicative of the fact that the rod was inserted through the vagina and/or anus upto the level of jejunum. Further, septicemia was the direct result of multiple internal injuries. Moreover, the prosecutrix has also maintained in her dying declaration that the accused persons were exhorting that the prosecutrix had died and she be thrown out of the bus. Ultimately, both the prosecutrix as well as the informant were thrown out of the moving bus through the front door by the accused after having failed to throw them through the rear door.

The conduct of the accused in committing heinous offences with the prosecutrix in concert with each other and thereafter throwing her out of the bus in an unconscious state alongwith P.W. 1 unequivocally bring home the charge Under Section 120B in case of each of them. The criminal acts done in furtherance of the conspiracy is evident from the acts and also the words uttered during the commission of the offence. Therefore, we do not have the slightest hesitation in holding that the trial court and the High Court have correctly considered the entire case on the touchstone of well- recognised principles for arriving at the conclusion of criminal conspiracy. The prosecution has been able to unfurl the case relating to criminal conspiracy by placing the materials on record and connecting the chain of circumstances. The relevant evidence on record lead to a singular conclusion that the accused persons are liable for criminal conspiracy and their confessions to counter the same deserve to be repelled.

Summary of conclusions:

304. From the critical analysis, keen appreciation of the evidence and studied scrutiny of the oral evidence and other materials, we arrive at the following conclusions:

i. The evidence of P.W. 1 is unimpeachable and it deserves to be relied upon.

ii. The accused persons alongwith the juvenile in conflict with law were present in the bus when the prosecutrix and her friend got into the bus.

iii. There is no reason or justification to disregard the CCTV footage, for the same has been duly proved and it clearly establishes the description and movement of the bus.

iv. The arrest of the accused persons from various places at different times has been clearly proven by the prosecution.

v. The personal search, recoveries and the disclosure leading to recovery are in consonance with law and the assail of the same on the counts of custodial confession made under torture and other pleas are highly specious pleas and they do not remotely create a dent in the said aspects.

vi. The contention raised by the accused persons that the recoveries on the basis of disclosure were a gross manipulation by the investigating agency and deserve to be thrown overboard does not merit acceptance.

vii. The relationship between the parties having been clearly established, their arrest gains more credibility and the involvement of each accused gains credence.

viii. The dying declarations, three in number, do withstand close scrutiny and they are consistent with each other.

ix. The stand that the deceased could not have given any dying declaration because of her health condition has to be repelled because the witnesses who have stated about the dying declarations have stood embedded to their version and nothing has been brought on record to discredit the same. That apart, the dying declaration by gestures has been proved beyond reasonable doubt.

x. There is no justification in any manner whatsoever to think that P.W. 1 and the deceased would falsely implicate the accused- Appellants and leave the real culprits.

xi. The dying declarations made by the deceased have received corroboration from the oral and documentary evidence and also enormously from the medical evidence.

xii. The DNA profiling, which has been done after taking due care for quality, proves to the hilt the presence of the accused persons in the bus and their involvement in the crime. The submission that certain samples were later on taken from the accused and planted on the deceased to prove the DNA aspect is noted only to be rejected because it has no legs to stand upon.

xiii. The argument that the transfusion of blood has the potentiality to give rise to two categories of DNA or two DNAs is farthest from truth and there is no evidence on that score. On the contrary, the evidence in exclusivity points to the matching of the DNA of the deceased with that of the accused on many aspects. The evidence brought on record with regard to finger prints is absolutely impeccable and the trial court and the High Court have correctly placed reliance on the same and we, in our analysis, have found that there is no reason to disbelieve the same.

xiv. The scientific evidence relating to odontology shows how far the accused have proceeded and where the bites have been found and definitely, it is extremely impossible to accept the submission that it has been a manipulation by the investigating agency to rope in the accused persons.

xv. The evidence brought on record as regards criminal conspiracy stands established.

In view of the aforesaid summation, the inevitable conclusion is that the prosecution has proved the charges leveled against the Appellants beyond reasonable doubt.

Sentencing procedure and compliance of Section 235(2) Code of Criminal Procedure:

305. Now we shall proceed to sentencing. A submission was raised that provisions of Section 235(2) Code of Criminal Procedure was not complied with. The said provision reads as follows:

235. Judgment of acquittal or conviction

(1) .....

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

306. While discussing Section 235(2) Code of Criminal Procedure, this Court, in Santa Singh v. State of Punjab MANU/SC/0167/1976 : (1976) 4 SCC 190, observed as follows:

4. .... the hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same.

307. A three- Judge Bench in Dagdu and Ors. v. State of Maharashtra MANU/SC/0086/1977 : (1977) 3 SCC 68 considered the object and scope of Section 235(2) Code of Criminal Procedure and held that:

79. But we are unable to read the judgment in Santa Singh as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question us sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to

the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

80. Bhagwati, J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is nut abused and turned into an instrument for unduly protracting the proceedings. The material on which the accused proposes to rely may therefore, according to the learned Judge, be placed before the Court by means of an affidavit. Fazal Ali, J., also observes that the courts must be vigilant to exercise proper control over their proceedings, that the accused must not be permitted to adopt dilatory tactics under the cover of the new right and that what Section 235(2) contemplates is a short and simple opportunity to place the necessary material before the Court. These observations show that for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction. The fact that in Santa Singh this Court remanded the matter to the Sessions Court does not spell out the ratio of the judgment to be that in every such case there has to be a remand. Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases.

308. Mr. Raju Ramachandran, learned amicus curiae, submitted that the sentence passed by the trial court that has been confirmed by the High Court ought to be set aside as they have not followed the fundamental norms of sentencing and have not been guided by the paramount beacons of legislative policy discernible from Section 354(3) and Section 235(2) Code of Criminal Procedure. It is urged by him that the import of Section 235 Code of Criminal Procedure is not only to hear the submissions orally but also to afford an opportunity to the prosecution and the defence to place the relevant material having bearing on the question of sentence. Learned amicus curiae would submit that the trial court as well as the High Court has failed to put any of the accused persons to notice on the question of imposition of death sentence; that sufficient time was not granted to reflect on the question of death penalty; that none of the accused persons were heard in person; that the learned trial Judge has failed to elicit those circumstances of the accused which would have a bearing on the question of sentence, especially the mitigating factors in a case where death penalty is imposed; that no separate reasons were ascribed for the imposition of death penalty on each of the accused; and that it was obligatory on the part of the learned trial Judge to individually afford an opportunity to the accused persons. Learned amicus curiae would submit that the learned trial Judge has pronounced the sentence in a routine manner which vitiates the sentence inasmuch as the solemn duty of the sentencing court has not been kept in view. Mr. Ramachandran had emphatically put forth that denial of an individualized sentencing process results in the denial of Articles 14 and 21 of the Constitution of India. Mr. Luthra, learned Senior Counsel for the Respondent- State, submitted that the learned trial Judge had heard the accused persons and there has been compliance with Section 235(2) Code of Criminal Procedure and the High Court has appositely concurred with the same.

309. Be it stated, after hearing the learned Counsel for the both sides and the learned amicus curiae, the Court, on 03.02.2017, passed the following order:

After the argument for the accused persons by Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel were advanced, we thought it appropriate to hear the learned friends of the Court and, accordingly, we have heard Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned Senior Counsel. It is worthy to note here that Mr. Hegde, learned Senior Counsel argued on the sustainability of the conviction on many a ground and submitted a written note of submission. Mr. Ramachandran, learned Senior Counsel, inter alia, emphasized on the aspect of sentence imposed by the trial court which has been confirmed Under Section 366 Code of Criminal Procedure. While arguing with regard to the imposition of the capital punishment on the accused persons, one of the main submissions of Mr. Ramachandran was that neither the trial court nor the High Court has followed the mandate enshrined Under Section 235(2) of the Code of Criminal Procedure. Section 235(2) Code of Criminal Procedure reads as follows:

235. Judgment of acquittal or conviction.- (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case. (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

Referring to the procedure adopted by the trial court, it was urged by Mr. Ramachandran that the learned trial Judge had not considered the aggravating and mitigating circumstances, as are required to be considered in view of the Constitution Bench decision in Bachan Singh v. State of Punjab MANU/SC/0055/1982 : (1980) 2 SCC 684, and further there has been a failure of the substantive law, inasmuch as there has been weighing of the mitigating or the aggravating circumstances in respect of each individual accused. Learned Senior Counsel contended that Section 235(2) Code of Criminal Procedure is not a mere formality and in a case when there are more than one accused, it is obligatory on the part of the learned trial Judge to hear the accused individually on the question of sentence and deal with him. As put forth by Mr. Ramachandran, the High Court has also failed to take pains in that regard. To bolster his submission, he has commended us to the authority in Santa Singh v. The State of Punjab. In the said case, Bhagwati, J. dealt with the anatomy of Section 235 Code of Criminal Procedure, the purpose and purport behind it and, eventually, came to hold that:

Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon,

fashioned by law, for protecting and perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in Section 235(2) and so also was the lawyer of the Appellant in the High Court unaware of it. No inference can, therefore, be drawn from the omission of the Appellant to raise this point, that he had nothing to Say in regard to the sentence and that consequently no prejudice was caused to him.

Thereafter, the learned Judge opined that non- compliance goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually, Bhagwati, J. set aside the sentence of death and remanded the case to the court of session with a direction to pass appropriate sentence after giving an opportunity to the Appellant therein to be heard in regard to the question of sentence in accordance with the provision contained in Section 235(2) Code of Criminal Procedure as interpreted by him.

In the concurring opinion, Fazal Ali, J., ruled thus:

The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate, that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? The Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the Court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:

We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause. It may not be practicable to keep up to the time- limit suggested by the Law Commission with mathematical accuracy but the Courts must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed.

The said decision was considered by a three- Judge Bench in Dagdu and Ors. v. State of Maharashtra MANU/SC/0086/1977 : (1977) 3 SCC 68. The three- Judge Bench referred to the law laid down in Santa Singh (supra) and opined that the mandate of Section 235(2) Code of Criminal Procedure has to be obeyed in letter and spirit. However, the larger Bench thought that Santa Singh (supra) does not lay down as a principle that failure on the part of the Court which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford the accused an opportunity to be heard on the question of sentence. Chandrachud, J. (as His Lordship then was) speaking for the Bench ruled thus:

The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

It is seemly to note here that Mr. Ramachandran has also commended us to a three- Judge Bench decision in Malkiat Singh and Ors. v. State of Punjab MANU/SC/0622/1991 : (1991) 4 SCC 341, wherein the three- Judge Bench ruled that sufficient time has to be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be.

Learned Senior Counsel has also drawn our attention to a two- Judge Bench decision in Ajay Pandit alias Jagdish Dayabhai Patel and Anr. v. State of Maharashtra MANU/SC/0562/2012 : (2012) 8 SCC 43, wherein the matter was remanded to the High Court. Mr. Ramachandran has drawn our attention to paragraph 47 of the said authority. It reads as follows:

Awarding death sentence is an exception, nor the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Code of Criminal Procedure.

Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said purpose, it is necessary that the learned Counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr.

V.P. Singh should be allowed to visit the jail and communicate with the accused persons and file the requisite affidavits and materials.

At this juncture, Mr. M.L. Sharma, learned Counsel has submitted that on many a occasion, he has faced difficulty as he had to wait in the jail to have a dialogue with his clients. Mr. Sidharth Luthra, learned Senior Counsel has submitted that if this Court directs, Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel and their associate Advocates can visit the jail at 2.45 p.m. each day and they shall be allowed to enter the jail between 3.00 p.m. to 3.15 p.m. and can spend time till 5.00 p.m. Needless to say, they can commence their visits from 7th February, 2017, and file the necessary separate affidavits and documents. After the affidavits are made ready by the learned Counsel for the accused persons, they can intimate about the same to Mr. Luthra, who in his turn, shall intimate the same to the Superintendent of Jail, who shall make arrangement for a Notary so that affidavits can be notarized, treating this as a direction of this Court. Needless to say, while the learned Counsel will be discussing with the accused persons, the meeting shall be held in separate rooms inside the jail premises so that they can have a free discussion with the accused persons. Needless to say, they can reproduce in verbatim what the accused persons tell them in the affidavit. The affidavits shall be filed by 23rd February, 2017.

We may hasten to add that after the affidavits come on record, a date shall be fixed for hearing of the affidavits and pertaining to quantum of sentence if, eventually, the conviction is affirmed. The learned Counsel for the prosecution, needless to say, is entitled to file necessary affidavits with regard to the circumstances or reasons for sustenance of the sentence. Additionally, the prosecution is given liberty to put forth in the affidavit any refutation, after the copies of the affidavits by the learned Counsel for the accused persons are served on him. For the said purpose, a week's time is granted. Needless to say, the matter shall be heard on sentence, after affidavits from both the sides are brought on record. The date shall be given at 2.00 p.m. on 6th February, 2017. For the present, the matter stands adjourned to 4th February, 2017, for hearing.

Let a copy of the order be handed over to Mr. Sidharth Luthra by 4th February, 2017, who shall get it translated in Hindi and give it to the Superintendent of Jail, who in his turn, shall hand over it to the accused persons and, simultaneously, explain the purport and effect of the order.

The Superintendent of Jail is also directed to submit a report with regard to the conduct of the accused persons while they are in custody.

310. After passing of the said order, the hearing continued and on 13.02.2017, the following order was passed:

Mr. A.P. Singh, learned Counsel has concluded his arguments. After his conclusion of the arguments, as per our order, dated 3.2.2017, affidavits are required to be filed by 23.2.2017. Let the affidavits be filed by that date. Mr. Siddharth Luthra, learned Senior Counsel appearing for

the State shall file the affidavit by 2nd March, 2017. Registry is directed to hand over copies of the affidavits to Mr. K. Parameshwar, learned Counsel assisting Mr. Raju Ramachandran, learned Senior Counsel and Mr. Anil Kumar Mishra- I, learned Counsel assisting Mr. Sanjay Kumar Hegde, learned Senior Counsel (Amicus Curiae).

Mr. Luthra, learned Senior Counsel shall make arrangements for visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma, learned Counsel for the Petitioners even on Saturday and sunday. He shall intimate our order to the jail authorities so that they can arrange the visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma on Saturday and Sunday.

Let the matter be listed on 3.3.2017 for hearing on the question of sentence, aggravating and mitigating circumstances on the basis of the materials brought on record by learned Counsel for the parties.

311. In pursuance of the aforesaid order, affidavits on behalf of the Appellants have been filed. It is necessary to note that the learned Counsel for the Appellants addressed the Court on the basis of affidavits on 06.03.2017 and the order passed on that date is extracted hereunder:

Mr. A.P. Singh, learned Counsel has filed affidavits on behalf of the three accused persons, namely, Pawan Kumar Gupta, Vinay Sharma and Akshay Kumar Singh and Mr. M.L. Sharma, learned Counsel has filed the affidavit on behalf of Mukesh. Be it noted, Mr. A.P. Singh, learned Counsel has filed the translated version of the affidavits and Mr. Manohar Lal Sharma, learned Counsel has filed the original version in Hindi as well as the translated one.

At this juncture, Mr. Raju Ramachandran, learned Senior Counsel who has been appointed as Amicus Curiae to assist the Court, submitted that two aspects are required to be further probed to comply with the order dated 3.2.2017 inasmuch as this Court has taken the burden on itself for compliance of Section 235(2) of the Code of Criminal Procedure. Learned Senior Counsel would point out that the affidavit filed by Mukesh does not cover many aspects, namely, socio- economic background, criminal antecedents, family particulars, personal habits, education, vocational skills, physical health and his conduct in the prison.

Mr. Manohar Lal Sharma, learned Counsel submits that a report was asked for from the Superintendent of Jail with regard to the conduct of the accused persons while they are in custody, but the same has not directly been filed by the Superintendent of Jail.

Mr. Siddharth Luthra, learned Senior Counsel for the Respondent- State, would, per contra, contend that he has filed the affidavit and the affidavit contains the report of the Superintendent of Jail.

In our considered opinion, the Superintendent of Jail should have filed the report with regard to the conduct of the accused persons since they are in custody for almost four years. That would have thrown light on their conduct. Let the report with regard to their conduct be filed by the Superintendent of Jail in a sealed cover in the Court on the next date of hearing.

As far as the affidavit filed by Mukesh is concerned, Mr. Sharma, learned Counsel stated that he will keep the aspects which are required to be highlighted in mind and file a further affidavit within a week hence.

The direction issued on the earlier occasion with regard to the visit of jail by the learned Counsel for the parties shall remain in force till the next date of hearing.

Let the matter be listed at 2.00 p.m. on 20.3.2017. The report of the Superintendent of Jail, as directed hereinabove, shall be filed in Court on that date.

312. Thereafter, the matter was heard on 20.03.2017 and the following order came to be passed:

Mr. M.L. Sharma, learned Counsel has filed an additional affidavit of the Petitioner, Mukesh and Mr. A.P. Singh, learned Counsel has filed affidavits for the Petitioners, Pawan Kumar Gupta, Vinay Kumar Sharma, and Akshay Kumar Singh.

Mr. Siddharth Luthra, learned Senior Counsel has produced two sealed covers containing the reports submitted by Superintendent of the Central Jail No. 2 and the Superintendent of Central Jail No. 4 in respect of the Petitioners who are in the respective jails. Two sealed covers are opened in presence of the learned Counsel for the parties. They be kept on record.

Registry is directed to supply a copy of the aforesaid reports to Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel for the Petitioners. Registry shall also supply a copy thereof to Mr. K. Parameshwar, learned Counsel assisting Mr. Raju Ramachandran, learned Amicus Curiae and Mr. Anil Kumar Mishra- I, learned Counsel assisting Mr. Sanjay R. Hegde, learned Amicus Curiae. A copy of the report shall also be handed over to Ms. Supriya Juneja, learned Counsel assisting Mr. Siddharth Luthra, learned Senior Counsel, for he does not have a copy as the reports have been produced before us in the sealed covers.

Mr. Siddharth Luthra, learned Senior Counsel prays for and is granted three days time to file a status report and argue the matter.

Delineation as regards the imposition of sentence

313. Be it noted, we have heard the learned Counsel appearing for the parties, Mr. Luthra, learned Senior Counsel for the Respondent- State, Mr. Ramachandran and Mr. Hegde on the question of sentence. Before we advert to the principles for imposition of sentence, we think it appropriate to deal with the affidavits filed by the accused. For the sake of convenience, it is necessary to make a summary of the affidavits.

314. Accused Mukesh, A- 2, filed his statement, written in his own hand- writing in Hindi, denying his involvement in the occurrence and pleading innocence. He stated that on 17.12.2012, he was picked up from his house at Karoli, Rajasthan and brought to Delhi where the police tortured him and threatened to kill him. Therefore, he acted as per the direction of the police and V.K. Anand, Advocate. He further stated that he is uneducated and poor, but not a criminal and if he is acquitted, he would go back to Karoli, Rajasthan and would take care of his parents.

315. Accused Akshay Kumar Singh, A- 3, has stated that he hails from a naxal affected area in District Aurangabad, Bihar and due to poverty, he could not continue his studies beyond 9th class. He has stated that his aged father Shri Saryu Singh and mother, Smt. Malti Devi, are dependent on him. He has further stated that he is married to Punita Devi since 2010 and they have a son, now aged about six years. He further stated that due to poverty and lack of adequate opportunity in home town, he came to Delhi in the month of November 2012 to earn his livelihood. To maintain his dependants which include his parents, wife and child, he started working as a cleaner in the concerned bus at a wage of Rs. 50/- per day. He reiterated his plea of alibi asserting that he had left Delhi on 15.12.2012 in Mahabodhi Express accompanied by his sister- in- law, Sarita Devi, and went to his native place Karmalahang where he was arrested. He further stated that after his confinement in Tihar Jail, he has been maintaining good behavior and is working hard as a labourer in the prison to maintain his family.

316. Accused Vinay Sharma, A- 4, in his affidavit stated that he was born in Kapiya Kalan, Tehsil Rudra Nagar, District Basti, Uttar Pradesh and that his parents used to work as labourers and that his family is very poor. The accused stated that he used to take care of his grandfather who was a religious saint and up to July, 2012, he was studying at his native place in Uttar Pradesh and only after July, 2012, he came to Delhi to pursue his further studies. He has stated that he got himself admitted to the University of Delhi, School of Open Learning, Delhi and to earn his livelihood, he worked as a part- time instructor in gym and also as a seasonal waiter in hotels and marriage ceremonies at night. Accused Vinay Sharma further stated that he has to take care of his ailing parents and also his younger sisters and younger brother, who are totally dependent on him. In his affidavit, he reiterated his plea of alibi asserting that on the fateful day, he had participated in the Christmas celebration and was enjoying there with his family. The accused has further stated that he has no criminal antecedents and after his confinement in Tihar Jail, he

has maintained good behavior and has also organized various musical programmes and his paintings are displayed in Tihar Jail.

317. Accused Pawan Gupta, A- 5, filed his affidavit stating that he comes from a very poor family where his father used to sell fruits on the road for their living. He further stated that he is a resident of Cluster Jhuggi Basti and was assisting his father in selling fruits on a cart. The accused also illustrated the ailing condition of his family stating that his parents are heart patients and his mother is a handicapped person suffering from BP and thyroid. He also stated that his younger sister, Dimple Gupta, was under depression on account of the false implication of her brother in the present case and could not tolerate humiliation by the society and she has committed suicide on 09.02.2013. Apart from that, he has to look after his dependant parents and two other sisters, one married and the other unmarried and aged 17 years, and one younger brother. On behalf of accused Pawan Gupta, fervent plea was made that he has no prior criminal antecedent and after being confined to Central Jail, Tihar, he is trying to reform himself into a better person.

318. Mr. Ramachandran, learned amicus curiae, criticized the sentence, placed reliance on Bachan Singh v. State of Punjab MANU/SC/0055/1982 : (1980) 2 SCC 684 and submitted that the trial court and the High Court have committed the error of not applying the doctrine of equality which prescribes similar treatment to similar persons and stated that the Court in Bachan Singh (supra) has categorically held that the extreme penalty can be inflicted only in gravest cases of extreme culpability; in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also; and that the mitigating circumstances referred therein are undoubtedly relevant and must be given great weight in the determination of sentence. Further placing reliance on Machhi Singh v. State of Punjab MANU/SC/0211/1983 : (1983) 3 SCC 470, it is submitted by learned amicus curiae that in the said case, the Court held that a balance sheet of the aggravating and mitigating circumstances should be drawn up and the mitigating circumstances should be accorded full weightage and a just balance should be struck between the aggravating and mitigating circumstances. He further pointed out number of decisions wherein this Court has given considerable weight to the circumstances of the criminal and commuted the sentence to life imprisonment.

319. Mr. Ramachandran further urged that in the present case, the decision in Bachan Singh (supra) was completely disregarded and the trial court, while sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation were ruled out on the basis of the nature of the crime and not on its own merits. It is further contended by him that in Sangeet and Anr. v. State of Haryana MANU/SC/0989/2012 : (2013) 2 SCC 452 and Shankar Kisanrao Khade v. State of Maharashtra MANU/SC/0476/2013 : (2013) 5 SCC 546, the decisions, i.e., Shiv v. High Court of Karnataka MANU/SC/7103/2007 : (2007) 4 SCC 713, B.A. Umesh v. Registrar General, High Court of Karnataka MANU/SC/0082/2011 : (2011) 3 SCC 85 and Dhananjoy Chaterjee v. State of West Bengal MANU/SC/0626/1994 : (1994) 2 SCC 220, relied upon by the Special Public Prosecutor and the High Court, have been doubted by this Court.

320. Learned amicus curiae has further propounded that sentencing and non- consideration of the mitigating circumstances are violative of Articles 14 and 21 of the Constitution. It is his submission that the prosecution's argument on aggravating circumstances gets buttressed by the material on record while the plea of mitigating circumstances rests solely on arguments and this imbalance is a serious violation of the doctrine of fairness and reasonableness enshrined in Article 14 of the Constitution; that there should be a fair and principle- based sentencing process in death penalty cases by which a genuine and conscious attempt is made to investigate and evaluate the circumstances of the criminal; that the fair and principled approaches are facets of Article 14; and that if the enumeration and evaluation of mitigating factors are left only to the accused or his counsel and the Court does not accord a principle- based treatment, the imposition of death penalty will be rendered the norm and not the exception, which is an inversion of the Bachan Singh (supra) logic and a serious violation of Article 21 of the Constitution.

321. Mr. Ramachandran submitted that the trial court and the High Court failed to pay due regard to the mitigating factors; that the courts have committed the mistake of rejecting the mitigating factors by reasoning that it may not be sufficient for awarding life sentence; and that the courts have not considered all the mitigating factors cumulatively to arrive at the conclusion whether the case fell within the rarest of rare category. He has referred to the Constitution Bench decision in Triveniben v. State of Gujarat MANU/SC/0520/1989 : (1989) 1 SCC 678 wherein Shetty, J. in his concurring opinion, opined that death sentence cannot be given if there is any one mitigating circumstance in favour of the accused and all circumstances of the case should be aggravating and submitted that this line of judicial thought has been completely ignored by the High Court and the trial court.

322. Learned amicus curiae further contended that the attribution of individual role with respect to the iron rod, which was a crucial consideration in convicting the accused Under Section 302 Indian Penal Code, was not considered by the trial court or the High Court in the sentencing process and stressed that when life imprisonment is the norm and death penalty the exception, the lack of individual role has to be regarded as a major mitigating circumstance. In this regard, reliance has been placed by him on Karnesh Singh v. State of U.P. MANU/SC/0051/1968 : AIR 1968 SC 1402, Ronny v. State of Maharashtra MANU/SC/0199/1998 : (1998) 3 SCC 625, Nirmal Singh v. State of Haryana MANU/SC/0178/1999 : (1999) 3 SCC 670 and Sahdeo v. State of U.P. MANU/SC/0423/2004 : (2004) 10 SCC 682.

323. Mr. Ramachandran has also contended that subsequent to the pronouncement in Machhi Singh (supra), there are series of decisions by this Court where the Court has given considerable weight to the concept of reformation and rehabilitation and commuted the sentence to life imprisonment. According to him, young age is a mitigating factor and this Court has taken note of the same in Raghubir Singh v. State of Haryana MANU/SC/0185/1974 : (1975) 3 SCC 37, Harnam Singh v. State of Uttar Pradesh MANU/SC/0129/1975 : (1976) 1 SCC 163, Amit v. State of Maharashtra MANU/SC/0567/2003 : (2003) 8 SCC 93, Rahul v. State of Maharashtra (2005) 10 SCC 322, Rameshbhai Chandubhai Rathod v. State of Gujarat MANU/SC/0663/2009 : (2009) 5 SCC 740, Santosh Kumar Bariyar v. State of Maharashtra MANU/SC/0801/2009 : (2009) 6 SCC

498, Sebastian v. State of Kerala MANU/SC/1717/2009 : (2010) 1 SCC 58, Santosh Kumar Singh (supra), Rameshbhai Chandubhai Rathod II v. State of Gujarat MANU/SC/0075/2011 : (2011) 2 SCC 764, Amit v. State of Uttar Pradesh MANU/SC/0133/2012 : (2012) 4 SCC 107 and Lalit Kumar Yadav v. State of Uttar Pradesh MANU/SC/0368/2014 : (2014) 11 SCC 129. That apart, it is urged by him that when the crime is not pre- meditated, the same becomes a mitigating factor and that has been taken note of by this Court in the authorities in Akhtar v. State of Uttar Pradesh MANU/SC/1008/1999 : (1999) 6 SCC 60, Raju v. State of Haryana MANU/SC/0324/2001 : (2001) 9 SCC 50 and Amrit Singh v. State of Punjab MANU/SC/8642/2006 : (2006) 12 SCC 79.

324. Learned amicus curiae would further urge that when the criminal antecedents are lacking and the prosecution has not been able to say about that the Appellants deserve imposition of lesser sentence. For the said purpose, he has commended us to the authorities in Nirmal Singh (supra), Raju v. State of Haryana (supra), Amit v. State of Maharashtra (supra), Surender Pal v. State of Gujarat MANU/SC/0794/2004 : (2005) 3 SCC 127, Rameshbhai Chandubhai Rathod II (supra), Amit v. State of Uttar Pradesh (supra), Anil v. State of Maharashtra MANU/SC/0124/2014 : (2014) 4 SCC 69 and Lalit Kumar Yadav v. State of Uttar Pradesh MANU/SC/0368/2014 : (2014) 11 SCC 129.

325. Learned Senior Counsel has emphasized on the reform, rehabilitation and absence of any continuing threat to the collective which are factors to be taken into consideration for the purpose of commutation of death penalty to life imprisonment. In this regard, learned Senior Counsel has drawn inspiration from the decisions in Ronny (supra), Nirmal Singh (supra), Bantu v. State of Madhya Pradesh MANU/SC/0684/2001 : (2001) 9 SCC 615, Lehna (supra), Rahul (supra), Santosh Kumar Bariyar (supra), Santosh Kumar Singh (supra), Rajesh Kumar v. State MANU/SC/1130/2011 : (2011) 13 SCC 706, Amit v. State of Uttar Pradesh (supra), Ramnaresh v. State of Chhattisgarh MANU/SC/0163/2012 : (2012) 4 SCC 257, Sandesh v. State of Maharashtra MANU/SC/1128/2012 : (2013) 2 SCC 479 and Lalit Kumar Yadav (supra).

326. Mr. Ramachandran has also submitted that the present case should be treated as a special category as has been held in Swamy Shradhananda (2) v. State of Karnataka MANU/SC/3096/2008 : (2008) 13 SCC 767 and the recent Constitution Bench decision in Union of India v. Sriharan MANU/SC/1377/2015 : (2016) 7 SCC 1. It is urged by him that in many a case, this Court has exercised the said discretion. Learned Senior Counsel in that regard has drawn our attention to the pronouncements in Rameshbhai Chandubhai Rathod (supra), Neel Kumar v. State of Haryana MANU/SC/0416/2012 : (2012) 5 SCC 766, Ram Deo Prasad v. State of Bihar MANU/SC/0360/2013 : (2013) 7 SCC 725, Chhote Lal v. State of Madhya Pradesh MANU/SC/0935/2011 : (2013) 9 SCC 795, Anil v. State of Maharashtra (supra), Rajkumar (supra) and Selvam v. State MANU/SC/0401/2014 : (2014) 12 SCC 274.

327. Mr. Hegde, learned friend of the Court, canvassed that the theory of reformation cannot be ignored entirely in the obtaining factual matrix in view of the materials brought on record. Learned Senior Counsel would contend that imposition of death penalty would be extremely

harsh and totally unwarranted inasmuch as the case at hand does not fall in the category of rarest of rare case. That apart, it is contended by him that the entire incident has to be viewed from a different perspective, that is, the accused persons had the bus in their control, they were drunk, and situation emerged where the poverty- stricken persons felt empowered as a consequence of which the incident took place and considering the said aspect, they may be imposed substantive custodial sentence for specific years but not death penalty. Additionally, it is submitted by him that in the absence of pre- meditation to commit a crime of the present nature, it would not invite the harshest punishment.

328. Mr. Luthra, learned Senior Counsel, has referred to the reports of the Superintendent of Jail that the conduct of the accused persons in the jail has been absolutely non- satisfactory and non-cooperative and the diabolic nature of the crime has shaken the collective conscience. According to him, the diabolic nature of the crime has nothing to do with poverty, for it was not committed for alleviation of poverty but to satiate their sexual appetite and enormous perversity. He would submit that this would come in the category of rarest of the rare cases in view of the law laid down in Sevaka Perumal v. State of Tamil Nadu MANU/SC/0338/1991 : (1991) 3 SCC 471, Kamta Tiwari v. State of Madhya Pradesh MANU/SC/0722/1996 : (1996) 6 SCC 250, State of U.P. v. Satish MANU/SC/0090/2005 : (2005) 3 SCC 114, Holiram Bordoloi v. State of Assam MANU/SC/0271/2005 : (2005) 3 SCC 793, Ankush Maruti Shinde v. State of Maharashtra MANU/SC/0700/2009 : (2009) 6 SCC 667, Sundar v. State MANU/SC/0105/2013 : (2013) 3 SCC 215 and Mohfil Khan v. State of Jharkhand MANU/SC/0915/2014 : (2015) 1 SCC 67.

329. It is also submitted by Mr. Luthra that mitigating circumstances are required to be considered in the light of the offence and not alone on the backdrop of age and family background. For this purpose, he has relied upon Deepak Rai v. State of Bihar MANU/SC/0965/2013 : (2013) 10 SCC 421 and Purshottam Dashrath Borate v. State of Maharashtra MANU/SC/0583/2015 : (2015) 6 SCC 652.

330. Mr. Sharma and Mr. Singh, learned Counsel for the Appellants, would submit that the conduct of the accused persons shows reformation as there are engaged in educating themselves and also they have been participating in affirmative and constructive activities adopted in jail and so, death penalty should not be affirmed and should be commuted. Mr. Sharma, learned Counsel appearing for the accused Mukesh, submits that he is not connected with the crime in question. It is put forth that the case at hand cannot be regarded as rarest of the rare cases and, therefore, the maximum punishment that can be given should be for a specific period.

331. Presently, we shall proceed to analyse the aforesaid aspect. In Bachan Singh (supra), the Court held thus:

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there

are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder Under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

332. In the said case, the Court, after referring to the authority in Furman v. Georgia MANU/USSC/0008/1972 : 33 L Ed 2d 346 : 408 US 238 (1972), noted the suggestion given by the learned Counsel about the aggravating and the mitigating circumstances. The aggravating circumstances suggested by the counsel read as follows:

Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed- -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty Under Section 43 of the Code of Criminal Procedure, 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.

After reproducing the same, the Court opined:

Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

333. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

Mitigating circumstances.- In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

The Court then observed:

We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

334. In the said case, the Court has also held thus:

It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines 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.

335. In Machhi Singh (supra), a three- Judge Bench has explained the concept of 'rarest of the rare cases' by observing thus:

The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence- in- no- case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection.

336. Thereafter, the Court has adverted to the aspects of the feeling of the community and its desire for self- preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing:

But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.

337. It is apt to state here that in the said case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti- social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. After so enumerating, the propositions that emerged from Bachan Singh (supra) were culled out which are as follows:

The following propositions emerge from Bachan Singh case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

339. The three- Judge Bench further opined that to apply the said guidelines, the following questions are required to be answered:

(a) Is there something uncommon about the crime which renders sentence of 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 even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

340. The Court in Haresh Mohandas Rajput v. State of Maharashtra MANU/SC/1099/2011 : (2011) 12 SCC 56, while dealing with the situation where the death sentence is warranted, referred

to the guidelines laid down in Bachan Singh (supra) and the principles culled out in Machhi Singh (supra) and opined as follows:

19. In Machhi Singh v. State of Punjab this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances.

After so stating, the Court ruled thus:

20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur- of- the- moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See C. Muniappan v. State of T.N. MANU/SC/0655/2010 : (2010) 9 SCC 567, Dara Singh v. Republic of India MANU/SC/0062/2011 : (2011) 2 SCC 490, Surendra Koli v. State of U.P. Ibid, Mohd. Mannan MANU/SC/0460/2011 : (2011) 5 SCC 317 and Sudam v. State of Maharashtra MANU/SC/0850/2011 : (2011) 7 SCC 125s.)

21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand.

341. This Court, while dealing with the murder of a young girl of about 18 years in Dhananjoy Chatterjee (supra), took note of the fact that the accused was a married man of 27 years of age, the principles stated in Bachan Singh's case and further took note of the rise of violent crimes against women in recent years and, thereafter, on consideration of the aggravating factors and mitigating circumstances, opined that:

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.

342. After so stating, the Court took note of the fact that the deceased was a school- going girl and it was the sacred duty of the Appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust, he had raped and murdered the girl in retaliation which made the crime more heinous. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless school- going girl of 18 years, the Court came to hold that the case fell in the category of rarest of the rare cases and, accordingly, affirmed the capital punishment imposed by the High Court.

343. In Laxman Naik v. State of Orissa MANU/SC/0264/1995 : (1994) 3 SCC 381, the Court commenced the judgment with the following passage:

The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the Appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large.

344. It is worthy to note that in the said case, the High Court had dismissed the Appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of the sentence, the Court referred to the decision in Bachan Singh's case and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case disclosed only aggravating circumstances against the Appellant. Elaborating further, the Court held thus:

The hard facts of the present case are that the Appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the Appellant and while reposing such faith and confidence in the Appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the Appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the Appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the Appellant misusing her confidence to fulfill his lust. It appears that the Appellant had preplanned to commit the crime

by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

After so stating, the Court, while affirming the death sentence, opined that:

.....The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The Appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the Appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the Appellant had conceived of his plan and brutally executed it and such a calculated, cold- blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the Appellant for the offence Under Section 302 of the Penal Code.

345. Kamta Tiwari (supra) is a case where the Appellant was convicted for the offences punishable Under Sections 363, 376, 302 and 201 of Indian Penal Code and sentenced to death by the learned trial Judge and the same was affirmed by the High Court. In appeal, the two- Judge Bench referred to the propositions culled out in Machhi Singh (supra) and expressed thus:

Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the Appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him Tiwari Uncle'. Obviously her closeness with the Appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The Appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder - - as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes.

346. In Bantu v. State of Uttar Pradesh MANU/SC/7863/2008 : (2008) 11 SCC 113, a five year old minor girl was raped and murdered and the Appellant was awarded death sentence by the trial Court which was affirmed by the High Court. This Court found the Appellant guilty of the crime and, thereafter, referred to the principles stated in Bachan Singh, Machhi Singh (supra) and Devender Pal Singh v. State of A.P. MANU/SC/0217/2002 : (2002) 5 SCC 234 and eventually

came to hold that the said case fell in the rarest of the rare category and the capital punishment was warranted. Being of this view, the Court declined to interfere with the sentence.

347. In Rajendra Pralhadrao Wasnik v. State of Maharashtra MANU/SC/0160/2012 : (2012) 4 SCC 37, the Appellant was awarded sentence of death by the learned trial Judge which was confirmed by the High Court, for he was found guilty of the offences punishable Under Sections 376(2)(f), 377 and 302 Indian Penal Code. In the said case, the prosecution had proven that the Appellant had lured a three year old minor girl child on the pretext of buying her biscuits and then raped her and eventually, being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:

37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust- belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.

348. At this stage, it is fruitful to refer to some authorities where in cases of rape and murder, the death penalty was not awarded. In State of T.N. v. Suresh and Anr. MANU/SC/0939/1998 : (1998) 2 SCC 372, the Court, while unsettling the judgment of acquittal recorded by the High Court and finding that the accused was guilty of rape of a pregnant woman and also murder, awarded the sentence of life imprisonment by observing:

The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A- 2 and A- 3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A- 2 and A- 3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused.

From the aforesaid authority, it is seen that the Court did not think it appropriate to restore the death sentence passed by the trial court regard being had to the passage of time.

349. In Akhtar v. State of U.P. (supra), the Appellant was found guilty of murder of a young girl after committing rape on her and was sentenced to death by the learned Sessions Judge and the said sentence was confirmed by the High Court. The two- Judge Bench referred to the decisions in Laxman Naik (supra) and Kamta Tiwari (supra) and addressed itself whether the case in hand was one of the rarest of the rare case for which punishment of death could be awarded. The Court distinguished the two decisions which have been referred to hereinabove and ruled:

In the case in hand on examining the evidence of the three witnesses it appears to us that the accused- Appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused- Appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death.

350. In State of Maharashtra v. Barat Fakira Dhiwar MANU/SC/0700/2001 : (2002) 1 SCC 622, a three- year old girl was raped and murdered by the accused. The learned trial Judge convicted the accused and awarded the death sentence. The High Court had set aside the order of conviction and acquitted him for the offences. This Court, on scrutiny of the evidence, found the accused guilty of rape and murder. Thereafter, the Court proceeded to deal with the sentence and, in that context, observed:

Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in Bachan Singh v. State of Punjab. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence Under Section 302 Indian Penal Code, to imprisonment for life.

351. Keeping in view the aforesaid authorities, the Court, in Vasanta Sampat Dupare v. State of Maharashtra MANU/SC/1098/2014 : (2015) 1 SCC 253, proceeded to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed and observed:

... When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away with any kind of individual philosophy and predilections. It should never have the

flavour of Judge- centric attitude or perception. It has to satisfy the test laid down in various precedents relating to rarest of the rare case. We are also required to pose two questions that has been stated in Machhi Singh's case.

352. In the said case, the Court dwelt upon the manner in which the crime was committed and how a minor girl had become a prey of the sexual depravity and was injured by the despicable act of the accused to silence the voice so that there would be no evidence. Dealing with the same, the Court referred to earlier judgments and held:

58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the Appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the Appellant. After the savage act was over, the coolness of the Appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life- spark. The barbaric act of the Appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the Appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

59. In this context, we may fruitfully refer to a passage from Shyam Narain v. State (NCT of Delhi) MANU/SC/0543/2013 : (2013) 7 SCC 77, wherein it has been observed as follows:

1. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the Appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity.

In the said case, while describing the rape on an eight- year- old girl, the Court observed: (Shyam Narain case, SCC p. 88, para 26)

26. ... Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight- year- old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age- old wise saying that 'child is a gift of the providence' enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.

Elucidating further, the Court held:

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned Counsel for the Appellant pointing out the mitigating circumstances would submit that the Appellant is in his mid- fifties and there is possibility of his reformation. Be it noted, the Appellant was aged about forty- seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the Appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned Counsel would submit that the Appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

62. As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and

seven makes a four- year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the Appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold.

353. In the said case, a review petition bearing Review Petition (Criminal) Nos. 637- 638 of 2015 was filed which has been recently dismissed. U.U. Lalit, J., authoring the judgment, has held:

19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

20. The material placed on record shows that after the Judgment under review, the Petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the Petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the Petitioner are after the judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petition.

354. The mitigating factors which have been highlighted before us on the basis of the affidavits filed by the Appellants pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative

path they have chosen and their transformation and the possibility of reformation. That apart, emphasis has been laid on their young age and rehabilitation.

355. Now, we shall focus on the nature of the crime and manner in which it has been committed. The submission of Mr. Luthra, learned Senior Counsel, is that the present case amounts to devastation of social trust and completely destroys the collective balance and invites the indignation of the society. It is submitted by him that that a crime of this nature creates a fear psychosis and definitely falls in the category of rarest of the rare cases.

356. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, P.W. 1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the Appellants; their brutish behavior in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ex. P.W. 50/A and Ex. P.W. 50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the Appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the Appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the Appellants to commit a crime which can summon

with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

357. When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the same.

358. Before we part with the case, we are obligated to record our unreserved appreciation for the assistance rendered by Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned amicus curiae appointed by the Court. We must also record our uninhibited appreciation for Mr. M.L. Sharma and Mr. A.P. Singh, learned Counsel for the Appellants, for they, keeping the tradition of the Bar, defended the Appellants at every stage.

359. In view of our preceding analysis, the appeals are bound to pave the path of dismissal, and accordingly, we so direct.

R. Banumathi, J.

360. I have gone through the judgment of my esteemed Brother Justice Dipak Misra. I entirely agree with the reasoning adopted by him and the conclusions arrived at. However, in view of the significant issues involved in the matter, in the light of settled norms of appreciation of evidence in rape cases and the role of Judiciary in addressing crime against women, I would prefer to give my additional reasoning for concurrence.

361. Honesty, pride, and self- esteem are crucial to the personal freedom of a woman. Social progress depends on the progress of everyone. Following words of the father of our nation must be noted at all times:

To call woman the weaker sex is a libel; it is man's injustice to woman. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self- sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be. If non- violence is the law of our being, the future is with woman. Who can make a more effective appeal to the heart than woman?

362. Crimes against women - an area of concern: Over the past few decades, legal advancements and policy reforms have done much to protect women from all sources of violence and also to sensitize the public on the issue of protection of women and gender justice. Still, the crimes

against women are on the increase. As per the annual report of National Crime Records Bureau titled, 'Crime in India 2015' available at http://ncrb.nic.in/StatePublications/CII/CII2015/FILES/Compendium- 15.11.16.pdf, a total of 3,27,394 cases of crime against women were reported in the year 2015, which shows an increase of over 43% in crime against women since 2011, when 2,28,650 cases were reported. A percentage change of 110.5% in the cases of crime against women has been witnessed over the past decade (2005 to 2015), meaning thereby that crime against women has more than doubled in a decade. An overall crime rate under the head, 'crime against women' was reported as 53.9% in 2015, with Delhi UT at the top spot.

363. As per the National Crime Records Bureau, a total of 34,651 cases of rape Under Section 376 Indian Penal Code were registered during 2015 (excluding cases under the Protection of Children from Sexual Offences Act, 2012). An increasing trend in the incidence of rape has been observed during the period 2011- 2014. These cases have shown an increase of 9.2% in the year 2011 (24,206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with further increase of 35.2% in the year 2013 (33,707 cases) over 2012 and 9.0% in 2014 (36,735 cases) over 2013. A decrease of 5.7% was reported in 2015 (34,651 cases) over 2014 (36,735 cases). 12.7% (4,391 out of 34,651 cases) of total reported rape cases in 2015 were reported in Madhya Pradesh followed by Maharashtra (4,144 cases), Rajasthan (3,644 cases), Uttar Pradesh (3,025 cases) and Odisha (2,251 cases) accounting for 11.9%, 10.5%, 8.7% and 6.5% of total cases respectively. NCT of Delhi reported highest crime rate of 23.7% followed by Andaman & Nicobar Islands at 13.5% as compared to national average of 5.7%. In order to combat increasing crime against women, as depicted in the statistics of National Crime Records Bureau, the root of the problem must be studied in depth and the same be remedied through stringent legislation and other steps. In order to secure social order and security, it is imperative to address issues concerning women, in particular crimes against women on priority basis.

364. Stringent legislation and punishments alone may not be sufficient for fighting increasing crimes against women. In our tradition bound society, certain attitudinal change and change in the mind- set is needed to respect women and to ensure gender justice. Right from childhood years' children ought to be sensitized to respect women. A child should be taught to respect women in the society in the same way as he is taught to respect men. Gender equality should be made a part of the school curriculum. The school teachers and parents should be trained, not only to conduct regular personality building and skill enhancing exercise, but also to keep a watch on the actual behavioral pattern of the children so as to make them gender sensitized. The educational institutions, Government institutions, the employers and all concerned must take steps to create awareness with regard to gender sensitization and to respect women. Sensitization of the public on gender justice through TV, media and press should be welcomed. On the practical side, few of the suggestions are worthwhile to be considered. Banners and placards in the public transport vehicles like autos, taxis and buses etc. must be ensured. Use of street lights, illuminated bus stops and extra police patrol during odd hours must be ensured. Police/security guards must be posted at dark and lonely places like parks, streets etc. Mobile apps for immediate assistance of women should be introduced and effectively maintained. Apart from effective implementation of the various legislation protecting women, change in the mind set of the society at large and

creating awareness in the public on gender justice, would go a long way to combat violence against women.

365. Factual Matrix: The entire factual matrix of the concerned horrendous incident has already been fairly set out in the judgment of my esteemed brother Justice Dipak Misra, the High Court and the trial Court. Suffice only to briefly recapitulate the facts, for my reference purpose and for completion.

366. In the wintry night of 16.12.2012, when the entire Delhi was busy in its day- to- day affair, embracing the joy of year- end, two youths were bravely struggling to save their dignity and life. It is a case of barbaric sexual violence against women, in fact against the society at large, where the accused and juvenile in conflict with law picked up a 23 year old physiotherapy student and her male friend (P.W. 1) accompanying her, from a busy place in Delhi- Munirka Bus stop and subjected them to heinous offences. The accused gang- raped the prosecutrix in the moving bus and completely ravished her in front of her helpless friend, Awninder Pratap (P.W. 1). The accused, on satisfaction of their lust, threw both the victims, half naked, outside the bus, in December cold near Mahipalpur flyover. The prosecutrix and P.W. 1 were noticed in miserable condition near Mahipalpur flyover, where they were thrown, by P.W. 72 Raj Kumar, who was on patrolling duty that night in the area and P.W. 73 Ram Chandar, Head Constable, rushed the prosecutrix and P.W. 1 to Safdarjung Hospital owing to the need of immediate medical attention. Law was set in motion by the statement of P.W. 1, which was recorded after giving primary medical treatment to him. Statement/Dying declaration of the prosecutrix was also recorded by P.W. 49 Doctor, P.W. 27 Sub- Divisional Magistrate and P.W. 30 Metropolitan Magistrate. After intensive care and treatment in ICU in Delhi, the victim was airlifted to a hospital in Singapore by an air- ambulance where she succumbed to her injuries on 29.12.2012.

367. The incident shocked the nation and generated public rage. A Committee headed by Justice J.S. Verma, Former Chief Justice of India was constituted to suggest amendments to deal with sexual offences more sternly and effectively in future. The suggestions of the Committee led to the enactment of Criminal Law (Amendment) Act, 2013 which, inter alia, brought in substantive as well as procedural reforms in the core areas of rape law. The changes brought in, inter alia, can broadly be titled as under: (i) Extension of the definition of the offence of rape in Section 375 Indian Penal Code; (ii) Adoption of a more pragmatic approach while dealing with the issue of consent in the offence of rape; and (iii) Introduction of harsher penalty commensurating with the gravity of offence. These subsequent events though not relevant for the purpose of this judgment, I have referred to it for the sake of factual completion.

368. Both the courts below, by recording concurrent findings, have found all the accused guilty of the offences they were charged with and owing to the gravity and manner of committing the heinous offences held that the acts of the accused shake the conscience of the society falling within the category of rarest of rare cases and awarded death penalty. Briefly put, the courts below have found that the prosecution has established the guilt of the accused inter alia on the following:

1. Three dying declarations of the prosecutrix, complementing each other, corroborated by medical evidence and other direct as well as circumstantial evidence.

2. Testimony of eye witness - P.W. 1, corroborated by circumstantial evidence as well as scientific evidence.

3. Recovery of the bus in which incident took place and recovery of the concerned iron rod therefrom, completing the chain of circumstantial evidence, by proof of scientific evidence like DNA analysis, finger print analysis etc.

4. Arrest of the accused and their identification by P.W. 1, recovery of articles belonging to the prosecutrix and P.W. 1 from the accused, pursuant to their disclosure statement, substantiated by proof of DNA analysis.

5. Conspiracy of the accused in the commission of offence.

369. While concurring with the majority, I have recorded my reasoning by considering the evidence on record in the light of settled legal principles and also analysed the justifiability of the punishment awarded to the accused. For proper appreciation of evidence, it is apposite to first refer to the settled principles and norms of appreciation of evidence of prosecutrix and other evidence in a rape case.

370. Duty of court in appreciation of evidence while dealing with cases of rape: Crime against women is an unlawful intrusion of her right to privacy, which offends her self- esteem and dignity. Expressing concern over the increasing crime against women, in State of Punjab v. Gurmit Singh and Ors. MANU/SC/0366/1996 : (1996) 2 SCC 384, this Court held as under:

21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get

swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.....

[Emphasis supplied]

371. The above principle of law, declared in Gurmeet Singh's case is reiterated in various cases viz., State of Rajasthan v. N.K. The Accused MANU/SC/0218/2000 : (2000) 5 SCC 30; State of H.P. v. Lekh Raj and Anr. MANU/SC/0714/1999 : (2000) 1 SCC 247; State of H.P. v. Asha Ram MANU/SC/1902/2005 : (2005) 13 SCC 766.

372. Clause (g) of Sub- section (2) of Section 376 Indian Penal Code (prior to 2013 Amendment Act 13 of 2013) deals with cases of gang rape. In order to establish an offence Under Section 376(2)(g) Indian Penal Code, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape is committed by even one, all the accused are guilty, irrespective of the fact that only one or more of them had actually committed the act. Section 376(2)(g) read with Explanation I thus embodies a principle of joint liability. But so far as appreciation of evidence is concerned, the principles concerning the cases falling under Sub- section (1) of Section 376 Indian Penal Code apply.

373. In a case of rape, like other criminal cases, onus is always on the prosecution to prove affirmatively each ingredients of the offence. The prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts. In Narender Kumar v. State (NCT of Delhi) MANU/SC/0481/2012 : (2012) 7 SCC 171, it was held as under:

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. ..... There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

374. At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of prosecutrix in lieu of settled legal principles. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well- settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination etc., if the same is found natural and trustworthy.

375. Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity. In State of Karnataka v. Krishnappa MANU/SC/0210/2000 : (2000) 4 SCC 75, it was held as under:

15. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. .....

16. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

[emphasis supplied]

376. There is no legal compulsion to look for corroboration of the prosecutrix's testimony unless the evidence of the victim suffers from serious infirmities, thereby seeking corroboration. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat MANU/SC/0090/1983 : (1983) 3 SCC 217, it was held as under:

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross- examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. .....

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition- bound non- permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) .....

11. ..... On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self- inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. .....

[emphasis supplied]

It was further held in Bharwada Bhoginbhai Hirjibhai (supra) that if the evidence of the victim does not suffer from any basic infirmity and the "probabilities- factor" does not render it unworthy of credence, there is no reason to insist on corroboration except corroboration by the medical evidence. The same view was taken in Krishan Lal v. State of Haryana MANU/SC/0147/1980 : (1980) 3 SCC 159.

377. It is well- settled that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable and there is a ring of truth in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a guidance of prudence under given circumstances. In Rajinder alias Raju v. State of Himachal Pradesh MANU/SC/1122/2009 : (2009) 16 SCC 69, it was held as under:

19. In the context of Indian culture, a woman- - victim of sexual aggression- - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self- respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is

unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.

378. In Raju and Ors. v. State of Madhya Pradesh MANU/SC/8353/2008 : (2008) 15 SCC 133, it was held as under:

10. .....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. .....

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

379. In State of H.P. v. Asha Ram MANU/SC/1902/2005 : (2005) 13 SCC 766, this Court highlighted the importance of, and the weight to be attached to, the testimony of the prosecutrix. In para (5), it was held as under:

5. ..... It is now a well- settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well- settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

380. As held in the case of State of Punjab v. Ramdev Singh MANU/SC/1063/2003 : (2004) 1 SCC 421, there is no rule of law that the testimony of the prosecutrix cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face

value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. The above judgment of Ramdev Singh (supra) has been approvingly quoted in State of U.P. v. Munshi MANU/SC/7982/2008 : (2008) 9 SCC 390.

381. In a catena of decisions, this Court has held that conviction can be based on the sole testimony of the prosecutrix, provided it is natural, trustworthy and worth being relied upon vide State of H.P. v. Gian Chand MANU/SC/0312/2001 : (2001) 6 SCC 71, State of Rajasthan v. N.K. The Accused MANU/SC/0218/2000 : (2000) 5 SCC 30; State of H.P. v. Lekh Raj and Anr. MANU/SC/0714/1999 : (2000) 1 SCC 247, Wahid Khan v. State of Madhya Pradesh MANU/SC/1850/2009 : (2010) 2 SCC 9, Dinesh Jaiswal v. State of Madhya Pradesh MANU/SC/0104/2010 : (2010) 3 SCC 232; Om Prakash v. State of Haryana MANU/SC/0756/2011 : (2011) 14 SCC 309.

382. Observing that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix and that corroboration of testimony of a prosecutrix is not a requirement of law but only a rule of prudence, in Narender Kumar's case (supra), this Court held as under:

20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject- matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony. (Vide Vimal Suresh Kamble v. Chaluverapinake Apal S.P. MANU/SC/0015/2003 : (2003) 3 SCC 175 and Vishnu v. State of Maharashtra MANU/SC/2156/2005 : (2006) 1 SCC 283.)

383. Courts should not attach undue importance to discrepancies, where the contradictions sought to be brought up from the evidence of the prosecutrix are immaterial and of no consequence. Minor variations in the testimony of the witnesses are often the hallmark of truth of the testimony. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Due to efflux of time, there are bound to be minor contradictions/discrepancies in the statement of the prosecutrix but such minor discrepancies and inconsistencies are only natural since when

truth is sought to be projected through human, there are bound to be certain inherent contradictions. But as held in Om Prakash v. State of U.P. MANU/SC/8150/2006 : (2006) 9 SCC 787, the Court should examine the broader probabilities of a case.

384. There is no quarrel over the proposition that the evidence of the prosecutrix is to be believed by examining the broader probabilities of a case. But where there are serious infirmities and inherent inconsistencies in evidence; the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part, no reliance can be placed upon the testimony of the prosecutrix. In Tameezuddin v. State (NCT of Delhi) MANU/SC/1621/2009 : (2009) 15 SCC 566, it was held as under:

9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.

The same view was taken in Suresh N. Bhusare v. State of Maharashtra MANU/SC/0529/1998 : (1999) 1 SCC 220 and Jai Krishna Mandal v. State of Jharkhand MANU/SC/1347/2010 : (2010) 14 SCC 534.

385. On the anvil of the above principles, let us test the case of prosecution and version of the prosecutrix as depicted in her dying declaration.

386. Dying Declaration: Prosecution relies upon three dying declarations of the victim: (i) Statement of victim recorded by P.W. 49 Dr. Rashmi Ahuja (Ex. P.W. 49/A) when the victim was brought to Safdarjung Hospital and admitted in the Gynae casualty at about 11:15 p.m. on 16.12.2012 - the victim gave a brief account of the incident stating that she went to a movie with her friend Awnindra (P.W. 1) and that after the movie, they together boarded the bus from Munirka bus stop in which she was gang- raped and that she was thrown away from the moving bus thereafter, along with her friend; (ii) Second dying declaration recorded by P.W. 27 Usha Chaturvedi, SDM (Ex. P.W. 27/A) on 21.12.2012 at about 09:00 p.m. - the victim gave the details of the entire incident specifying the role of each accused: gang- rape, unnatural sex committed on her, the injuries inflicted by accused on her vagina and rectum, by use of iron rod and by insertion of hands in her private parts; description of the bus, robbery and lastly throwing both the victim and also her boyfriend out of the moving bus in naked condition near Mahipalpur flyover; (iii) Third dying declaration recorded by P.W. 30 Pawan Kumar, Metropolitan Magistrate (Ex. P.W. 30/D) on 25.12.2012 at 1:00 PM at ICU, Safdarjung Hospital by putting questions in multiple choice and recording answers through such questions by gestures or writings - the victim wrote the names of the accused in the third dying declaration. Evidence of P.W. 28 Dr. Rajesh Rastogi and the certificate (Ex. P.W. 28/A) given by him establishes that the victim was in a fit mental condition to give the statement through gestures. Furthermore, P.W. 75 Asha Devi, mother of the victim in her cross- examination also deposed that she had a talk with her daughter on the night

of 25.12.2012, which shows that the victim was conscious, communicative and oriented. Contentions urged, assailing the fit mental condition of the victim have no merit.

387. With regard to the contention that there were improvements in the dying declarations, I am of he view, the victim was gang- raped and iron rod was inserted in her private parts in the incident and the victim must have been pushed to deep emotional crisis. Rape deeply affects the entire psychology of the woman and humiliates her, apart from leaving her in a trauma. The testimony of the rape victim must be appreciated in the background of the entire case and the trauma which the victim had undergone. As a matter of record, P.W. 49 Dr. Rashmi Ahuja, at around 11:15 p.m. on the night of 16.12.2012, had attended to the prosecutrix as soon as she was brought to the hospital and had prepared casualty/OPD Card of the prosecutrix (Ex. P.W. 49/A), as well as her MLC (Ex. P.W. 49/B). At that time, P.W. 49 had found her cold and clammy due to vaso- constriction. The prosecutrix was found shivering, for which she was administered IV line and warm saline in order to stabilize her pulse and BP. When the victim was in such a condition, the victim cannot be expected to give minute details of the occurrence like overt act played by the accused, insertion of iron rod etc. There is no justification for blowing up such omission out of proportion in the statement recorded by P.W. 49 Dr. Rashmi Ahuja and doubt the same. In the occurrence, physical and emotional balance of the victim must have been greatly disturbed. Startled by the incident, whatever the victim was able to momentarily recollect, she narrated to P.W. 49 and placed in that position non- mention of minute details in Ex. P.W. 49/A cannot be termed as a material omission.

388. Dying declaration is a substantial piece of evidence provided it is not tainted with malice and is not made in an unfit mental state. Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well- known tests to ascertain as to whether the statement was made in reference to cause of death of its maker and whether the same could be relied upon or not. The Court also has to satisfy as to whether the deceased was in a fit mental state to make the statement. The Court must scrutinize the dying declaration carefully and ensure that the declaration is not the result of tutoring, prompting or imagination. Once the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. That the deceased had the opportunity to observe and identify the assailants and was in a fit state to make the declaration. [K. Ramachandra Reddy and Anr. v. Public Prosecutor MANU/SC/0127/1976 : (1976) 3 SCC 618]

389. The principles governing dying declarations have been exhaustively laid down in several judicial pronouncements. In Paniben (Smt.) v. State of Gujarat MANU/SC/0346/1992 : (1992) 2 SCC 474, this Court referred to a number of judgments laying down the principles governing dying declaration. In this regard, I find it apposite to quote the following from Paniben (supra) as under:

18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. MANU/SC/0174/1975 : (1976) 3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav MANU/SC/0118/1985 : (1985) 1 SCC 522; Ramawati Devi v. State of Bihar MANU/SC/0135/1983 : (1983) 1 SCC 211).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor MANU/SC/0127/1976 : (1976) 3 SCC 618).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. MANU/SC/0160/1973 : (1974) 4 SCC 264)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P. (1981) Supp. SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. MANU/SC/0207/1981 : (1981) 2 SCC 654)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu (1980) Supp. SCC 455)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar MANU/SC/0269/1979 : (1980) Supp. SCC 769)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P. MANU/SC/0334/1988 : (1988) Supp. SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan MANU/SC/0565/1989 : (1989) 3 SCC 390)

The above well- settled tests relating to dying declarations and the principles have been elaborately considered in a number of judgments. [Vide Khushal Rao v. State of Bombay MANU/SC/0107/1957 : AIR 1958 SC 22; State of Uttar Pradesh v. Ram Sagar Yadav MANU/SC/0118/1985 : (1985) 1 SCC 552; State of Orissa v. Bansidhar Singh MANU/SC/0248/1996 : (1996) 2 SCC 194; Panneerselvam v. State of Tamil Nadu MANU/SC/7726/2008 : (2008) 17 SCC 190; Atbir v. Govt. of NCT of Delhi MANU/SC/0576/2010 : (2010) 9 SCC 1 and Umakant and Anr. v. State of Chhattisgarh MANU/SC/0574/2014 : (2014) 7 SCC 405].

390. Multiple Dying Declarations: In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declaration, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations. Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration. Court has to examine the contents of dying declaration in the light of various surrounding facts and circumstances. This Court in a number of cases, where there were multiple dying declarations, consistent in material particulars not being contradictory to each other, has affirmed the conviction. [Vide Vithal v. State of Maharashtra MANU/SC/8618/2006 : (2006) 13 SCC 54].

391. In Amol Singh v. State of Madhya Pradesh MANU/SC/7724/2008 : (2008) 5 SCC 468, while discarding the two inconsistent dying declarations, laid down the principles for consideration of multiple dying declarations as under:

13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof

that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See Kundula Bala Subrahmanyam v. State of A.P. MANU/SC/0508/1993 : (1993) 2 SCC 684) However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

392. In Ganpat Mahadeo Mane v. State of Maharashtra MANU/SC/0167/1993 : (1993) Supp. (2) SCC 242, there were three dying declarations. One recorded by the doctor; the second recorded by the police constable and also attested by the doctor and the third dying declaration recorded by the Executive Magistrate which was endorsed by the doctor. Considering the third dying declaration, this Court held that all the three dying declarations were consistent and corroborated by medical evidence and other circumstantial evidence and that they did not suffer from any infirmity.

393. In Lakhan v. State of M.P. MANU/SC/0577/2010 : (2010) 8 SCC 514, this Court considered a similar situation where in the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the Judicial Magistrate lacked certain information given earlier. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between two dying declarations and non- mention of certain features in the dying declarations recorded by the Judicial Magistrate does not make both the dying declarations inconsistent.

394. In the light of the above principles, I now advert to analyze the facts of the present case. The victim made three dying declarations: (i) statement recorded by P.W. 49 Dr. Rashmi Ahuja immediately after the victim was admitted to the hospital; (ii) Dying declaration (Ex. P.W. 27/A) recorded by P.W. 27 SDM Usha Chaturvedi on 21.12.2012; and (iii) dying declaration (Ex. P.W. 30/D) recorded by P.W. 30 Pawan Kumar, Metropolitan Magistrate on 25.12.2012 at 1:00 P.M. by multiple choice questions and recording answers by gestures and writing. In the first dying declaration (Ex. P.W. 49/A), the prosecutrix has stated that more than two men committed rape on her, bit her on lips, cheeks and breast and also subjected her to unnatural sex. In the second dying declaration (Ex. P.W. 27/A) recorded by P.W. 27, the victim has narrated the entire incident in great detail, specifying the role of each accused, rape committed by number of persons, insertion of iron rod in her private parts, description of the bus, robbery committed and throwing of both the victims out of the moving bus in naked condition. In the second dying declaration, she has also stated that the accused were addressing each other with the names like, "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay". In the second dying declaration, though there are improvements in giving details of the incident, names of the accused etc., there are no material contradictions between the first and second dying declaration (Ex. P.W. 49/A and Ex. P.W. 27/A).

395. On 25.12.2012 at 1:00 P.M., P.W. 30 Pawan Kumar, Metropolitan Magistrate recorded the statement by putting multiple choice questions to the victim and by getting answers through gestures and writing. The third dying declaration (Ex. P.W. 30/D) is found consistent with the earlier two declarations. It conclusively establishes that the victim was brutally gang- raped, beaten by iron rod, subjected to other harsh atrocities and was finally dumped at an unknown place. While making the third declaration, the victim also tried to reveal the names of the accused by writing in her own handwriting viz. Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju.

396. As per the settled law governing dying declarations, even if there are minor discrepancies in the dying declarations, in the facts and circumstances of the case, the Court can disregard the same as insignificant. A three- Judge Bench of this Court in Abrar v. State of Uttar Pradesh MANU/SC/1062/2010 : (2011) 2 SCC 750, held that it is practical that minor discrepancies in recording dying declarations may occur due to pain and suffering of the victim, in case the declaration is recorded at multiple intervals and thus, such discrepancies need not be given much emphasis.

12. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To our mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. We, particularly, notice that the dying declaration had been recorded by the Tahsildar after the doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. We are, therefore, of the opinion, that no fault whatsoever could be found in the dying declarations.

397. When a dying declaration is recorded voluntarily, pursuant to a fitness report of a certified doctor, nothing much remains to be questioned unless, it is proved that the dying declaration was tainted with animosity and a result of tutoring. Especially, when there are multiple dying declarations minor variations does not affect the evidentiary value of other dying declarations whether recorded prior or subsequent thereto. In Ashabai and Anr. v. State of Maharashtra MANU/SC/0011/2013 : (2013) 2 SCC 224, it was held as under:

15. ....As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other.

398. Considering the present case on the anvil of the above principles, I find that though there was time gap between the declarations, all the three dying declarations are consistent with each

other and there are no material contradictions. All the three dying declarations depict truthful version of the incident, particularly the detailed narration of the incident concerning the rape committed on the victim, insertion of iron rod and the injuries caused to her vagina and rectum, unnatural sex committed on the victim and throwing the victim and P.W. 1 out of the moving bus. All the three dying declarations being voluntary, consistent and trustworthy, satisfy the test of reliability.

399. Dying Declaration by gestures and nods: Adverting to the contention that the third dying declaration made through gestures lacks credibility, it is seen that the multiple choice questions put to the prosecutrix by P.W. 30 Pawan Kumar, Metropolitan Magistrate, were simple and easily answerable through nods and gestures. That apart, before recording the dying declaration, P.W. 30 Pawan Kumar, Metropolitan Magistrate had satisfied himself about fit mental state of the victim to record dying declaration through nods and gestures. There is nothing proved on record to show that the mental capacity of the victim was impaired, so as to doubt the third dying declaration. As the victim was conscious, oriented and meaningfully communicative, it is natural that the victim was in a position to write the names of the accused persons and also about the use of long iron rod. The third dying declaration recorded through nods and gestures and also by the victim's own writing, writing the names of the accused inspires confidence in the Court; the same was rightly relied upon by the trial Court as well as the High Court.

400. Dying declaration made through signs, gesture or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the Court ought to take is to ensure that the person recording the dying declaration was able to correctly notice and interpret the gestures or nods of the declarant. While recording the third dying declaration, signs/gestures made by the victim, in response to the multiple choice questions put to the prosecutrix are admissible in evidence.

401. A dying declaration need not necessarily be by words or in writing. It can be by gesture or by nod. In Meesala Ramakrishan v. State of A.P. MANU/SC/0709/1994 : (1994) 4 SCC 182, this Court held as under:

20. .....that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational attainment, what gestures and nods were made, what were the questions asked - - whether they were simple or complicated - - and how effective or understandable the nods and gestures were.

The same view was reiterated in B. Shashikala v. State of A.P. MANU/SC/0052/2004 : (2004) 13 SCC 249.

402. In the case of rape and sexual assault, the evidence of prosecutrix is very crucial and if it inspires confidence of the court, there is no requirement of law to insist upon corroboration of the same for convicting the accused on the basis of it. Courts are expected to act with sensitivity and appreciate the evidence of the prosecutrix in the background of the entire facts of the case and not in isolation. In the facts and circumstances of the present case as the statements of the prosecutrix in the form of three dying declarations are consistent with each other and there are no material contradiction, they can be completely relied upon without corroboration. In the present case, the prosecutrix has made a truthful statement and the prosecution has established the case against the Respondents beyond reasonable doubt. The victim also wrote the names of the accused persons in her own hand- writing in the dying declaration recorded by P.W. 30 (Ex. P.W. 30/D). Considering the facts and circumstances of the present case and upon appreciation of the evidence and material on record, I find all the three dying declarations consistent, true and voluntary, satisfying the test of probabilities factor. That apart, the dying declarations are well-corroborated by medical and scientific evidence adduced by the prosecution. Moreover, the same has been amply corroborated by the testimony of eye witness- P.W. 1.

403. Corroboration of Dying declaration by Medical Evidence: The dying declaration is amply corroborated by medical evidence depicting injuries to vagina and internal injuries to rectum and recto- vaginal septum as noted by P.W. 49 Dr. Rashmi Ahuja and P.W. 50 Dr, Raj Kumar Chejara. On the night of 16.12.2012, the prosecutrix was medically examined by P.W. 49 who recorded her injuries and statement in the MLC (Ex. P.W. 49/B). On local examination, a sharp cut over right labia and a 6 cm long tag of vagina was found hanging outside the introitus. Vaginal examination showed bleeding and about 7 to 8 cm long posterior vaginal wall tear. A rectal tear of about 4 to 5 cm was also noticed communicating with the vaginal tear. Apart from the said injuries to the private parts of the prosecutrix, guarding and rigidity was also found in her abdomen and several bruises and marks on face were noticed. Bruises and abrasions around both the eyes and nostrils were also found. Lips were found edematous and left side of the mouth was injured by a small laceration. Bite marks over cheeks and breast, below areola, were also present. Bruises over the left breast and bite mark in interior left quadrant were prominent.

404. During surgery, conducted on 16/17.12.2012 P.W. 50 Dr. Raj Kumar Chejara (Ex. P.W. 50/A and Ex. P.W. 50/B) noted contusion and bruising of jejunum, large bowel, vaginal tear, and completely torn recto- vaginal septum. Small and large bowels were affected and were extremely bad for any definitive repair. It was also noted that rectum was longitudinally torn and the tear was continuing upward involving sigmoid colon, descending colon which was splayed open. There were multiple perforations at many places of ascending colon and calcum. Terminal ileum approximately one and a half feet loosely hanging in the abdominal cavity avulsed from its mesentery. Rest of the small bowel was non- existent with only patches of mucosa at places and borders of the mesentery were contused. While performing second surgery on 19th December, 2012, surgery team also recorded findings that rectum was longitudinally torn on anterior aspect in continuation with peritorial tear and other internal injuries. On 26- 12- 2012 the condition of the prosecutrix was examined and it was decided to shift her abroad for further treatment and she was shifted by an air- ambulance to Singapore Mount Elizabeth Hospital. The prosecutrix died at Mount Elizabeth Hospital, Singapore on 29- 12- 2012 at 04:45 AM. Cause of death is stated as sepsis with multi organ failure following multiple injuries. (Ex. P.W. 34/A)

405. Injuries to vagina, rectum and recto- vaginal septum as noted by P.W. 49 Dr. Rashmi Ahuja and P.W. 50 Dr. Raj Kumar Chejara; and the injuries as depicted in the post- mortem certificate, including the other external injuries which are evidently marks of violence during the incident, exhibit the cruel nature of gang rape committed on the victim. The profused bleeding from vagina and tag of vagina hanging outside; completely recto- vaginal septum clearly demonstrate the violent act of gang rape committed on the victim. The medical reports including the operation theatre notes (Ex. P.W. 50/A and 50/B) and the injuries thereon indicates the pain and suffering which the victim had undergone due to multiple organ failure and other injuries caused by insertion of iron rod.

406. If considered on the anvil of settled legal principles, injuries on the person of a rape victim is not even a sine qua non for proving the charge of rape, as held in Joseph v. State of Kerala MANU/SC/0313/2000 : (2000) 5 SCC 197. The same principle was reiterated in State of Maharashtra v. Suresh MANU/SC/0765/1999 : (2000) 1 SCC 471. As rightly held in State of Rajasthan v. N.K., The Accused MANU/SC/0218/2000 : (2000) 5 SCC 30, absence of injury on the person of the victim is not necessarily an evidence of falsity of the allegations of rape or evidence of consent on the part of the prosecutrix. In the present case, the extensive injuries found on the vagina/private parts of the body of the victim and injuries caused to the internal organs and all over the body, clearly show that the victim was ravished.

407. Corroboration of dying declaration by scientific evidence: The DNA profile generated from blood- stained pants, t- shirts and jackets recovered at the behest of A- 2 Mukesh matched with the DNA profile of the victim. Likewise, the DNA profile generated from the blood- stained jeans and banian recovered at the behest of A- 3 Akshay matched with the DNA profile of the victim. DNA profile generated from the blood- stained underwear, chappal and jacket recovered at the behest of A- 4 Vinay matched with the DNA profile of the victim. DNA profiles generated from the clothes of the accused recovered at their behest consistent with that of the victim is an unimpeachable evidence incriminating the accused in the occurrence. As submitted by the prosecution, there is no plausible explanation from the accused as to the matching of DNA profile of the victim with that of the DNA profile generated from the clothes of the accused. The courts below rightly took note of the DNA analysis report in finding the accused guilty.

408. Bite marks on the chest of the victim and Odontology Report: It is also to be noted that the photographs of bite marks found on the body of the victim, lifted by P.W. 66 Shri Asghar Hussain were examined by P.W. 71 Dr. Ashith B. Acharya. The analysis shows that at least three bite marks were caused by accused Ram Singh whereas one bite mark has been identified to have been most likely caused by accused Akshay. This aspect of Odontology Report has been elaborately discussed by the High Court in paragraphs (91) to (94) of its judgment. Odontology Report which links accused Ram Singh and accused Akshay, with the case, strengthens the prosecution case as to their involvement.

409. Going by the version of the prosecutrix, as per the dying declaration and the evidence adduced, in particular medical evidence and scientific evidence, I find the evidence of the prosecutrix being amply corroborated. As discussed earlier, in rape cases, Court should examine the broader probabilities of a case and not get swayed by discrepancies. The conviction can be based even on the sole testimony of the prosecutrix. However, in this case, dying declarations recorded from the prosecutrix are corroborated in material particulars by: (i) medical evidence; (ii) evidence of injured witness P.W. 1; (iii) matching of DNA profiles, generated from blood-stained clothes of the accused, iron rod recovered at the behest of deceased accused Ram Singh and various articles recovered from the bus with the DNA profile of the victim; (iv) recovery of belongings of the victim at the behest of the accused, viz. debit card recovered from A- 1 Ram Singh and Nokia mobile from A- 4 Vinay. The dying declarations well corroborated by medical and scientific evidence strengthen the case of the prosecution by conclusively connecting the accused with the crime.

410. Use of Iron Rod and death of the victim: Case of the prosecution is that the accused brutally inserted iron rod in the vagina of the prosecutrix and pulled out internal organs of the prosecutrix. The defence refuted the use of iron rod by the accused on the ground that the complainant as well as the victim did not mention the use of iron rods in their first statements. Contention of the Appellants is that when the victim had given details of the entire incident to P.W. 49 Dr. Rashmi Ahuja, if iron rod had been used, she would not have omitted to mention the use of iron rods in the incident. We do not find force in such a contention, as ample reliable evidence are proved on record which lead to the irresistible conclusion that iron rod was used and it was not a mere piece of concoction.

411. Use of iron rods and insertion of the same in the private parts of the victim is established by the second dying declaration recorded by SDM P.W. 27 Usha Chaturvedi, where the victim has given a detailed account of the incident, role of the accused, gang rape committed on her and other offences including the use of iron rods. The brutality with which the accused persons inserted iron rod in the rectum and vagina of the victim and took out her internal organs from the vaginal and anal opening is reflected in Ex. P.W. 49/A. Further, medical opinion of P.W. 49 (Ex. P.W. 49/G) stating that the recto- vaginal injury could be caused by the rods recovered from the bus, strengthens the statement of the victim and the prosecution version. When the second and third dying declarations of the prosecutrix are well corroborated by the medical evidence, non- mention of use of iron rods in prosecutrix's statement to P.W. 49 Dr. Rashmi Ahuja (Ex. P.W. 49/A), does not materially affect the credibility of the dying declaration. Insertion of iron rod in the private parts of the prosecutrix is amply established by the nature of multiple injuries caused to jejunum and rectum which was longitudinally torn, tag of vagina hanging out; and completely torn recto- vaginal septum.

412. At the behest of accused Ram Singh two iron rods (Ex. P- 49/1 and Ex. P- 49/2) were recovered from the shelf of the driver's cabin vide seizure Memo Ex. P.W. 74/G. The blood-stained rods deposited in the Malkhana were thereafter sent for chemical analysis. The DNA report prepared by P.W. 45 Dr. B.K. Mohapatra, indicates that the DNA profile developed from

the blood- stained iron rods is consistent with the DNA profile of the victim. Presence of blood on the iron rods and the DNA profile of which is consistent with the DNA profile of the victim establishes the prosecution case as to the alleged use of iron rods in the incident.

413. Evidence of P.W. 1: In his first statement made on 16.12.2012, eye witness P.W. 1 stated that he accompanied the prosecutrix to Select City Mall, Saket, New Delhi in an auto from Dwarka, New Delhi where they watched a movie till about 08:30 p.m. After leaving the Mall, P.W. 1 and the victim took an auto to Munirka from where they boarded the fateful bus. After the prosecutrix and P.W. 1 boarded the bus, the accused surrounded P.W. 1 and pinned him down in front side of the bus. While the accused Vinay and Pawan held P.W. 1, the other three accused committed rape on the victim on the rear side of the bus. Thereafter, other accused held P.W. 1, while Vinay and Pawan committed rape on the victim. Later accused Mukesh who was earlier driving the bus, committed rape on the victim. After the incident, P.W. 1 and the prosecutrix were thrown out of the moving bus, near Mahipalpur flyover. In the incident, P.W. 1 himself sustained injuries which lends assurance to his credibility.

414. That P.W. 1 accompanied the victim to Select City Mall and that he was with the victim till the end, is proved by ample evidence. As per the case of the prosecution, on the fateful day, the complainant and the prosecutrix had gone to Saket Mall to see a movie. CCTV footage produced by P.W. 25 Rajender Singh Bisht in two CDs (Ex. P.W. 25/C- 1 and P.W. 25/C- 2) and seven photographs (Ex. P.W. 25/B- 1 to Ex. P.W. 25/B- 7) corroborate the version of P.W. 1 that the complainant and the victim were present at Saket Mall till 8:57 p.m. The certificate Under Section 65- B of the Indian Evidence Act, 1872 with respect to the said footage is proved by P.W. 26 Shri Sandeep Singh (Ex. P.W. 26/A) who is the CCTV operator at Select City Mall.

415. The computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65- B of the Evidence Act. Sub- section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub- section (2) of Section 65- B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible. Secondary evidence of contents of document can also be led Under Section 65 of the Evidence Act.

416. Having carefully gone through the deposition of P.W. 1, I find that his evidence, even after lengthy cross examination, remains unshaken. The evidence of a witness is not to be disbelieved simply because of minor discrepancies. It is to be examined whether he was present or not at the crime scene and whether he is telling the truth or not. P.W. 1 has clearly explained as to how he happened to be with the victim and considering the cogent evidence adduced by the prosecution, presence of P.W. 1 cannot be doubted in any manner. P.W. 1 himself was injured in the incident and he was admitted in the Casualty Ward, where P.W. 51 Dr. Sachin Bajaj examined him. As per

Ex. P.W. 51/A, lacerated wound over the vertex of scalp, lacerated wound over left upper lip and abrasion over right knee were found on the person of P.W. 1. Testimony of P.W. 1 being testimony of an injured witness lends credibility to his evidence and prosecution's case. As rightly pointed out by the Courts below, no convincing grounds exist to discard the evidence of P.W. 1, an injured witness.

417. The question of the weight to be attached to the evidence of an injured witness has been extensively discussed by this Court in Mano Dutt and Anr. v. State of Uttar Pradesh MANU/SC/0159/2012 : (2012) 4 SCC 79. After exhaustively referring to various judgments on this point, this Court held as under:

31. We may merely refer to Abdul Sayeed v. State of M.P. MANU/SC/0702/2010 : (2010) 10 SCC 259 where this Court held as under: (SCC pp. 271- 72, paras 28- 30)

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built- in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide Ramlagan Singh v. State of Bihar MANU/SC/0216/1972 : (1973) 3 SCC 881, Malkhan Singh v. State of U.P. MANU/SC/0164/1974 : (1975) 3 SCC 311, Machhi Singh v. State of Punjab MANU/SC/0211/1983 : (1983) 3 SCC 470, Appabhai v. State of Gujarat 1988 Supp SCC 241, Bonkya v. State of Maharashtra MANU/SC/0066/1996 : (1995) 6 SCC 447, Bhag Singh v. State of Punjab MANU/SC/1308/1997 : (1997) 7 SCC 712, Mohar v. State of U.P. MANU/SC/0808/2002 : (2002) 7 SCC 606 (SCC p. 606b- c), Dinesh Kumar v. State of Rajasthan MANU/SC/7910/2008 : (2008) 8 SCC 270, Vishnu v. State of Rajasthan (2009) 10 SCC 477, Annareddy Sambasiva Reddy v. State of A.P. MANU/SC/0640/2009 : (2009) 12 SCC 546 and Balraje v. State of Maharashtra MANU/SC/0352/2010 : (2010) 6 SCC 673.]

29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab MANU/SC/1584/2009 : (2009) 9 SCC 719 where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726- 27, paras 28- 29)

'28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka MANU/SC/0053/1995 : 1994 Supp (3) SCC 235 this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason

that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand MANU/SC/0652/2004 : (2004) 7 SCC 629 a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

418. After the accused were arrested, they made disclosure statements. Pursuant to the said disclosure statements, recoveries of various articles were effected which included clothes of the accused and articles belonging to P.W. 1 and the prosecutrix. The Samsung Galaxy Duos mobile phone recovered from A- 2 was identified by the complainant in the court as belonging to him and testimony of the complainant was further fortified by the testimony of P.W. 56 Sandeep Dabral, Manager, Spice Mobile Shop, who stated that the said Samsung Mobile bearing the respective IMEI number was sold in the name of the complainant. Also, the metro card and silver ring recovered at the behest of A- 3 Akshay were identified by P.W. 1 in court as belonging to him. The silver ring was also identified by the complainant in the TIP proceedings conducted on 28.12.2012. Likewise, the Hush- Puppies shoes recovered at the behest of A- 4 Vinay and wrist watch of Sonata make recovered at the behest of A- 5 Pawan were identified by P.W. 1 in TIP proceedings as belonging to him. Recoveries of articles of P.W. 1 and other scientific evidence, irrebutably establish the presence of P.W. 1 at the crime scene and strengthens the credibility of P.W. 1's testimony.

419. Apart from the recoveries made at the behest of the accused, presence of P.W. 1 is also confirmed by DNA profile generated from the blood- stained mulberry leaves and grass collected from Mahipalpur (seized vide Memo Ex. P.W. 74/C) where both the victims were thrown after the incident. As per the Chemical Analysis Report, DNA profile generated from the blood-stained murberry leaves collected from the Mahipalpur flyover were found to be of male origin and consistent with the DNA profile of P.W. 1. This proves that P.W. 1 was present with the

victim at the time of the incident and both of them were together thrown out of the bus at Mahipalpur.

420. Further, as discussed infra, pursuant to the disclosure statement of the accused, clothes of accused, some of which were blood- stained and other incriminating articles were recovered. P.W. 45 Dr. B.K. Mohapatra matched the DNA profiles of the blood detected on the clothes of the accused with that of the complainant and the victim. One set of DNA profile generated from jeans- pant of the accused Akshay (A- 3) matched the DNA profile of P.W. 1. Likewise, one set of DNA profile generated from the sports jacket of accused Vinay (A- 4) was found consistent with the DNA profile of P.W. 1. Also, one set of DNA profile generated from black coloured sweater of Accused Pawan Gupta (A- 5) was found consistent with the DNA profile of P.W. 1. Result of DNA analysis further corroborates the version of P.W. 1 and strengthens the prosecution case. DNA Analysis Report, as provided by P.W. 45 is a vital piece of evidence connecting the accused with the crime.

421. Matching of DNA profile generated from the bunch of hair recovered from the floor of the bus near the second row seat on the left side, with DNA profile of the complainant is yet another piece of evidence corroborating the version of P.W. 1 [vide Ex. P.W. 45/B]. Further, DNA profile developed from burnt cloth pieces, recovered from near the rear side entry of the bus was found consistent with DNA profile of P.W. 1; and this again fortifies the presence of P.W. 1 with the victim in the bus.

422. Contention of the Appellants is that there are vital contradictions in the statements of P.W. 1. It is contended that initially P.W. 1 did not give the names of the accused in the FIR and that he kept on improving his version, in particular, in the second supplementary statement recorded on 17.12.2012 in which he gave the details of the bus involved. To contend that testimony of P.W. 1 is not trustworthy, reliance is placed on Kathi Bharat Vajsur and Anr. v. State of Gujarat MANU/SC/0413/2012 : (2012) 5 SCC 724. In Kathi Bharat Vajsur's case, this Court has observed that when there are inconsistencies or contradictions in oral evidence and the same is found to be in contradiction with other evidence then it cannot be held that the prosecution has proved the case beyond reasonable doubt.

423. While appreciating the evidence of a witness, the approach must be to consider the entire evidence and analyze whether the evidence as a whole gives a complete chain of facts depicting truth. Once that impression is formed, it is necessary for the court to scrutinize evidence particularly keeping in view the prosecution case. Any minor discrepancies or improvements not touching the core of the prosecution case and not going to the root of the matter, does not affect the trustworthiness of the witness. Insofar as the contention that P.W. 1 kept on improving his version in his statement recorded at various point of time, it is noted that there are indeed some improvements in his version but, the core of his version as to the occurrence remains consistent. More so, when P.W. 1 and the victim faced such a traumatic experience, immediately after the incident, they cannot be expected to give minute details of the incident. It would have taken some

time for them to come out of the shock and recollect the incident and give a detailed version of the incident. It is to be noted that in the present case, the statements of P.W. 1 recorded on various dates are not contradictory to each other. The subsequent statements though are more detailed as compared to the former ones, in the circumstances of the case, it cannot be said to be unnatural affecting the trustworthiness of P.W. 1's testimony. There is hardly any justification for doubting the evidence of P.W. 1, especially when it is corroborated by recovery of P.W. 1's articles from the accused and scientific evidence.

424. The trial Court as well as the High Court found P.W. 1's evidence credible and trustworthy and I find no reason to take a different view. The view of the High Court and the trial court is fortified by the decisions of this Court in Pudhu Raja and Anr. v. State Rep. by Inspector of Police MANU/SC/0761/2012 : (2012) 11 SCC 196, Jaswant Singh v. State of Haryana MANU/SC/0236/2000 : (2000) 4 SCC 484 and Akhtar and Ors. v. State of Uttaranchal MANU/SC/0556/2009 : (2009) 13 SCC 722. Further, the evidence of P.W. 1 is amply strengthened by scientific evidence and recovery of the incriminating articles from the accused. The alleged omissions and improvements in the evidence of P.W. 1 pointed out by the defence do not materially affect the evidence of P.W. 1.

425. Recovery of the bus and its Involvement in the incident: Description of the entire incident by P.W. 1 and the victim led the investigating team to the Hotel named "Hotel Delhi Airport", where P.W. 1 and the victim were dumped after the incident. P.W. 67 P.K. Jha, owner of Hotel Delhi Airport handed over the pen drive containing CCTV footage (Ex. P- 67/1) and CD (Ex. P- 67/2) to the Investigating Officer which were seized. From the CCTV footage, the offending bus bearing registration No. DL- 1PC- 0149 was identified by P.W. 1. The bus was seized from Ravi Dass Camp and Ram Singh (A- 1) was also arrested.

426. P.W. 81 Dinesh Yadav is the owner of the bus bearing Registration No. DL- 1PC- 0149 (Ex. P- 1). P.W. 81 runs buses under the name and style "Yadav Travels". On interrogation, P.W. 81 Dinesh Yadav stated that A- 1 Ram Singh was the driver of the bus No. DL- 1PC- 0149 in December, 2012 and A- 3 Akshay Kumar Singh was his helper in the bus. P.W. 81 also informed the police that the bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students to the school in the morning and that it was also engaged by a Company named M/s. Net Ambit in Noida, to take its employees from Delhi to Noida. P.W. 81 also informed the police that after daily routine trip, A- 1 Ram Singh used to park the bus at Ravi Dass Camp, R.K. Puram, near his residence. P.W. 81 further informed that on 17.12.2012, the bus as usual went from Delhi to Noida to take the Staff of M/s. Net Ambit to their office. The recovery of the bus (Ex. P- 1) and evidence of P.W. 81 led to a breakthrough in the investigation that A- 1 Ram Singh was the driver of the bus and A- 3 Akshay was the cleaner of the bus.

427. Furthermore, in order to prove that A1 Ram Singh (Dead) was the driver of the bus No. DL- 1PC- 0149 (Ex. P- 1), P.W. 16 Rajeev Jakhmola, Manager (Administration) of Birla Vidya Niketan School, Pushp Vihar, New Delhi was examined. In his evidence, P.W. 16 stated that P.W. 81,

Dinesh Yadav had provided the school with seven buses on contract basis including the bus No. DL- 1PC- 0149 (Ex. P- 1) and that A- 1 Ram Singh was its driver. In his interrogation by the police, P.W. 16 had also handed over Ram Singh's driving licence alongwith copy of agreement of the school with the owner of the bus and other documents. By adducing the evidence of P.W. 81 Dinesh Yadav and P.W. 16 Rajeev Jakhmola, the prosecution has established that the bus in question was routinely driven by A- 1 Ram Singh (Dead) and A- 3 Akshay Kumar was the helper in the bus.

428. On 17.12.2012, a team of experts from CFSL comprising P.W. 45 Dr. B.K. Mohapatra, P.W. 46 A.D. Shah, P.W. 79 P.K. Gottam and others, went to the Thyagraj Stadium and inspected the bus Ex. P1. On inspection, certain articles were seized from the said bus vide seizure memo Ex. P.W. 74/P. It is brought on record that the samples were diligently collected and taken to CFSL, CBI by SI Subhash (P.W. 74) vide RC No. 178/21/12 for examination. The DNA profile of material objects lifted from the bus bearing No. DL- 1PC- 0149 were found consistent with that of the victim and the complainant. Matching of the DNA profile developed from the articles seized from the bus DL- 1PC- 0149 like hair recovered from the third row of the bus on the left side with the DNA profile of P.W. 1, strengthens the prosecution case as to the involvement of the offending bus bearing registration No. DL- 1PC- 0149. DNA profile developed from the blood- stained curtains of the bus and blood- stained seat covers of bus and the bunch of hair recovered from the floor of the bus below sixth row matched with the DNA profile of the victim. The evidence of DNA analysis is an unimpeachable evidence as to the involvement of the offending bus in the commission of offence and also strong unimpeachable evidence connecting the accused with the crime.

429. The accused neither rebutted this evidence nor offered any convincing explanation except making feeble attempt by stating that everything was concocted. P.W. 46, A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI examined the chance prints lifted from the bus. Chance print marked as 'Q.1' lifted from the bus (Ex. P- 1) was found identical with the left palm print of accused Vinay Sharma. Further chance print marked as 'Q.4' was found identical with right thumb impression of accused Vinay Sharma. A finger print expert report (Ex. P.W. 46/D) states that the chance print lifted from the bus being identical with the finger print of accused Vinay Sharma, establishes the presence of accused Vinay Sharma in the bus, thereby strengthening prosecution case.

430. Arrest and Recovery Under Section 27 of the Indian Evidence Act: Prosecution very much relies upon disclosure statements of the accused, pursuant to which articles of the victim and also of P.W. 1 were recovered. Accused being in possession of the articles of the victim and that of P.W. 1, is a militating circumstance against the accused and it is for the accused to explain as to how they came in possession of these articles. Details of arrest of accused and articles recovered from the accused are as under:

431. As noted in the above tabular form, various articles of the complainant and the victim were recovered from the accused viz., Samsung Galaxy Phone (recovered at the behest of A- 2 Mukesh); silver ring (recovered at the behest of A- 3 Akshay); Hush Puppies shoes (recovered at the behest of A- 4 Vinay) and Sonata Wrist Watch (recovered at the behest of A- 5 Pawan). Recovery of belongings of P.W. 1 and that of the victim, at the instance of the accused is a relevant fact duly proved by the prosecution. Notably the articles recovered from the accused thereto have been duly identified by the complainant in test identification proceedings. Recovery of articles of complainant (P.W. 1) and that of the victim at the behest of accused is a strong incriminating circumstance implicating the accused. As rightly pointed out by the Courts below, the accused have not offered any cogent or plausible explanation as to how they came in possession of those articles.

432. Similarly, the Indian bank debit card (Ex. P.W. 74/3) recovered at the behest of A- 1 Ram Singh and black coloured Nokia mobile phone (Ex. P.W. 68/5) recovered at the behest of A- 4 Vinay have been proved to be used by the prosecutrix. P.W. 75 Asha Devi mother of the victim in her testimony stated that the Debit card belonged to her P.W. 75 Asha Devi and that the same was in the possession of her daughter. Nokia mobile phone (Ex. P.W. 68/5) is stated to be the mobile used by the victim. Notably, the articles of the prosecutrix recovered from the accused were proved by the evidence of P.W. 75 Asha Devi (mother of the victim) and the same was not controverted by the defence.

433. Section 25 of the Indian Evidence Act (for short 'the Evidence Act') speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence. Section 26 of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Sections 25 and 26 of the Evidence Act put a complete bar on the admissibility of a confessional statement made to a police officer or a confession made in absentia of a Magistrate, while in custody. Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 of the Evidence Act and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. Section 27 of the Evidence Act reads as under:

27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and is a relevant fact and accordingly it can be safely allowed to be given in evidence.

434. Section 27 has prescribed two limitations for determining how much of the information received from the accused can be proved against him: (i) The information must be such as the

accused has caused discovery of the fact, i.e. the fact must be the consequence, and the information the cause of its discovery; (ii) The information must 'relate distinctly' to the fact discovered. Both the conditions must be satisfied. Various requirements of Section 27 of the Evidence Act are succinctly summed up in Anter Singh v. State of Rajasthan MANU/SC/0096/2004 : (2004) 10 SCC 657:

16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

435. Appending a note of caution to prevent the misuse of the provision of Section 27 of the Evidence Act, this Court in Geejaganda Somaiah v. State of Karnataka MANU/SC/7211/2007 : (2007) 9 SCC 315, observed that the courts need to be vigilant about application of Section 27 of the Evidence Act. Relevant extract from the judgment is as under:

22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because

this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act.

436. Even though, the arrest and recovery Under Section 27 of the Evidence Act is often sought to be misused, the courts cannot be expected to completely ignore how crucial are the recoveries made Under Section 27 in an investigation. The legislature while incorporating Section 27, as an exception to Sections 24, 25 and 26 of the Evidence Act, was convinced of the quintessential purpose Section 27 would serve in an investigation process. The recovery made Under Section 27 of the Evidence Act not only acts as the foundation stone for proceeding with an investigation, but also completes the chain of circumstances. Once the recovery is proved by the prosecution, burden of proof on the defence to rebut the same is very strict, which cannot be discharged merely by pointing at procedural irregularities in making the recoveries, especially when the recovery is corroborated by direct as well as circumstantial evidence, especially when the investigating officer assures that failure in examining independent witness while making the recoveries was not a deliberate or mala fide, rather it was on account of exceptional circumstances attending the investigation process.

437. While the prosecution has been able to prove the recoveries made at the behest of the accused, the defence counsel repeatedly argued in favour of discarding the recoveries made, on the ground that no independent witnesses were examined while effecting such recoveries and preparing seizure memos.

438. The above contention of the defence counsel urges one to look into the specifics of Section 27 of the Evidence Act. As a matter of fact, need of examining independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the Judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. In the present case, P.W. 80 SI Pratibha Sharma has deposed in her cross- examination that no independent person had agreed to become a witness and in the light of such a statement, there is no reason for the courts to doubt the version of the police and the recoveries made.

439. When recovery is made pursuant to the statement of accused, seizure memo prepared by the Investigating Officer need not mandatorily be attested by independent witnesses. In State Govt. of NCT of Delhi v. Sunil and Anr. MANU/SC/0735/2000 : (2001) 1 SCC 652, it was held that non-attestation of seizure memo by independent witnesses cannot be a ground to disbelieve recovery of articles' list consequent upon the statement of the accused. It was further held that there was no requirement, either Under Section 27 of the Evidence Act or Under Section 161 Code of Criminal Procedure to obtain signature of independent witnesses. If the version of the police is not shown to be unreliable, there is no reason to doubt the version of the police regarding arrest and contents of the seizure memos.

440. In the landmark case of Pulukuri Kottaya v. King- Emperor MANU/PR/0049/1946 : AIR 1947 PC 67, the Privy Council has laid down the relevance of information received from the accused for the purpose of Section 27 of the Evidence Act. Relevant extracts from the judgment are as under:

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

The test laid down in Pulukuri Kottaya's case was reiterated in several subsequent judgments of this Court including State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru MANU/SC/0465/2005 : (2005) 11 SCC 600.

441. In the light of above discussion, it is held that recoveries made pursuant to disclosure statement of the accused are duly proved by the prosecution and there is no substantial reason to discard the same. Recovery of articles of P.W. 1 and also that of victim at the instance of the accused is a strong incriminating evidence against accused, especially when no plausible explanation is forthcoming from the accused. Further, as discussed infra, the scientific examination of the articles recovered completely place them in line with the chain of events described by the prosecution.

442. DNA Analysis: In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA analysis. For the purpose of DNA profiling, various samples were taken from the person of the prosecutrix; the complainant; the accused, their clothes/articles; the dumping spot; the iron rods; the ashes of burnt clothes; as well as from the offending bus. P.W. 45 Dr. B.K. Mohapatra analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt. Prosecution relies upon the biological examination of various articles including the samples collected from the accused and the DNA profiles generated from the blood- stained clothes of the accused. The DNA profile generated from the samples collected, when compared with the DNA profile generated from the blood samples of the victim and P.W. 1 Awninder Pratab Singh, were found consistent.

443. For easy reference and for completion of narration of events, I choose to refer to the articles recovered from the accused pursuant to their disclosure statements and other articles like blood-stained clothes; samples of personal fluids like blood, saliva with control swab; other samples like nail clippings, penil swab, stray hair etc. Details of the DNA analysis is contained in the reports of biological examination and DNA profiling (Ex. P.W. 45/A to Ex. P.W. 45/C), furnished by P.W. 45 Dr. B.K. Mohapatra.

444. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA - De- oxy- ribonucleic acid, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood- stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.

445. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:

DNA.- De- oxy- ribonucleic acid, the nucleoprotein of chromosomes.

The double- helix structure in cell nuclei that carries the genetic information of most living organisms.

The material in a cell that makes up the genes and controls the cell. (Biological Term)

DNA finger printing. A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)

In the same Law Lexicon, learned author refers to DNA identification as under:

DNA identification. A method of comparing a person's deoxyribonucleic acid (DNA) - a patterned chemical structure of genetic information - with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. - Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)

446. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A Code of Criminal Procedure is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.

447. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in Santosh Kumar Singh v. State through CBI MANU/SC/0801/2010 : (2010) 9 SCC 747, the Court held as under:

65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the Appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.

66. Dr. Lalji Singh in his examination- in- chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in Kamalanantha v. State of T.N. MANU/SC/0259/2005 : (2005) 5 SCC 194. We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.

67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents

that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the Appellant was from a single source and that source was the Appellant.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das v. State of Rajasthan MANU/SC/0037/1957 : AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram MANU/SC/0335/2001 : (2001) 5 SCC 311. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the Appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.

[emphasis added].

448. From the evidence of P.W. 45 and the details given in the above tabular form, it is seen that the DNA profile generated from blood- stained clothes of the accused namely, A- 1 Ram Singh (dead); A- 2 Mukesh; A- 3 Akshay; A- 4 Vinay; and A- 5 Pawan Gupta @ Kalu are found consistent with the DNA profile of the prosecutrix. Also as noted above, two sets of DNA profile were generated from the black colour sweater of the accused Pawan. One set of DNA profile found to be female in origin, consistent with the DNA profile of the prosecutrix; other set found to be male in origin, consistent with the DNA profile of P.W. 1. Likewise, two sets of DNA profile were generated from the black colour sports jacket of accused Vinay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of P.W. 1. Likewise, two sets of DNA profile were generated from the jeans pant of accused Akshay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of P.W. 1. The result of DNA analysis and that of the DNA profile generated from blood- stained clothes of the accused found consistent with that of the victim is a strong piece of evidence incriminating the accused in the offence.

449. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa

was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in origin, consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay.

450. As discussed earlier, identification by DNA genetic finger print is almost hundred per cent precise and accurate. The DNA profile generated from the blood- stained clothes of the accused and other articles are found consistent with the DNA profile of the victim and DNA profile of P.W. 1; this is a strong piece of evidence against the accused. In his evidence, P.W. 45 Dr. B.K. Mohapatra has stated that once DNA profile is generated and found consistent with another DNA profile, the accuracy is hundred per cent and we find no reason to doubt his evidence. As pointed out by the Courts below, the counsel for the defence did not raise any substantive ground to rebut the findings of DNA analysis and the findings through the examination of P.W. 45. The DNA report and the findings thereon, being scientifically accurate clearly establish the link involving the accused persons in the incident.

451. Conspiracy: The accused have been charged with the offence of "conspiracy" to commit the offence of abduction, robbery/dacoity, gang rape and unnatural sex, in pursuance of which the accused are alleged to have picked up the prosecutrix and P.W. 1. The charge sheet also states that in furtherance of conspiracy, the accused while committing the offence of gang rape on the prosecutrix intentionally inflicted bodily injury with iron rod and inserted the iron rod in the vital parts of her body with the common intention to cause her death.

452. The learned amicus Mr. Sanjay Hegde submitted that there is no specific evidence to prove that there was prior meeting of minds of the accused and that they had conspired together to commit grave offence by use of iron rod, resulting in the death of the victim and, therefore, insertion/use of iron rod by any one of the accused cannot be attributed to all the accused in order to hold them guilty of the offence of murder.

453. The essentials of the offence of conspiracy and the manner in which it can be proved has been laid down by this Court through a catena of judicial pronouncements and I choose to briefly recapitulate the law on the point, so as to determine whether the offence is made out in this case or not. Meeting of minds for committing an illegal act is sine qua non of the offence of conspiracy. It is also obvious that meeting of minds, thereby resulting in formation of a consensus between the parties, can be a sudden act, spanning in a fraction of a minute. It is neither necessary that each of the conspirators take active part in the commission of each and every conspiratorial act, nor it is necessary that all the conspirators must know each and every details of the conspiracy. Essence of the offence of conspiracy is in agreement to break the law as aptly observed by this Court in Major E.G. Barsay v. State of Bombay MANU/SC/0123/1961 : (1962) 2 SCR 195.

454. So far as the English law on conspiracy is concerned, which is the source of Indian law, KENNY has succinctly stated that in modern times conspiracy is defined as an agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. Stressing on the need of formation of an agreement, he has cautioned that conspiracy should not be misunderstood as a purely mental crime, comprising the concurrence of the intentions of the parties. The meaning of an 'agreement', he has explained by quoting following words of Lord Chelmsford:

Agreement is an act in advancement of the intention which each person has conceived in his mind.

KENNY has further said that it is not mere intention, but the announcement and acceptance of intentions. However, it is not necessary that an overt act is done; the offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. [Refer KENNY on Outlines of Criminal Law, 19th Edn., pp. 426- 427]

455. The most important aspect of the offence of conspiracy is that apart from being a distinct statutory offence, all the parties to the conspiracy are liable for the acts of each other and as an exception to the general law in the case of conspiracy intent i.e. mens rea alone constitutes a crime. As per Section 10 of the Evidence Act, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then, anything done by any one of them in reference to their common intention, is admissible against the others. As held in State of Maharashtra v. Damu and Ors. MANU/SC/0299/2000 : (2000) 6 SCC 269, the only condition for the application of the rule in Section 10 of the Evidence Act is that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence.

456. The principles relating to the offence of criminal conspiracy and the standard of proof for establishing offence of conspiracy and the joint liability of the conspirators have been elaborately laid down in Shivnarayan Laxminarayan Joshi and Ors. v. State of Maharashtra MANU/SC/0241/1979 : (1980) 2 SCC 465; Mohammad Usman Mohammad Hussain Maniyar and Ors. v. State of Maharashtra MANU/SC/0180/1981 : (1981) 2 SCC 443; Kehar Singh and Ors. v. State (Delhi Administration) MANU/SC/0241/1988 : (1988) 3 SCC 609; State of Maharashtra and Ors. v. Som Nath Thapa and Ors. MANU/SC/0451/1996 : (1996) 4 SCC 659; State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru MANU/SC/0465/2005 : (2005) 11 SCC 600; State Through Superintendent of Police, CBI/SIT v. Nalini and Ors. MANU/SC/0945/1999 : (1999) 5 SCC 253; Yakub Abdul Razak Menon v. The State of Maharashtra, through CBI, Bombay MANU/SC/0268/2013 : (2013) 13 SCC 1.

457. Another significant aspect of the offence of criminal conspiracy is that it is very rare to find direct proof of it, because of the very fact that it is hatched in secrecy. Unlike other offences, criminal conspiracy in most of the cases is proved by circumstantial evidence only. It is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested,

quarters or from utter strangers. Conspiracy is a matter of inference, deduced from words uttered, criminal acts of the accused done in furtherance of conspiracy. (Vide Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra MANU/SC/0157/1970 : (1970) 1 SCC 696; Firozuddin Basheeruddin and Ors. v. State of Kerala MANU/SC/0471/2001 : (2001) 7 SCC 596; Ram Narain Poply v. Central Bureau of Investigation and Ors. MANU/SC/0017/2003 : (2003) 3 SCC 641; Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra MANU/SC/7528/2008 : (2008) 10 SCC 394; Pratapbhai Hamirbhai Solanki v. State of Gujarat and Anr. MANU/SC/0854/2012 : (2013) 1 SCC 613; Chandra Prakash v. State of Rajasthan MANU/SC/0457/2014 : (2014) 8 SCC 340 etc.)

458. In Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra MANU/SC/7528/2008 : (2008) 10 SCC 394, this Court, after referring to the law laid down in several pronouncements, summarised the core principles of law of conspiracy in the following words:

23. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

459. In the present case, there is ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution has established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy, is established by the sequence of events and the conduct of the accused. Existence of conspiracy and its objects could be inferred from the chain of events. The chain of events described by the victim in her dying declarations coupled with the testimony of P.W. 1 clearly establish that as soon as the complainant and the victim boarded the bus, the accused switched off the lights of the bus. Few accused pinned down P.W. 1 and others committed rape on the victim in the back side of the bus one after the other. The accused inserted iron rods in the private parts of the prosecutrix, dragging her holding her hair and then threw her outside the bus. The victim has also maintained in her dying declaration that the accused persons were exhorting that the victim has died and she be thrown out of the bus. Ultimately, both the victim and the complainant were thrown out of the moving bus through the front door, having failed to throw them through the rear door. The chain of action and the act of finally throwing the victim and P.W. 1 out of the bus show that there was unity of object among the accused to commit rape and destroy the evidence thereon.

460. In this case, the existence of conspiracy is sought to be drawn by an inference from the circumstances: (i) the accused did not allow any other passenger to board the bus after P.W. 1 and the prosecutrix boarded the bus; (ii) switching off the lights; pinning P.W. 1 down by some while others commit rape/unnatural sex with the prosecutrix at the rear side of the bus; (iii) exhortation by some of the accused that the victim be not left alive; and (iv) their act of throwing the victim

and P.W. 1 out of the running bus without clothes in the wintery night of December. Existence of conspiracy and its objects is inferred from the above circumstances and the words uttered. In my view, the courts below have rightly drawn an inference that there was prior meeting of minds among the accused and they have rightly held that the prosecution has proved the existence of conspiracy to commit gang rape and other offences.

461. As already stated in the beginning, in achieving the goal of the conspiracy, several offences committed by some of the conspirators may not be known to others, still all the accused will be held guilty of the offence of criminal conspiracy. The trial court has recorded that the victim's complete alimentary canal from the level of duodenum upto 5 cm from anal sphincter was completely damaged. It was beyond repair. Causing of damage to jejunum is indicative of the fact that the rods were inserted through vagina and/or anus upto the level of jejunum." Further "the septicemia was the direct result of internal multiple injuries". Use of iron rod by one or more of the accused is sufficient to inculpate all the accused for the same. In the present case, gang rape and use of iron rod caused grave injuries to victim's vagina and intestines; throwing her out of the bus in that vegetative state in chilled weather led to her death; all this taking place in the course of same transaction and with the active involvement of all the accused is more than sufficient evidence to find the accused guilty of criminal conspiracy. I, thus, affirm the findings of the courts below with regard to conviction of all the accused Under Section 120- B Indian Penal Code and Section 302 read with Section 120- B Indian Penal Code.

462. Apart from considering the principles of law of conspiracy distinctly, if we consider it in the context of 'conspiracy to commit the offence of gang rape, unnatural sex etc., as is specifically relevant in the present case, we find that existence of common intent and joint liability is already implicit in the offence of gang rape. Gang rape is dealt with in Clause (g) of Sub- section (2) of Section 376 Indian Penal Code read with Explanation 1. As per Explanation 1 to Section 376 Indian Penal Code, "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape" and all of them shall be liable to be punished under Sub- section (2) of Section 376 Indian Penal Code. As per Explanation 1, by operation of deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the groups has committed rape in furtherance of the common intention.

463. While considering the scope of Section 376(2)(g) Indian Penal Code read with Explanation, in Ashok Kumar v. State of Haryana MANU/SC/1176/2002 : (2003) 2 SCC 143, this Court held as under:

8. Charge against the Appellant is Under Section 376(2)(g) Indian Penal Code. In order to establish an offence Under Section 376(2)(g) Indian Penal Code, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for

the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.

[Emphasis added]

So far as the offence Under Section 376 (2)(g) Indian Penal Code, the sharing of common intention and the jointness in commission of rape is concerned, the same is established by the presence of all the accused in the bus; their action in concert as established by the dying declaration of the prosecutrix and the evidence of P.W. 1, presence of blood in the clothes of all the accused, DNA profile generated thereon being consistent with the DNA profile of the victim.

464. The prosecution has established the presence of the accused in the bus and the heinous act of gang rape committed on the prosecutrix by the accused by the ample evidence - by the multiple dying declaration of the victim and also by the evidence of P.W. 1 and medical evidence and also by arrest and recovery of incriminating articles of the victim and that of P.W. 1 complainant. The scientific evidence in particular DNA analysis report clearly brings home the guilt of the accused.

465. Section 235(2), Code of Criminal Procedure: Once the conviction of the accused persons is affirmed, what remains to be decided is the question of appropriate punishment imposed on them. On the aspect of sentencing, we were very effectively assisted by the learned Amicus Curiae. Accused were convicted vide judgment and order dated 10.09.2013 and on the very next day of judgment i.e. on 11.09.2013, the arguments on sentencing were concluded. Thereafter, a separate order on sentence was pronounced on 13.09.2013.

466. Counsel for the Appellants as well as the learned amicus Mr. Raju Ramachandran contended that no effective opportunity was given to the Appellants to lead their defence on the point of sentencing as mandated Under Section 235(2) Code of Criminal Procedure and each of the accused were not individually heard in person on the question of sentence. Learned Amicus Curiae, Mr. Raju Ramachandran submitted only the counsel for the accused were heard and all the accused were treated alike irrespective of their individual background and were sentenced to death, which is in clear violation of the mandate of Section 235(2) Code of Criminal Procedure. It was submitted that Section 235(2) Code of Criminal Procedure is intended to give an opportunity to the accused to place before the Court all the relevant facts and material having a bearing on the question of sentence and, therefore, salutary provision should not have been treated as a mere formality by the trial court. In support of his contention, the learned Amicus has placed reliance upon a number of judgments viz. - (i) Dagdu and Ors. v. State of Maharashtra

MANU/SC/0086/1977 : (1977) 3 SCC 68; (ii) Malkiat Singh and Ors. v. State of Punjab MANU/SC/0622/1991 : (1991) 4 SCC 341; and (iii) Ajay Pandit alias Jagdish Dayabhai Patel and Anr. v. State of Maharashtra MANU/SC/0562/2012 : (2012) 8 SCC 43.

467. Section 235 Code of Criminal Procedure deals with the judgments of acquittal or conviction. Under Section 235(2) Code of Criminal Procedure, where the accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the accused on the question of sentence and then pass sentence in accordance with law. Section 235(2) Code of Criminal Procedure imposes duty on the court to hear the accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of applicability of Section 360 Code of Criminal Procedure i.e. when the court finds the accused eligible to be released on probation of good conduct or after admonition.

468. Section 354 Code of Criminal Procedure specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Code of Criminal Procedure deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. Section 354(3) Code of Criminal Procedure mandates that when the conviction is for an offence 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, the special reasons for such sentence.

469. The statutory duty to state special reasons Under Section 354(3) Code of Criminal Procedure can be meaningfully carried out only if the hearing on sentence Under Section 235(2) Code of Criminal Procedure is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused Under Section 235(2) Code of Criminal Procedure on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Code of Criminal Procedure becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment.

470. It is well- settled that Section 235(2) Code of Criminal Procedure is intended to give an opportunity of hearing to the prosecution as well as the accused on the question of sentence. The Court while awarding the sentence has to take into consideration various factors having a bearing on the question of sentence. In case, Section 235(2) Code of Criminal Procedure is not complied with, as held in Dagdu's case, the appellate Court can either send back the case to the Sessions

Court for complying with Section 235(2) Code of Criminal Procedure so as to enable the accused to adduce materials; or, in order to avoid delay, the appellate Court may by itself give an opportunity to the parties in terms of Section 235(2) Code of Criminal Procedure to produce the materials they wish to adduce instead of sending the matter back to the trial Court for hearing on sentence. In the present case, we felt it appropriate to adopt the latter course and accordingly asked the counsel appearing for the Appellants to file affidavits/materials on the question of sentence. Consequently, vide order dated 03.02.2017, we directed the learned Counsel for the accused to place in writing, before this Court, their submissions, whatever they desired to place on the question of sentence. In compliance with the order, Mr. M.L. Sharma, learned Counsel on behalf of the accused A- 2 Mukesh and A- 5 Pawan and Mr. A.P. Singh, learned Counsel on behalf of the accused Akshay Kumar Singh, Vinay Sharma and Pawan Gupta filed the individual affidavits of the accused.

471. Accused Mukesh (A- 2) in his affidavit has stated that he was picked up from his house at Karoli, Rajasthan and brought to Delhi and reiterated that he is innocent and he denied his involvement in the occurrence. In their affidavits, accused Akshay Kumar Singh (A- 3), accused Vinay Sharma (A- 4) and accused Pawan Gupta (A- 5) submitted in their individual affidavits have stated that they hail from an ordinary/poor background and are not much educated. They have also stated that they have aged parents and other family members who are dependent on them and they are to be supported by them. Accused have also stated that they have no criminal antecedents and that after their confinement in Tihar Jail they have maintained good behavior.

472. Learned Counsel Mr. M.L. Sharma submitted that accused Mukesh (A- 2) is innocent and he has been falsely implicated only because he is the brother of accused Ram Singh.

473. Taking us through the affidavits filed by the accused, learned Counsel Mr. A.P. Singh submitted that the accused namely Akshay Kumar Singh, Pawan Gupta and Vinay Sharma hail from very poor background; and have got large families to support; and have no criminal antecedents. It has been contended that having regard to the fact that the three accused have no prior criminal antecedents and are not hardened criminals, the case will not fall under "rarest of rare cases" to affirm the death sentence.

474. Supplementing the affidavits filed by the accused, the learned amicus and senior Counsel Mr. Raju Ramachandran and Mr. Sanjay Hegde submitted that assuming that the conviction of the Appellants are confirmed, the accused who hail from very ordinary poor background and having no criminal antecedents, the death sentence be commuted to life imprisonment.

475. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is

the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

476. In State of M.P. v. Munna Choubey and Anr. MANU/SC/0055/2005 : (2005) 2 SCC 710, it was observed as under:

10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu MANU/SC/0338/1991 : (1991) 3 SCC 471.

477. In Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat MANU/SC/1561/1994 : (1994) 4 SCC 353, while upholding the award of death sentence, this Court held that sentencing process has to be stern where the circumstances demand so. Relevant extract is as under:

12.....The courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be.

478. Whether the Case falls under rarest of rare cases: Law relating to award of death sentence in India has evolved through massive policy reforms- nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformative approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in Bachan Singh v. State of Punjab MANU/SC/0055/1982 : (1980) 2 SCC 684, by a Constitution Bench of this Court.

479. In Bachan Singh (supra), while upholding the constitutional validity of capital sentence, this Court revisited the law relating to death sentence at that point of time, by thoroughly discussing the law laid down in Jagmohan Singh v. State of U.P. MANU/SC/0139/1972 : (1973) 1 SCC 20;

Rajendra Prasad v. State of U.P. MANU/SC/0212/1979 : (1979) 3 SCR 646 and other cases. The principles laid down in Bachan Singh's case is that, normal rule is awarding of 'life sentence', imposition of death sentence being justified, only in rarest of rare case, when the option of awarding sentence of life imprisonment is unquestionably foreclosed'. By virtue of Bachan Singh (supra), 'life imprisonment' became the rule and 'death sentence' an exception. The focus was shifted from 'crime' to the 'crime and criminal' i.e. now the nature and gravity of the crime needs to be analysed juxtaposed to the peculiar circumstances attending the societal existence of the criminal. The principles laid down in Bachan Singh's case were considered in Machhi Singh and Ors. v. State of Punjab MANU/SC/0211/1983 : (1983) 3 SCC 470 and was summarised as under:

38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case (supra):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

480. In Machhi Singh's case, this Court took the view that in every case where death penalty is a question, a balance sheet of aggravating and mitigating circumstances must be drawn up before arriving at the decision. The Court held that for practical application of the doctrine of 'rarest of rare case', it must be understood broadly in the background of five categories of cases crafted thereon that is 'Manner of commission of crime', 'Motive', 'Anti- social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder'. These five categories are elaborated in para Nos. 32 to 37 as under:

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence- in- no- case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self- preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti- social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain

control over property of a ward or a person under the control of the murderer or vis- a- vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti- social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis- a- vis whom the murderer is in a position of domination or trust (d) when 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.

481. The principle laid down in Bachan Singh (supra) and Machhi Singh (supra) came to be discussed and applied in all the cases relating to imposition of death penalty for committing heinous offences. However, lately, it was felt that the courts have not correctly applied the law laid down in Bachan Singh (supra) and Machhi Singh (supra), which has led to inconsistency in sentencing process in India; also it was observed that the list of categories of murder crafted in Machhi Singh (supra), in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario. In Swamy

Shradhananda alias Murali Manohar Mishra (2) v. State of Karnataka MANU/SC/3096/2008 : (2008) 13 SCC 767; a three- Judge Bench of this Court, observed as under in this regard:

43. In Machhi Singh the Court crafted the categories of murder in which 'the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself.

482. A milestone in the sentencing policy is the concept of 'life imprisonment till the remainder of life' evolved in Swamy Shradhananda (2)(supra). In this case, a man committed murder of his wife for usurping her property in a cold- blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was affirmed by the High Court. Though the conviction was affirmed by this Court also on the point of sentencing, the views of a two- Judge Bench of this Court, in Swamy Shradhananda v. State of Karnataka (2007) 12 SCC 282 differed, and consequently, the matter was listed before a three- Judge Bench, wherein a mid way was carved. The three- Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused, viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court etc., made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in Swamy Shradhananda (2) (supra) the Court directed that the accused shall not be released from the prison till the rest of his life. Relevant extract from the judgment reads as under:

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that

the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.

483. After referring to a catena of judicial pronouncements post Bachan Singh (supra) and Machhi Singh (supra), in the case of Ramnaresh and Ors. v. State of Chhattisgarh MANU/SC/0163/2012 : (2012) 4 SCC 257, this Court, tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances. It would be apposite to refer to the same here:

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold- blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and

circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

484. Similarly, this Court in Sangeet and Anr. v. State of Haryana MANU/SC/0989/2012 : (2013) 2 SCC 452, extensively analysed the evolution of sentencing policy in India and stressed on the need for further evolution. In para (77), this Court emphasized on making the sentencing process a principled one, rather than Judge- centric one and held that a re- look is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court.

485. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be made to Holiram Bordoloi v. State of Assam MANU/SC/0271/2005 : (2005) 3 SCC 793 [Para 15- 17], Ankush Maruti Shinde and Ors. v. State of Maharashtra MANU/SC/0700/2009 : (2009) 6 SCC 667 (para 31- 34), Kamta Tiwari v. State of Madhya Pradesh MANU/SC/0722/1996 : (1996) 6 SCC 250 (para 7- 8), State of U.P. v. Satish MANU/SC/0090/2005 : (2005) 3 SCC 114 (para 24- 31), Sundar alias Sundarajan v. State by Inspector of Police and Anr. MANU/SC/0105/2013 : (2013) 3 SCC 215 (para 36- 38, 42- 42.7, 43), Sevaka Perumal and Anr. v. State of Tamil Nadu MANU/SC/0338/1991 : (1991) 3 SCC 471 (para 8- 10, 12), Mohfil Khan and Anr. v. State of Jharkhand MANU/SC/0915/2014 : (2015) 1 SCC 67 (para 63- 65).

486. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of Bhagwan Swarup v. State of U.P. MANU/SC/0094/1970 : (1971) 3 SCC 759 (para 5), Deepak Rai v. State of Bihar MANU/SC/0965/2013 : (2013) 10 SCC 421 (para 91- 100) and Shabhnam v. State of Uttar Pradesh MANU/SC/0649/2015 : (2015) 6 SCC 632 (para 36).

487. Let me now refer to a few cases of rape and murder where this Court has confirmed the sentence of death. In Molai & Anr. v. State of M.P. MANU/SC/0680/1999 : (1999) 9 SCC 581, death sentence awarded to both the accused for committing offences Under Sections 376(2)(g) Indian Penal Code, 302 read with Section 34 Indian Penal Code and 201 Indian Penal Code, was confirmed by this Court. The accused had committed gang rape on the victim, strangulated her thereafter and threw away her body into the septic tank with the cycle, after causing stab injuries. It was held as under:

36.....It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under- garment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (Appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below.

488. In Bantu v. State of Uttar Pradesh MANU/SC/7863/2008 : (2008) 11 SCC 113, the victim aged about five years was not only raped, but was murdered in a diabolic manner. The Court awarded extreme punishment of death, holding that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed must be delicately balanced by the Court in a dispassionate manner.

489. In Ankush Maruti Shinde and Ors. v. State of Maharashtra MANU/SC/0700/2009 : (2009) 6 SCC 667, concerned accused were found guilty of offences Under Sections 307 Indian Penal Code, 376(2)(g) Indian Penal Code and 397 read with 395 and 396 of Indian Penal Code. This Court declined to interfere with the concurrent findings of the courts below and upheld death penalty awarded to the accused, taking into account the brutality of the incident, tender age of the deceased, and the fact of a minor girl being mercilessly gang raped and then put to death. The court also noted that there was no provocation from the deceased's side and the two surviving eye witnesses had fully corroborated the case of the prosecution.

490. In Mehboob Batcha and Ors. v. State rep. by Supdt. of Police MANU/SC/0260/2011 : (2011) 7 SCC 45, accused were policemen who had wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.05.1992 till 02.06.1992 and had beaten him to death there with lathis, and had also gang raped his wife Padmini in a barbaric manner. This Court could not award death penalty due to omission of the courts below in framing charge Under Section 302, Indian Penal Code. However, the observations made by this Court are worth quoting here:

Bane hain ahal- e- hawas muddai bhi munsif bhi Kise vakeel karein kisse munsifi chaahen - - Faiz Ahmed Faiz

1. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge Under Section 302 Indian Penal Code was framed against the accused by the Courts below.

.....

9. We have held in Satya Narain Tiwari @ Jolly and Anr. v. State of U.P. MANU/SC/0910/2010 : (2010) 13 SCC 689 and in Sukhdev Singh v. State of Punjab MANU/SC/1355/2010 : (2010) 13 SCC 656 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment.....

491. In Mohd. Mannan @ Abdul Mannan v. State of Bihar MANU/SC/0460/2011 : (2011) 5 SCC 317, this Court upheld award of death sentence to a 43 year old accused who brutally raped and murdered a minor girl, while holding a position of trust. Relevant considerations of the Court while affirming the death sentence are extracted as under:

26....The postmortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that Appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

In Shivaji @ Dadya Shankar Alhat v. State of Maharashtra MANU/SC/8019/2008 : (2008) 15 SCC 269; Rajendra Pralhadrao Wasnik v. The State of Maharashtra MANU/SC/0160/2012 : (2012) 4 SCC 37 award of death penalty in case of rape and murder was upheld, finding the incident brutal and accused a menace for the society.

492. In Dhananjoy Chatterjee alias Dhana v. State of W.B. MANU/SC/0626/1994 : (1994) 2 SCC 220, a security guard who was entrusted with the security of a residential apartment had raped

and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. and 5.45 p.m. The entire case of the prosecution was based on circumstantial evidence. However, Court found that it was a fit case for imposing death penalty. Following observation of the Court while imposing death penalty is worth quoting:

14. 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 over- all 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.

15. 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 fitting to 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.

(Emphasis added)

493. In a landmark judgment Shankar Kisanrao Khade v. State of Maharashtra MANU/SC/0476/2013 : (2013) 5 SCC 546, Justice Madan B. Lokur (Concurring) after analysing various cases of rape and murder, wherein death sentence was confirmed by this Court, in para (122) briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under:

122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan v. State of U.P. MANU/SC/0081/1991 : (1991) 1 SCC 752, Dhananjoy Chatterjee v. State of W.B. MANU/SC/0626/1994 : (1994) 2 SCC 220, Laxman Naik v. State of Orissa MANU/SC/0264/1995 : (1994) 3 SCC 381, Kamta Tewari v. State of M.P. MANU/SC/0722/1996

: (1996) 6 SCC 250, Nirmal Singh v. State of Haryana MANU/SC/0178/1999 : (1999) 3 SCC 670, Jai Kumar v. State of M.P. MANU/SC/0360/1999 : (1999) 5 SCC 1, State of U.P. v. Satish MANU/SC/0090/2005 : (2005) 3 SCC 114, Bantu v. State of U.P. MANU/SC/7863/2008 : (2008) 11 SCC 113, Ankush Maruti Shinde v. State of Maharashtra MANU/SC/0700/2009 : (2009) 6 SCC 667, B.A. Umesh v. State of Karnataka MANU/SC/0082/2011 : (2011) 3 SCC 85, Mohd. Mannan v. State of Bihar MANU/SC/0460/2011 : (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik v. State of Maharashtra MANU/SC/0160/2012 : (2012) 4 SCC 37);

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee MANU/SC/0626/1994 : (1994) 2 SCC 220, Jai Kumar MANU/SC/0360/1999 : (1999) 5 SCC 1, Ankush Maruti Shinde MANU/SC/0700/2009 : (2009) 6 SCC 667 and Mohd. Mannan MANU/SC/0460/2011 : (2011) 5 SCC 317);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar MANU/SC/0360/1999 : (1999) 5 SCC 1, B.A. Umesh MANU/SC/0082/2011 : (2011) 3 SCC 85 and Mohd. Mannan MANU/SC/0460/2011 : (2011) 5 SCC 317);

(4) the victims were defenceless (Dhananjoy Chatterjee MANU/SC/0626/1994 : (1994) 2 SCC 220, Laxman Naik MANU/SC/0264/1995 : (1994) 3 SCC 381, Kamta Tewari MANU/SC/0722/1996 : (1996) 6 SCC 250, Ankush Maruti Shinde MANU/SC/0700/2009 : (2009) 6 SCC 667, Mohd. Mannan MANU/SC/0460/2011 : (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik MANU/SC/0160/2012 : (2012) 4 SCC 37);

(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee MANU/SC/0626/1994 : (1994) 2 SCC 220, Laxman Naik MANU/SC/0264/1995 : (1994) 3 SCC 381, Kamta Tewari MANU/SC/0722/1996 : (1996) 6 SCC 250, Nirmal Singh MANU/SC/0178/1999 : (1999) 3 SCC 670, Jai Kumar MANU/SC/0360/1999 : (1999) 5 SCC 1, Ankush Maruti Shinde MANU/SC/0700/2009 : (2009) 6 SCC 667, B.A. Umesh MANU/SC/0082/2011 : (2011) 3 SCC 85 and Mohd. Mannan MANU/SC/0460/2011 : (2011) 5 SCC 317) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu v. High Court of Karnataka MANU/SC/7103/2007 : (2007) 4 SCC 713, B.A. Umesh MANU/SC/0082/2011 : (2011) 3 SCC 85 and Rajendra Pralhadrao Wasnik MANU/SC/0160/2012 : (2012) 4 SCC 37).

494. We also refer to para (106) of Shankar Kisanrao Khade's case where Justice Madan B. Lokur (Concurring) has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation. Para (106) reads as under:

106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [Amit v. State of Maharashtra MANU/SC/0567/2003 : (2003) 8 SCC 93 aged 20 years, Rahul v. State of Maharashtra (2005) 10 SCC 322 aged 24 years, Santosh Kumar Singh v. State MANU/SC/0801/2010 : (2010) 9 SCC 747 aged 24 years, Rameshbhai Chandubhai Rathod (2) MANU/SC/0075/2011 : (2011) 2 SCC 764 aged 28 years and Amit v. State of U.P. MANU/SC/0133/2012 : (2012) 4 SCC 107 aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in Santosh Kumar Singh MANU/SC/0801/2010 : (2010) 9 SCC 747 and Amit v. State of U.P. MANU/SC/0133/2012 : (2012) 4 SCC 107 the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (Nirmal Singh MANU/SC/0178/1999 : (1999) 3 SCC 670, Raju MANU/SC/0324/2001 : (2001) 9 SCC 50, Bantu MANU/SC/0684/2001 : (2001) 9 SCC 615, Amit v. State of Maharashtra MANU/SC/0567/2003 : (2003) 8 SCC 93, Surendra Pal Shivbalakpal MANU/SC/0794/2004 : (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P. MANU/SC/0133/2012 : (2012) 4 SCC 107);

(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh MANU/SC/0178/1999 : (1999) 3 SCC 670, Mohd. Chaman MANU/SC/0781/2000 : (2001) 2 SCC 28, Raju MANU/SC/0324/2001 : (2001) 9 SCC 50, Bantu MANU/SC/0684/2001 : (2001) 9 SCC 615, Surendra Pal Shivbalakpal MANU/SC/0794/2004 : (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P. MANU/SC/0133/2012 : (2012) 4 SCC 107).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (State of T.N. v. Suresh MANU/SC/0939/1998 : (1998) 2 SCC 372, State of Maharashtra v. Suresh MANU/SC/0765/1999 : (2000) 1 SCC 471, State of Maharashtra v. Bharat Fakira Dhiwar MANU/SC/0700/2001 : (2002) 1 SCC 622, State of Maharashtra v. Mansingh MANU/SC/1159/2004 : (2005) 3 SCC 131 and Santosh Kumar Singh MANU/SC/0801/2010 : (2010) 9 SCC 747);

(6) the crime was not premeditated (Kumudi Lal v. State of U.P. MANU/SC/0275/1999 : (1999) 4 SCC 108, Akhtar v. State of U.P. MANU/SC/1008/1999 : (1999) 6 SCC 60, Raju v. State of Haryana MANU/SC/0324/2001 : (2001) 9 SCC 50 and Amrit Singh v. State of Punjab MANU/SC/8642/2006 : (2006) 12 SCC 79);

(7) the case was one of circumstantial evidence (Mansingh MANU/SC/1159/2004 : (2005) 3 SCC 131 and Bishnu Prasad Sinha MANU/SC/7022/2007 : (2007) 11 SCC 467).

In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (Kumudi Lal MANU/SC/0275/1999 : (1999) 4 SCC 108) and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput MANU/SC/1099/2011 : (2011) 12 SCC 56).

495. In the same judgment in Shankar Kisanrao Khade v. State of Maharashtra MANU/SC/0476/2013 : (2013) 5 SCC 546, Justice Madan B. Lokur (concurring) while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape- murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

In Shankar Kisanrao's case, it was observed by Justice Madan B. Lokur that Dhananjay Chatterjee's case was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

496. Another significant development in the sentencing policy of India is the 'victim- centric' approach, clearly recognised in Machhi Singh (Supra) and re- emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: Gurvail Singh @ Gala and Anr. v. State of Punjab MANU/SC/0111/2013 : (2013) 2 SCC 713; Mohfil Khan and Anr. v. State of Jharkhand MANU/SC/0915/2014 : (2015) 1 SCC 67; Purushottam Dashrath Borate and Anr. v. State of Maharashtra MANU/SC/0583/2015 : (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the

rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In Mohfil Khan (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.

497. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above- stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- 'death sentence', life sentence commutable to 14 years' or 'life imprisonment for the rest of the life'.

498. The question would be whether the present case could be one of the rarest of rare cases warranting death penalty. Before the court proceed to make a choice whether to award death sentence or life imprisonment, the court is to draw up a balance- sheet of aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered: (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

499. We are here concerned with the award of an appropriate sentence in case of brutal gang-rape and murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the Munirka bus stand with the mala fide intent of ravishing and torturing her. The accused not only abducted the victim, but gang- raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries.

500. If we look at the aggravating circumstances in the present case, following factors would emerge:

• Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang- rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (P.W. 1) naked in the cold wintery night and trying to run the bus over them.

• The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.

• The horrific acts reflecting the in- human extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.

• The acts committed so shook the conscience of the society.

501. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/Appellants namely A- 3 Akshay, A- 4 Vinay and A- 5 Pawan placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:

(a) Family circumstances such as poverty and rural background,

(b) Young age,

(c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,

(d) Absence of criminal antecedents,

(e) Conduct in jail, and

(f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

502. In Purushottam Dashrath Borate and Anr. v. State of Maharashtra MANU/SC/0583/2015 : (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

503. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in Om Prakash v. State of Haryana MANU/SC/0129/1999 : (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

504. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post- crime remorse and post- crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "rarest of rare cases". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

505. In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to 'life imprisonment for the rest of the life'. The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang- rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of 'rarest of rare case' where the question of any other punishment is 'unquestionably foreclosed'. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the

gang- rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the 'rarest of rare category', then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

506. The incident of gang- rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nation- wide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang- rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

507. The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

508. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye- opener for a mass movement "to end violence against women" and "respect for women and her dignity" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro- active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same.

MANU/SC/0205/2002

Back to Section 100 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Appeal (crl.) 31 of 2000

Decided On: 20.03.2002

Khet Singh Vs. Union of India (UOI)

Hon'ble Judges/Coram:

R.P. Sethi and K.G. Balakrishnan, JJ.

JUDGMENT

K.G. Balakrishnan, J.

1. This appeal is directed against the judgment of the High Court of Rajasthan challenging the conviction and sentence of the appellant under Sections 17 18 & 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"). Appellant had been sentenced to undergo 10 years' rigorous imprisonment and a fine of Rs. 1 lakh and in default of payment of fine further to undergo two years and six months' rigorous imprisonment.

2. Appellant Khet Singh was tried along with one Kanhaiya Lal for the aforesaid offences and Kanhaiya Lal was acquitted by the Sessions Court. The case of the prosecution is that on 6.5.1989, PW6 Shri Narain Das Lakhara, Inspector, Customs Department, Jaisalmer, along with the Superintendent of Customs and two other constables was proceeding on patrolling and checking duty towards Ramgarh. Near Brahamsar crossing, they started checking several motor vehicles as it was suspected that there might be drug trafficking. In truck no. RJC 1472, the appellant was found sitting with a cloth basket in his hand. During the search, a polythene bag was found in the basket which contained some black substance suspected to be opium. Appellant Khet Singh and Kanhaiya Lal along with the cloth basket were brought to the Office of the Customs. In the office of the Customs, the opium was seized, samples were taken from it and were sealed. Appellant and Kanhaiya Lal were questioned. The appellant stated that he had purchased the seized opium from Kanhaiya Lal. The samples were sent for chemical examination and the report from the Forensic Science Laboratory revealed that the sample was 'opium'.

3. The appellant contended before the trial court that there was violation of Section 50 of the NDPS Act as the search and seizure was not made in the presence of a Gazetted Officer or a Magistrate and that the appellant was not told in advance that he had a right to demand that the search to be effected shall be in the presence of a Magistrate or a Gazetted Officer. This plea was rejected on the ground that search and checking was being conducted of the vehicles and it was during the course of this general search that the appellant was found travelling with the opium and hence

Section 50 of the NDPS Act is not applicable and that the same would apply in the case of a search on the person of the appellant. The same plea was raised before the High Court and was rightly rejected.

4. The learned Counsel, Mr. Doongar Singh who appeared on behalf of the appellant raised a contention that though the search and seizure was effected near Brahamsar crossing, no mahazar was prepared and no samples were taken from the contraband article; the seizure memo was prepared in the Office of the Customs Department and the samples were also taken at the Office of the Customs Department, and that this has caused serious prejudice to the appellant. According to the appellant's Counsel, the seizure memo should have been prepared at the place where the contraband article was seized from the accused. He further pointed out that the recovery was effected but the contraband article was not sealed at the spot and the truck along with the driver and the appellant were brought to the office of Customs Department at Jaisalmer and that there were about 10 other persons in the truck and all of them were allowed to go. The learned counsel further contended that had the search mahazar been prepared at the spot, it could have been satisfactorily proved that it was from the appellant's possession that the bag was taken and it is doubtful whether the bag belonged to the appellant or to any other passengers.

5. It is true that the search and seizure of contraband article is a serious aspect in the matter of investigation related to offences under the NDPS Act. The NDPS Act and the rules framed thereunder have laid down a detailed procedure and guidelines as to the manner in which search and seizure are to be effected. If there is any violation of these guidelines, Courts would take a serious view and the benefit would be extended to the accused. The offences under NDPS Act are grave in nature and minimum punishment prescribed under the Statute is incarceration for a long period. As the possession of any narcotic drugs or psychotropic substance by itself is made punishable under the act, the seizure of the article from the appellant is of vital importance.

6. Section 51 of the NDPS Act provides that the provisions of the Code of Criminal Procedure, 1973 shall apply in respect of warrants, arrests, searches and seizure in so far as they are not inconsistent with the provisions of the NDPS Act. Section 165 of the Code confers powers on the police to search any place without search warrant. 'Place' has been defined in Section 2(p) of the Code as one which includes house, building, tent, vehicle and vessel. Section 165 of the Code empowers a police officer making an investigation to conduct search without a warrant if he has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence may be found and that he is of the opinion that undue delay may frustrate the object of the search. Further, Section 100 of the Code lays down the detailed procedure and guidelines regarding the manner in which search is to be conducted of a closed place.

7. In the present case, the learned Counsel for the appellant contended that the police officer did not prepare the seizure mahazar at the spot and thereby violated the provisions of law. Therefore, it is argued that the evidence collected by the prosecution was not admissible. The learned Counsel further contended that the directions contained in the Standing Instructions issued by

the Narcotics Control Bureau were not complied with. Our attention was drawn to clause 1.5 of the Standing Instruction No. 1/88 issued by the Narcotics Control Bureau, New Delhi, which is to the following effect :- \

" Place and time for drawal of sample

Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search(Panch) witnesses and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

8. The learned Counsel for the appellant also pointed out to us Clause 3.8 of the Standing Order No. 2/88 issued by the Narcotics Control Bureau, New Delhi, which reads as follows :-

Each seizing officer should deposit the drugs fully packed and sealed with his seal in the godown within 48 hours of seizure of such drugs, with a forwarding memo indicating:

(i) NDPS Crime No. as per crime and prosecution register under the new law (i.e. NDPS Act)

(ii) Name (s) of accused

(iii) Reference of test memo

(iv) Description of drugs in the sealed packages/containers and other goods, if any

(v) Drug- wise quantity in each package/container

(vi) Drug- wise number of packages/containers

(vii) Total number of all packages/containers.

9. The learned Counsel for the appellant contended that these instructions issued by the Narcotics Control Bureau, New Delhi, were not followed and the seizure memo was not prepared at the spot and there was delay in depositing the seized drug in the godown. It was argued that this has caused serious prejudice to the accused and therefore, his conviction is vitiated on that account.

10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in- charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in- charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared

at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody.

11. In the present case, though the article was seized from the accused while he was travelling in a truck, no seizure mahazar was prepared at that time. The accused persons were taken to the office of customs and the seizure mahazar was prepared at the office of customs. The learned Single Judge of the High Court held that no prejudice was caused to the appellant. The learned Counsel for the appellant contended that NDPS Act being a special Statute with provision for severe punishment on the accused found guilty of the offences punishable thereunder, the procedure established by law for search and seizure is to be strictly complied with and any failure to comply with such procedure is to be viewed seriously and any evidence collected shall be made inadmissible under law.

12. Whether evidence collected by illegal search or seizure is admissible or not was considered by this Court in series of decisions and one of the earliest decisions is the decision of the Constitution Bench in Pooran Mal vs. The Director of Inspection (Investigation), New Delhi and others, etc.etc. MANU/SC/0055/1973 : [1974]93ITR505(SC) . Though the search in that case was done under the provisions of the Income Tax Act, it is apposite to note the following observation made by this court:-

"So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure."

13. In State of Punjab vs. Baldev Singh MANU/SC/0972/1998 : (1999)6SCC172 , the Constitution Bench of this Court extensively considered the question whether the procedure laid down under Section 50 of NDPS Act is mandatory or not. It was held that the judgment in Pooran Mal case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illicit search. In paragraph 45 of the Judgment, Dr. A.S. Anand(Chief Justice) held as under:-

"..Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against

an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded.."

14. In State of H.P. vs. Prithi Chand and Another MANU/SC/0259/1996 : 1996CriLJ1354 , it was held that it would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.

15. In Radha Kishan vs. State of Uttar Pradesh MANU/SC/0146/1962 : (1963)IILLJ667SC this Court held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra vs. Natwarlal Damodardas Soni MANU/SC/0518/1979 : 1980CriLJ429 it was held that even if the search was illegal, it will not affect the validity of the seizure and further investigation of the authorities or the validity of the trial which followed on the complaint by the customs officials.

16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence.

17. In the present case, though the mahazar was not prepared at the spot where the accused persons were found to be in possession of the contraband article but the same was done only at the Office of the Customs Department while the accused persons were very much present throughout, there was no allegation or suggestion that the contraband article was, in any way, meddled with by the officers. Therefore, we are of the view that the appellant has rightly been found to be in possession of the opium. We find no reason to interfere with the conviction and sentence entered against the appellant. The appeal is dismissed accordingly.

MANU/SC/7020/2008

Back to Section 102 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 179 of 2008 (Arising out of SLP (Crl.) 3408 of 2007)

Decided On: 24.01.2008

Suresh Nanda Vs. C.B.I.

Hon'ble Judges/Coram:

P.P. Naolekar and Markandey Katju, JJ.

ORDER

1. Leave granted.

2. The appellant claims to be a non- resident Indian settled in United Kingdom for the last 23 years. The passport of the appellant as well as other documents were seized by the respondent from 4, Prithviraj Road, New Delhi in a search conducted on 10.10.2006 when the appellant was on a visit to India. The said search and seizure was pursuant to an F.I.R. dated 9.10.2006 registered on the basis of a sting operation carried out by a news portal in the year 2001. The passport seized during the search was retained by the C.B.I. officials. An application was moved by the appellant before the Special Judge, C.B.I., Patiala House Courts, New Delhi praying for release of his passport so that he can travel abroad to London and Ducal for a period of 15 days. The learned Special Judge, by order dated 13.1.2007, directed the release of the passport to the appellant by imposing upon him certain conditions. Aggrieved against the order passed by the Learned Special Judge, C.B.I., the respondent preferred a Criminal Revision before the High Court, The High Court, by order dated 5.2.2007, reversed the order of the learned Special Judge and refused to release the passport to the appellant. Aggrieved against the order of the High Court, present appeal, by special leave, has been preferred by the appellant.

3. Learned senior counsel appearing for the appellant submitted that the power and jurisdiction to impound the passport of any individual has to be exercised under the Passports Act, 1967 (hereinafter referred to as "The Act"). He specifically referred to Sub- section (3)(e) of Section 10 of the Act which reads as under:

(3) The passport authority may impound or cause to be impounded or revoke a passport or travel document -

(e) if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India:

Reference was also made to Section 10A of the Act which has been introduced by Act 17/2002 w.e.f. 17.10.2001.

4. Learned senior counsel for the appellant also placed reliance on the decision of 5- Judge Bench of this Court in Satwant Singh Sawhney v. D. Rajnarathnam, Asstt. Passport Officer MANU/SC/0040/1967 : [1967]3SCR525 wherein in para 31, it was held as under:

31: For the reasons mentioned above, we would accept the view of Kerala, Bombay and Mysore High Courts in preference to that expressed by the Delhi High Court. It follows that under Article 21 of the Constitution no person can be deprived of his right to travel except according to procedure established by law. It is not disputed that no law was trade by the State regulating or depriving persons of such a right.

5. A similar view is reiterated in the decision rendered by 7- Juage Bench of this Court in Maneka Gandhi v. Union of India and Anr. MANU/SC/0133/1978 : [1978]2SCR621 wherein at page 280, it was held as under;

...Now, it has been held by this Court in Satwant Singh's case (supra) that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case (supra) was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State law' (Vide A.K. Gopalan's case). Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure....

6. On the other hand, learned Additional Solicitor General appearing for the respondent submitted that the passport was seized and impounded by exercising the powers under Section 102 read with Sections 165 and 104 of Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C"). He further contended that the power to retain and impound the passport has been rightly exercised by the respondent as there is an order dated 3.11.2006' passed by the learned Special Judge for C.B.I, exercising the power under Section 104 of Cr.P.C.

7. Sub- section (3) (e) of Section 10 of the Act provides for impounding of a passport if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India. Thus, the Passport Authority has the

power to impound the passport under the Act, Section 102 of Cr.P.C. gives powers to the police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence. Sub-section (5) of Section 165 of Cr.P.C. provides that the copies of record made under Sub- section (1) or sub- section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance to the offence Whereas Section 104 of Cr.P.C. authorizes the court to impound any document or thing produced before it under the Code. Section 165 of Cr.P.C. does not speak about the passport which has been searched and seized as in the present case. It does not speak about the documents found in search, but copies of the records prepared under Sub- section (1) and Sub- section (3). "Impound" means to keep in custody of the law. There trust be some distinct action which will show that documents or things have been impounded. According to the Oxford Dictionary "impound" means to take legal or formal possession. In the present case, the passport of the appellant is in possession of CBI right from the date it has been seized by the CBI. When we read Section 104 of Cr.P.C. and Section 10 of the Act together, under Cr.P.C., the Court is empowered to impound any document or thing produced before it whereas the Act speaks specifically of impounding of the passport.

8. Thus, the Act is a special Act relating to a matter of passport, whereas Section 104 of the Cr.P.C. authorizes the Court to impound document or thing produced before it. Where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the specific Act. As the Passports Act is a special act, the rule that "general provision should yield to the specific provision" is to be applied. See: Dam Vaiaji Shah and Anr. v. Life Corporation of India and Ors. AIR 1966 SC 1351; Gobind Sugar Mills Ltd. v. State of Bihar and Ors. MANU/SC/0486/1999 : AIR1999SC3097 ; and Belsund Sugar Co. Ltd. v. State of Bihar and Ors. MANU/SC/0457/1999 : AIR1999SC3125 .

9. The Act being a specific Act whereas Section 104 of Cr.P.C. is a general provision for impounding any document or thing, it shall prevail over that Section in the Cr.P.C. as regards the passport. Thus, by necessary implication, the power of Court to impound any document or thing produced before it would exclude passport.

10. In the present case, no steps have been taken under Section 10 of the Act which provides for variation, impounding and revocation of the passports and travel documents. Section 10A of the Act which provides for an order to suspend with immediate effect any passport or travel document; such other appropriate order which may have the effect of rendering any passport or travel document invalid, for a period not exceeding four weeks, if the Central Government or any designated officer on its satisfaction holds that it is necessary in public interest to do without prejudice to the generality of the provisions contained in Section 10 by approaching the Central Government or any designated officer. Therefore, it appears that the passport of the appellant cannot be impounded except by the Passport Authority in accordance with law. The retention of the passport by the respondent (CBI) has not been done in conformity with the provisions of law as there is no order of the passport authorities under Section 10(3)(e) or by the Central

Government or any designated officer under Section 10A of the Act to impound the passport by the respondent exercising the powers vested under the act.

11. Learned Additional Solicitor General has submitted that the police has power to seize a passport in view of Section 102(1) of the Cr.P.C. which states:

Power of police officer to seize certain property; (1) Any police officer may seize any property which may be alleged or suspected to have seen stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

In our opinion, while the police may have the power to seize a passport under Section 102(1) Cr.P.C, it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967.

12. It may be mentioned that there is a difference between seizing of a document and impounding a document. a seizure is made e at a particular moment when a person or authority taxes into his possession some property which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/or document. In the Law Lexicon by P. Ramanatha Aiyar (2nd Edition), the word "impound" has been defined to mean "to take possession of a document or thing for being held in custody in accordance with law". Thus, the word 'impounding" really means retention of possession of a good or a document which has been seized.

13. Hence, while the police may have power to seize a passport under Section 102 Cr.P.C. if it is permissible within the authority given under Section 102 of Cr.P.C. it does not have power to retain or impound the same, because that can only be done by the passport authority under Section 10(3) of the Passports Act. Hence, if the police seizes a passport (which it has power to do under Section 102 Cr.P.C.), thereafter the police must send it along with a letter to the passport authority clearly stating that the seized passport deserves to be impounded for one of the reasons mentioned in Section 10(3) of the Act. It is thereafter the passport authority to decide whether to impound the passport or not. Since impounding of a passport has civil consequences, the passport authority must give an opportunity of hearing to the person concerned before impounding his passport. It is well settled that any order which has civil consequences must be passed after giving opportunity of hearing to a party vide State of Orissa v. Binapani Dei MANU/SC/0332/1967 : (1967)IILLJ266SC .

14. In the present case, neither the passport authority passed any order of impounding nor was any opportunity of hearing given to the appellant by the passport authority for impounding the document. It was only the CBI authority which has retained possession of the passport (which in substance amounts to impounding it) from October, 2006. In our opinion, this was clearly illegal.

Under Section 10A of the Act retention by the Central Government can only be for four weeks. Thereafter it can only be retained by an order of the Passport authority under Section 10(3).

15. In our opinion, even the Court cannot impound a passport. Though, no doubt. Section 104 Cr.P.C. states that the Court may, if it thinks fit, impound any document or thing produced before it, in our opinion, this provision will only enable the Court to impound any document or thing other than a passport. This is because impounding a "passport" is provided for in Section 10(3) of the Passports Act. The Passports Act is a special law while the Cr.P.C. is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of Statutory Interpretation (9th Edition pg, 133). This principle is expressed in the maxim "Generalia specialibus non derogant", Hence, impounding of a passport cannot be done by the Court under Section 104 Cr.P.C. though it can impound any other document or thing.

16. For the aforesaid reasons, we set aside the impugned order of the High Court and direct the respondent to hand over the passport to the appellant within a week from today. However, it shall be open to the respondent to approach the Passport Authorities under Section 10 or the authorities under Section 10A of the Act for impounding the passport of the appellant in accordance with law.

17. We, however, make it clear that we are not expressing any opinion on the merits of the case and are not deciding whether the passport can be impounded as a condition for grant of bail.

The appeal stands disposed of accordingly.

MANU/SC/0194/1985

Back to Section 125 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 103 of 1981

Decided On: 23.04.1985

Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.

Hon'ble Judges/Coram:

Y.V. Chandrachud, C.J., D.A. Desai, E.S. Venkataramiah, O. Chinnappa Reddy and Ranganath Misra, JJ.

JUDGMENT

1. This appeal does not involve any question of constitutional importance but, that is not to say that it does not involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far- reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. ' Na stree swatantramarhati" said Manu, the Law giver : The woman does not deserve independence. And, it is alleged that the 'fatal point in Islam is the 'degradation of woman' 'Selections from Kuran' Edward William Lane 1843, Reprint 1982, page xc (Introduction). To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break ; therefore treat your wives kindly.

2. This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under Section 125 of the CrPC, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable decree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters wire born of that marriage. In 1975 the appellant drove the respondent out of the matrimonial home, la April 1978, the respondent filed a petition against the appellant under Section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat. In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980 in a revisional application filed by the respondent, the High court of

Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

3. Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty B of paying adequately so as to enable her to keep her body and soul together ? Then again, is there any provision in the Muslim Personal Law under which a sun is payable to the wife 'on divorce' ? These are some of the important, though agonising, questions which arise for our decision.

4. The question as to whether Section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in Bai Tahira Ali Hussain Fidaalli Chothia MANU/SC/0402/1978 : 1979CriLJ151 and Fuzlunbi v. K. Khader Vali MANU/SC/0508/1980 : 1980CriLJ1249 . Those decisions took the view that the divorced Muslim wife is entitled to apply for maintenance nice under Section 125. But, a Bench consisting of our learned Brethren, Murtaza Fazal Ali and A. Varadarajan, JJ. were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus :

As this case involves substantial questions of law of far- reaching consequences, we feel that the decisions of this Court in Bai Tahira v. Ali Hussain Fidaalli Chothia and Anr. and Fuzlunbi v. K. Khader Vali and Anr. require reconsideration because, in our opinion, they are not only in direct contravention of the plain and an unambiguous language of Section 127(3)(b) of the CrPC, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appear to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937- :in Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three Judges.

5. Section 125 of the CrPC which deals with the right of maintenance reads thus :

Order for maintenance of wives, children and parents

125. (1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself,

(b)....

(c)....

(d)....

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife ..., at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate think fit....

Explanation For the purposes of this Chapter,-

(a)....

(b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her not remarried.

(2) ....

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the older, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided....

Provided further that if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated

by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation - If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

6. Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

Alteration in allowance

127. (1) ....

(2) ....

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that-

(a) ....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date o the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.

7. Under Section 125(1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding Five Hundred rupees. By Clause (b) of the Explanation to Section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are

too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens is wholly irrelevant in the application of these provision. The reason for this is axiomatic, in the sense that Section 125 is a part of the code of Criminal Procedure, not of the Civil Laws which define and govern the right and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent ?Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective are the objective criteria which determine the applicability of Section 125. Such provisions, which are essentially of a prophylactic nature, across the barriers of religion. True that they do not supplant the personal law of the parties or the state of the personal law y which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by Section 125 to maintain close relatives who are indigent is founded upon individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to Section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character.

8. Sir James Fitz James Stephen who piloted the CrPC, 1872 as a Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in which Section 125 occurs, as 'a mode of preventing vagrancy or at least of preventing its consequences. In Jagir kaur v. Jaswant Singh MANU/SC/0242/1963 : [1964]2SCR73 , 84 Subba Rao, J. speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained Section 488, corresponding to Section 125, "intends to serve a social purpose". In Nanak Chand v. Shri Chandra Kishore Agarwala MANU/SC/0481/1969 : 1970CriLJ522 Sikri, J., while pointing out that the scope of the Hindu Adoptions and Maintenance Act. 1956 and that of Section 488 was different, said that Section 488 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties".

9. Under Section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of Clause (b) of the Explanation to Section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1898 that the provisions regarding maintenance were independent of the personal law governing the parties. The induction of the definition of 'wife, so as to include a divorced woman lends even greater weight to that conclusion. 'Wife' means a wife as defined, irrespective of the religion

professed by her or by her husband. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of Section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

10. The conclusion that the right conferred by Section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to Section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance notwithstanding the offer of the husband, if he is satisfied that there is a just ground for passing such an order.

According to the Explanation to the proviso :

If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

11. It is too well- known that "A. Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular". (See Mulla's Mahomedan Law, 18th Edition, paragraph 255, page 285, quoting Baillie's Digest of Moohummudan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280). The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that Section 125 overrides the personal law, if is any there conflict between the two.

12. The whole of this discussion as to whether the right conferred by Section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by reason of Section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Persona" Law" also proceed upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption the it there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether Section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

13. The next logical step to take is to examine the question, on which considerable argument has been advanced before us, whether there is any conflict between the provisions of Section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

14. The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the

period of iddat in support of this proposition, they rely upon the statement of law on the point contained in certain text books. In Mulla's Mahomedan Law (18th Edition, para 279, page 301), there is a statement to the effect that, "After divorce, the wife is entitled to maintenance during the period of iddat". At page 302, the learned author says :

Where an order is made for the maintenance of a wife under Section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahomedan may defeat an order made against him under Section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat.

15. Tyabji's Muslim law (4th Edition, para 304, pages 268- 269) contains the statement that :

On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code.

According to Dr Paras Diwan :

When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat.... On the expiration of the period of iddat, the wife is not entitled to any maintenance under any circumstances. Muslim Law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced.

(Muslim Law in Modern India, 1982 Edition, page 130)

16. These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent both, in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308). But, one must have regard to the realities of life Mahr is a mark of respect to the wife. The sum settled by way of Main is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. Hut these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife.

We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of Section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Persona! Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat despite the fact she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

17. There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will". (The Quran Interpreted by Arthur J. Arberry). Verses (Aiyats) 241 and 242 of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives. The Arabic version of those Aiyats and their English translation are reproduced below :

(See 'The Holy Quran' by Yusuf Ali, Page 96).

18. The correctness of the translation of these Aiyats is not in dispute except that, the contention of the appellant is that the word 'Mata' in Aiyat No. 241 means 'provision' and not 'maintenance'. That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Aiyat 241, the exhortation is to the 'Mutta Queena', that is, to the more pious and the more God- fearing, not to the general run of the Muslims, the 'Muslminin'. In Aiyat 242, the Quran says : "It is expected that you will use your commonsense".

19. The English version of the two Aiyats in Muhammad Zafrullah Khan's 'The Quran' (page 38) reads thus :

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand.

20. The translation of Aiyats 240 to 242 in 'The Meaning of the Quran' (Vol. I, published by the Board of Islamic Publications, Delhi) reads thus.

240- 241.

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way ; Allah is All- Powerful, All- wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God- fearing people.

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Thus Allah makes clear His commandments for you :

It is expected that you will use your commonsense.

21. In "The Running Commentary of The Holy Quran" (1964 Edition) by Dr. Allamah Khadim Rahmani Nuri, Aiyat No. 241 is translated thus :

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And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower) ; (This is) a duty (incumbent) on the reverent.

22. In "The Meaning of the Glorious Quran, Text and Explanatory Translation", by Marmaduke Pickthall, (Taj Company Ltd., karachi), Aiyat 241 is translated thus :

241.

For divorced women a provision in kindness : A duty for those who ward oil (evil).

23. Finally, in "The Quran Interpreted" by Arthur J. Arberry. Aiyat 241 is translated thus :

241.

There shall be for divorced women provision honourable an obligation on the god fearing ."

So God makes clear His signs for you : Happily you will understand.

24. Dr. K.R. Nuri in his book quoted above : 'The Running Commentary of the Holy Quran", says in the preface :

Belief in Islam does not mean mere confession of the existence of something. It really means the translation of the faith into action. Words without deeds carry no meaning in Islam. Therefore the term "believe and do good" has been used like a phrase all over the Quran. Belief in something means that man should inculcate the qualities or carry out the promptings or guidance of that thing in his action. Belief in Allah means that besides acknowledging the existence of the Author of the Universe, we are to show obedience to His commandments....

25. These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Quran, As observed by Mr. M. Hidayatullah in his introduction to Mulla's Mahomedan Law, the Quran is Al- furqan' that is one showing truth from falsehood and right from wrong.

26. The second plank of the appellant's argument is that the respondent's application under Section 125 is liable to be dismissed because of the provision contained in Section 127(3)(b). That section provides, to the extent material, that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce". That raises the question as to whether, under the Muslim Personal Law, any sum is payable to the wife 'on divorce'. We do not have to grope in the dark and speculate as to which kind of a sum this can be because, the only argument advanced before us on behalf of the appellant and by the interveners supporting him, is that Mahr is the amount payable by the husband to the wife on divorce. We find it impossible to accept this argument.

27. In Mulla's principles of Mahomedan Law (18th Edition, page 308), Mahr or Dower is defined in paragraph 285 as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage." Dr. Paras Diwan in his book, "Muslim Law in Modern India" (1982 Edition, page 60), criticises this definition on the ground that Mahr is not payable "in consideration of marriage" but is an obligation imposed by law on the husband as a mark of respect for the wife, as is evident from the fact that non- specification of Mahr at the time

of marriage does not affect the validity of the marriage. We sued not enter into this controversy and indeed, Mulla's book itself contains the further statement at page 308 that the word 'consideration' is not used in the sense in which it is used in the Contract Act and that under the Mohammedan Law, Dower is m obligation imposed upon the husband as a mark of respect for the wife. We are concerned to find whether Mahr is an amount payable by the husband to the wife on divorce. Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called "prompt", which is payable on demand, and the other is called "deferred", which is payable on the dissolution of the marriage by death or by divorce. But, the fact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorcel. Even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce maybe a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in Section 127(3)(b) of the Code. If Mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the Marriage. Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that Mahr is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce'.

28. In an appeal from a Full Bench decision of the Allahabad High Court, the Privy Council in Hamira Bibi v. Zubaide Bibi 43 I. A. 294 summed up the nature and character of Mahr in these words :

Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent that is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called "prompt" payable before the wife can be called upon to enter the conjugal domicile ; the other "deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce.

29. This statement of law was adopted in another decision of the Privy Council in Syed Sabir Husain v. Farzand Hasan 65 I. A. 119. It is not quite appropriate and seems invidious to describe any particular Bench of a court as "strong" but, we cannot resist the temptation of mentioning that Mr. Syed Ameer Ali was a party to the decision in Hamira Bibi while Sir Shadi Lal was a party to the decision in Syed Sabir Husain. These decisions show that the payment of dower may be deferred to a future date as, for example, death or divorce. But, that does not mean that the payment of the deferred dower is occasioned by these events.

30. It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil, would show that the intention of the Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs :

Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is a demand for change in the Muslim Personal Law, it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystalise before we try to change this customary right or make changes in their personal law. Above all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the admit of Clause 125, but a limitation is being imposed by this amendment to Clause 127, namely, that the maintenance orders would ceases to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between what has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think, should satisfy Hon. Members that whatever advance we have made is in the right direction and it should be welcomed.

31. It does appear from this speech that the Government did not desire to interfere with the personal law of the Muslim through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystalise on the reforms in their personal law. However, we do not concerned with the question whether the Government did or did not desire to bring about changes in the Muslim Personal Law by enacting Sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in Section 127(3)(b) may have been introduces because of the misconception that dower is an amount payable "on divorce". But, that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce.

32. It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in Bui Tahira (Krishna Iyer J., Tulzapurkar J. and Pathak J.) and fazlunbi (Krishna Iyer, J.,) one of us, Chinnappa Reddy J. and A. P. Sen J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one

finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 and that, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce.

33. Though Bai Tahira was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgment There is a statement at page 80 of the report, in the context of Section 127(3)(b), that "payment of Mahr money, as a customary discharge, is with in the cognizance of that provision". We have taken the view that Mahr, not being payable on divorce, does not fall within the meaning of that provision.

34. It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorce should maintain herself. The facile answer of the Board is (that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephew and cousins, to support her. This is a most unreasonable view of law as well as life. We appreciate that Begum Temur Jehan, a social worker who has been working in association with the Delhi City Women's Association for the uplift of Muslim women, intervened to support Mr. Daniel Latifi who appeared on behalf of the wife.

35. It is also a matter of regret that Article 44 of our Constitution has remained a dead letter It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their persona law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

36. Dr. Tahir Mahmood in his book 'Muslim Personal Law' (1977 Edition, pages 200- 202), has made a powerful plea for framing a uniform Civil Code for all citizens of India. He say: "In

pursuance of the goal of secularism, the State must stop administering religion- based personal laws". He wants the lead to come from the majority community but, we should have, thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community :

Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the stated legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time- worn and anachronistic interpretations, can enrich the common civil code of India.

37. At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies New Delhi he also made and appeal to the Muslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce (See Islam and Comparative Law Quarterly, April- June, 1981, page 146).

38. Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No. 5 (page 1215 of the Report) is that

a large number of middle- aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any mean; of sustaining themselves and their children.

39. The Report concludes thus :

In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution- a question which will require great intellectual effort, and is sure to be answered in the affirmative.

40. For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under Section 127(1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

MANU/SC/0402/1978

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 332 of 1977

Decided On: 06.10.1978

Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Ors.

Back to Section 125 of Code of Criminal Procedure, 1973

Back to Section 127 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

R.S. Pathak, V.D. Tulzapurkar and V.R. Krishna Iyer, JJ.

JUDGMENT

V.R. Krishna Iyer, J.

1. In this appeal, by special leave, we are called upon to interpret a benign provision enacted to ameliorate the economic condition of neglected wives and discarded divorcees, namely, Section 125, Cr.P.C.

2. Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Article 15(3) of the Constitution must be light the meaning of the Section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure. So, Section 125 and sister clauses must receive a compassionate expansion of sense that the words used permit.

The Brief Facts

3. The respondent (husband) married the appellant (wife) as a second wife, way back in 1956, and a few years later had a son by her. The initial warmth vanished and the jealousies of a triangular situation erupted, marring mutual affection. The respondent divorced the appellant around July 1962. A suit relating to a flat in which the husband had housed the wife resulted in a consent decree which also settled the marital disputes. For instance, it recited that the respondent had transferred the suit premises, namely, a flat in Bombay, to the appellant and also the shares of the Cooperative Housing Society which built the flat concerned. There was a reference to mehar money (Rs. 5,000/- and 'iddat' money, Rs. 180/-) which was also stated to have been adjusted by the compromise terms.

4. There was a clause in the compromise :

The plaintiff declares that she has now no claim or right whatsoever against the defendant or against the estate and the properties of the defendant.

And another term in the settlement was that the appellant had by virtue of the compromise become the absolute owner of the flat and various deposits in respect of the said flat made with the cooperative housing society.

5. For some time there was flickering improvement in the relations between the quondam husband and the quondam wife and they lived together. Thereafter, again they separated, became entranged. The appellant, finding herself in financial straits and unable to maintain herself, moved the magistrate under Section 125 of the Criminal Procedure Code, 1973, for a monthly allowance for the maintenance of herself and her child. She proceeded on the footing that she was still a wife while the respondent rejected this status and asserted that she was a divorce and therefore ineligible for maintenance. The Magistrate who tried the petition for maintenance held that the appellant was a subsisting wife and awarded monthly maintenance of Rs. 300/- for the son and Rs. 400/- for the mother for their subsistence, taking due note of the fact that the cost of living in Bombay, where the parties lived, was high, and that the respondent had provided residential accommodation to the appellant.

6. This order was challenged before the sessions Judge by the aggrieved husband, who on a strange view of the law that the court, under Section 125, had no jurisdiction to consider whether the applicant was a wife, dismissed the petition in allowance of the appeal. The High Court deigned to bestow little attention on the matter and summarily dismissed a revision petition. This protracted and fluctuating litigation misfortune has led to the appeal, by special leave, before this Court.

The Questions Mooted

7. Shri Bhandare appearing for the appellant contended that the Courts below had surprisingly forgotten the plain provision in the Explanation (b) to Section 125(1) of the Code, which reads :

"wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

8. On this foundation, he urged that accepting the contention of the respondent that the appellant was a divorcee, his client was still entitled to an allowance. This is obviously beyond dispute on a simple reading of the sub- section and it is curious how this innovative and sensitive provision with a benignant disposition towards destitute divorcees has been overlooked by all the courts below. We hold that every divorce otherwise eligible, is entitled to the benefit of maintenance

allowance and the dissolution of the marriage makes no difference to this right under the current Code. In the normal course, an order for maintenance must follow, the quantum having been determined by the learned Magistrate at the trial level.

9. However, Shri Sanghi, appearing for the respondent, sought to sustain the order in his favour on three grounds. They are of public importance since the affected party in such a fact- situation is the neglected divorcee. He first argued that Section 125(4) would apply in the absence of proof that the lady was not living separately by mutual consent. His next plea was that there must be proof of neglect to maintain to attract Section 125 and his third contention was that there was a settlement by consent decree in 1962 whereby the mehar money had been paid and all claims adjusted, and so no claim for maintenance could survive. The third contention is apparently based upon a contractual arrangement in the consent decree read with Section 127(3)(b) which reads :

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, -

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

We must state, however, that there was no specific plea, based upon the latter provision, set up anywhere in the courts below or urged before us. But if one were to locate a legal ground to raise the contention that the liability to pay maintenance had ceased on account of the payment of mehar, it is Section 127(3) of the Code. So we must deal with the dual sub- heads of the third ground.

10. The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has compelling, compassionate relevance in the context of Section 125 and the benefit of doubt, if any in statutory interpretation belongs to the ill- used wife and the derelict divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Article 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice, specificated in Article 38, fulfilment of which is fundamental to the governance of the country (Article 37). From this coign of vantage we must view the printed text of the particular Code.

11. Section 125 requires, as a sine qua non for its application, neglect by husband or father. The magistrate's order proceeds on neglect to maintain; the sessions judge has spoken nothing to the contrary; and the High Court has not spoken at all. Moreover, the husband has not examined himself to prove that he has been giving allowances to the divorced wife. His case, on the contrary, is that she has forfeited her claim because of divorce and the consent decree. Obviously, he has no case of non- neglect. His plea is his right to ignore. So the basic condition of neglect to maintain is satisfied. In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof.

12. The next submission is that the absence of mutual consent to live separately must be made out if the hurdle of Section 125(4) is to be overcome. We see hardly any force in this plea. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as evidenced by the consent decree fills the bill. Do divorcees have to prove mutual consent to live apart? Divorce painfully implies that the husband orders her out of the conjugal home. If law has nexus with life this argument is still- born.

13. The last defence, based on mehar payment, merits more serious attention. The contractual limb of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available. But here is a new statutory right created as a projection of public policy by the Code of 1973, which could not have been in the contemplation of the parties when in 1962, they entered into a contract to adjust their then mutual rights. No settlement of claims which does not have the special statutory right of the divorcee under Section 125 can operate to negate that claim.

14. Nor can Section 127 rescue the respondent from his obligation. Payment of mehar money, as a customary discharge, is within the cognisance of that provision. But what was the amount of mehar ? Rs. 5000/- , interest from which could not keep the woman's body and soul together for a day, even in that city where 40% of the population are reported to live on pavements, unless she was ready to sell her body and give up her soul? The point must be clearly understood that the scheme of the complex of provisions in Chapter IX has a social purpose. Ill- used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section 127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorce, a subsequent series of recurrent doles is contra- indicated and the husband liberated. This is the teleological interpretation, the sociological decoding of the text of Section 127. The keynote thought is adequacy of payment which will take reasonable care of her maintenance.

15. The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration

of the statutory project can secure validation if the court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit. If the first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under Section 125 not mathematically but fairly- then Section 127(3)(b) subserves the goal and relieves the obligor, not pro tanto but wholly. The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance. To interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from this obligation under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.

16. The conclusion that we therefore reach is that the appeal should be allowed and it is hereby allowed, and the order of the trial court restored.

MANU/SC/0066/1978

IN THE SUPREME COURT OF INDIA

Review Petition No. 95 of 1978

Decided On: 13.11.1978

Bhupinder Singh Vs. Daljit Kaur

Back to Section 125 of Code of Criminal Procedure, 1973

Back to Section 127 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

A.P. Sen, P.N. Shinghal and V.R. Krishna Iyer, JJ.

ORDER

V.R. Krishna Iyer, J.

1. A short narrative of the facts is necessary to explore and explode the submission that a substantial question of law arises, which merits grant of leave under Article 136 of the Constitution. The respondent is the wife of the petitioner. She moved the Magistrate, having jurisdiction over the subject- matter, for grant of maintenance under Section 125 of the Criminal Procedure Code. The Court awarded maintenance in a sum of Rs. 250/- per mensem but the order was made ex parte since the petitioner did not appear in court. The motion for setting aside the ex parte order was dismissed whereupon a criminal revision was filed by the husband before the High Court. During the pendency of the said petition a compromise was entered into between the parties as a result of which the wife resumed cohabitation with the husband. This resumption of conjugal life was followed by an application by the wife (respondent) praying that her application for maintenance be dismissed and the execution proceedings for recovery of arrears of maintenance be withdrawn. Apparently, on this basis the trial court did not proceed to recover arrears of maintenance. But as the record now stands, the order for maintenance remains. That has not been set aside and must be treated as subsisting. The High Court apparently dismissed the revision petition on the score that the parties had compromised the dispute.

2. Later developments were not as smooth as expected. The wife was betrayed, because her allegation is that her husband is keeping a mistress making it impossible for her to live in the conjugal home. Naturally, she proceeded to enforce the order for maintenance. This was resisted by the petitioner (husband) on the ground that resumption of cohabitation, after the original order for maintenance, revoked the said order. This plea having been rejected right through, the petitioner has come up to this Court seeking leave to appeal. The short question of law pressed before us is that the order for maintenance under Section 125 of the Code is superseded by the subsequent living of the wife with the husband and is unavailable for enforcement.

3. Counsel has relied on a ruling of the Madras High Court in MANU/TN/0169/1960 : AIR1960Mad515 . The holding in that case is that resumption of cohabitation puts an end to the order of maintenance. The learned Judge observed;

On the authority of the above decisions I must hold in this case that there was a reunion for some time and that put an end to the order under Section 488 Cr.P.C. If the wife separated again from the husband, then she must file another petition, a fresh cause of action, and obtain an order if she satisfied the Court that there is sufficient reason to leave her husband and that he neglected to maintain her.

4. To the same effect is the decision of the Andhra High Court reported in 1955 Andhra Law Times Reports (Criminal) Page 244. The head note there reads :

If a wife who has obtained an order of maintenance under Section 488 rejoins her husband and lives with him, the order is revoked and cannot be enforced subsequently, if they fall out again. If there are fresh grounds, such as would entitle her to obtain maintenance under Section 488, it is open to her to invoke the jurisdiction of court once again for the same relief.

5. An earlier Rangoon case MANU/RA/0120/1930 : (A.I.R. 1931 Rangoon 89) as lends support to this proposition.

6. A contrary position has found favour with the Lahore High Court reported in MANU/LA/0070/1931 : A.I.R. 1932 Lah.115. The facts of that case have close similarity to the present one and the head- note brings out the ratio with sufficient clarity. It reads :

7. Shadi Lal, C.J. observed :

Now in the present case the compromise, as pointed out above, was made out of Court and no order under Section 488, Criminal P.C. was made in pursuance of that compromise, Indeed, the order of the Magistrate allowing maintenance at the rate of Rs. 10 per mensem was neither rescinded nor modified, and no ground has been shown why that order should not be enforced. If the husband places his reliance upon the terms of the compromise, he may have recourse to such remedy in a civil Court as may be open to him. The criminal Court cannot however take cognizance of the compromise and refuse to enforce the order made by it.

This reasoning of the learned Chief Justice appeals to us.

8. We are concerned with a Code which is complete on the topic and any defence against an order passed under Section 125 Crl. P.C. must be founded on a provision in the Code. Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms

of the provisions of the Code itself. If the husband has a case under Section 125(4)(5) or Section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a higher court or is varied or vacated in terms of Section 125(4) or (5) or Section 127, its validity survives. It is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence. In this view, we hold that the decisions cited before us in favour of the proposition contended for by the petitioner are not good law and that the view taken by Sir Shadi Lal Chief Justice is sound.

9. A statutory order can ordinarily be demolished only in terms of the statute. That being absent in the present case the Magistrate will execute the order for maintenance. Our order does not and shall not be deemed to prejudice the petitioner in any proceedings under the law which he may start to vacate or vary the order for maintenance.

MANU/SC/0807/2010

Back to Section 125 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Decided On: 07.10.2010

Civil Appeal No. ... of 2010 (Arising out of SLP (C) No. 15071 of 2009)

Chanmuniya Vs. Chanmuniya Virendra Kumar Singh Kushwaha and Ors.

Hon'ble Judges/Coram:

G.S. Singhvi and A.K. Ganguly, JJ.

JUDGMENT

A.K. Ganguly, J.

1. Leave granted.

2. One Sarju Singh Kushwaha had two sons, Ram Saran (elder son) and Virendra Kumar Singh Kushwaha (younger son and the first respondent). The appellant, Chanmuniya, was married to Ram Saran and had 2 daughters- Asha, the first one, was born in 1988 and Usha, the second daughter, was born in 1990. Ram Saran died on 7.03.1992.

3. Thereafter, the appellant contended that she was married off to the first respondent as per the customs and usages prevalent in the Kushwaha community in 1996. The custom allegedly was that after the death of the husband, the widow was married off to the younger brother of the husband. The appellant was married off in accordance with the local custom of Katha and Sindur. The appellant contended that she and the first respondent were living together as husband and wife and had discharged all marital obligations towards each other. The appellant further contended that after some time the first respondent started harassing and torturing the appellant, stopped her maintenance and also refused to discharge his marital obligations towards her.

4. As a result, she initiated proceedings under Section 125 of the Cr.P.C. for maintenance (No. 20/1997) before the 1st Additional Civil Judge, Mohamadabad, Ghazipur. This proceeding is pending.

5. She also filed a suit (No. 42/1998) for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 in the Court of 1st Additional District Judge, Ghazipur.

6. The Trial Court decreed the suit for restitution of conjugal rights in favour of the appellant on 3.1.2004 as it was of the opinion that the appellant had remarried the first respondent after the death of Ram Saran, and the first respondent had deserted the appellant thereafter. Thus, it directed the first respondent to live with the appellant and perform his marital duties.

7. Hence, the first respondent preferred a first appeal (No. 110/2004) under Section 28 of the Hindu Marriage Act. The main issue in appeal was whether there was any evidence on record to prove that the appellant was the legally wedded wife of the first respondent. The High Court in its judgment dated 28.11.2007 was of the opinion that the essentials of a valid Hindu marriage, as required under Section 7 of the Hindu Marriage Act, had not been performed between the first respondent and the appellant and held that the first respondent was not the husband of the appellant and thus reversed the findings of the Trial Court.

8. Aggrieved by the aforesaid judgment of the High Court, the appellant sought a review of the order dated 28.11.2007. The review petition was dismissed on 23.01.2009 on the ground that there was no error apparent on the face of the record of the judgment dated 28.11.2007.

9. Hence, the appellant approached this Court by way of a special leave petition against the impugned orders dated 28.11.2007 and 23.01.2009.

10. One of the major issues which cropped up in the present case is whether or not presumption of a marriage arises when parties live together for a long time, thus giving rise to a claim of maintenance under Section 125 Cr.P.C. In other words, the question is what is meant by 'wife' under Section 125 of Criminal Procedure Code especially having regard to explanation under Clause (b) of the Section.

11. Thus, the question that arises is whether a man and woman living together for a long time, even without a valid marriage, would raise as in the present case, a presumption of a valid marriage entitling such a woman to maintenance.

12. On the question of presumption of marriage, we may usefully refer to a decision of the House of Lords rendered in the case of Lousia Adelaide Piers and Florence A.M. De Kerriguen v. Sir Henry Samuel Piers (1849) II HLC 331, in which their Lordships observed that the question of validity of a marriage cannot be tried like any other issue of fact independent of presumption. The Court held that law will presume in favour of marriage and such presumption could only be rebutted by strong and satisfactory evidence.

13. In Lieutenant C.W. Campbell v. John A.G. Campbell (1867) Law Rep. 2 HL 269, also known as the Breadalbane case, the House of Lords held that cohabitation, with the required repute, as

husband and wife, was proof that the parties between themselves had mutually contracted the matrimonial relation. A relationship which may be adulterous at the beginning may become matrimonial by consent. This may be evidenced by habit and repute. In the instant case both the appellant and the first respondent were related and lived in the same house and by a social custom were treated as husband and wife. Their marriage was solemnized with Katha and Sindur. Therefore, following the ratio of the decisions of the House of Lords, this Court thinks there is a very strong presumption in favour of marriage. The House of Lords again observed in Captain De Thoren v. The Attorney- General (1876) 1 AC 686, that the presumption of marriage is much stronger than a presumption in regard to other facts.

14. Again in Sastry Velaider Aronegary and his wife v. Sembecutty Viagalie and Ors. (1881) 6 AC 364, it was held that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

15. In India, the same principles have been followed in the case of A. Dinohamy v. W.L. Balahamy MANU/PR/0116/1927 : AIR 1927 P.C. 185, in which the Privy Council laid down the general proposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

16. In Mohabbat Ali Khan v. Muhammad Ibrahim Khan and Ors. MANU/PR/0068/1929 : AIR 1929 PC 135, the Privy Council has laid down that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

17. In the case of Gokal Chand v. Parvin Kumari MANU/SC/0077/1952 : AIR 1952 SC 231, this Court held that continuous co- habitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long co- habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

18. Further, in the case of Badri Prasad v. Dy. Director of Consolidation and Ors. MANU/SC/0004/1978 : (1978) 3 SCC 527, the Supreme Court held that a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin.

19. Again, in Tulsa and Ors. v. Durghatiya and Ors. MANU/SC/0424/2008 : 2008 (4) SCC 520, this Court held that where the partners lived together for a long spell as husband and wife, a presumption would arise in favour of a valid wedlock.

20. Sir James Fitz Stephen, who piloted the Criminal Procedure Code of 1872, a legal member of Viceroy's Council, described the object of Section 125 of the Code (it was Section 536 in 1872 Code) as a mode of preventing vagrancy or at least preventing its consequences.

21. Then came the 1898 Code in which the same provision was in Chapter XXXVI Section 488 of the Code. The exact provision of Section 488(1) of the 1898 Code runs as follows:

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub- divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

22. In Jagir Kaur and Anr. v. Jaswant Singh MANU/SC/0242/1963 : AIR 1963 SC 1521, the Supreme Court observed with respect to Chapter XXXVI of Cr.P.C. of 1898 that provisions for maintenance of wives and children intend to serve a social purpose. Section 488 prescribes forums for a proceeding to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief.

23. In Nanak Chand v. Chandra Kishore Aggarwal and Ors. MANU/SC/0481/1969 : 1969 (3) SCC 802, the Supreme Court, discussing Section 488 of the older Cr.P.C, virtually came to the same conclusion that Section 488 provides a summary remedy and is applicable to all persons belonging to any religion and has no relationship with the personal law of the parties.

24. In Captain Ramesh Chander Kaushal v. Veena Kaushal and Ors. MANU/SC/0067/1978 : AIR 1978 SC 1807, this Court held that Section 125 is a reincarnation of Section 488 of the Cr.P.C. of 1898 except for the fact that parents have also been brought into the category of persons entitled for maintenance. It observed that this provision is a measure of social justice specially enacted to protect, and inhibit neglect of women, children, old and infirm and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. Speaking for the Bench Justice Krishna Iyer observed that- "We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it is to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause- the cause of the derelicts." (Para 9 on pages 1809- 10)

25. Again in Vimala (K) v. Veeraswamy (K) MANU/SC/0719/1991 : (1991) 2 SCC 375, a three-Judge Bench of this Court held that Section 125 of the Code of 1973 is meant to achieve a social purpose and the object is to prevent vagrancy and destitution. Explaining the meaning of the word 'wife' the Court held:

...The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept- mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term 'wife' in Section 125 of the Code of Criminal Procedure, includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective....

26. Thus, in those cases where a man, who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserts her. The man should not be allowed to benefit from the legal loopholes by enjoying the advantages of a de facto marriage without undertaking the duties and obligations. Any other interpretation would lead the woman to vagrancy and destitution, which the provision of maintenance in Section 125 is meant to prevent.

27. The Committee on Reforms of Criminal Justice System, headed by Dr. Justice V.S. Malimath, in its report of 2003 opined that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties. Thus, it recommended that the word 'wife' in Section 125 Cr.P.C. should be amended to include a woman who was living with the man like his wife for a reasonably long period.

28. The Constitution Bench of this Court in Mohammad Ahmed Khan v. Shah Bano Begum and Ors. reported in MANU/SC/0194/1985 : (1985) 2 SCC 556, considering the provision of Section 125 of the 1973 Code, opined that the said provision is truly secular in character and is different from the personal law of the parties. The Court further held that such provisions are essentially of a prophylactic character and cut across the barriers of religion. The Court further held that the liability imposed by Section 125 to maintain close relatives, who are indigent, is founded upon the individual's obligation to the society to prevent vagrancy and destitution.

29. In a subsequent decision, in Dwarika Prasad Satpathy v. Bidyut Prava Dixit and Anr. MANU/SC/0673/1999 : (1999) 7 SCC 675, this Court held that the standard of proof of marriage in a Section 125 proceeding is not as strict as is required in a trial for an offence under Section 494 of IPC. The learned Judges explained the reason for the aforesaid finding by holding that an order passed in an application under Section 125 does not really determine the rights and obligations of parties as the section is enacted with a view to provide a summary remedy to neglected wives

to obtain maintenance. The learned Judges held that maintenance cannot be denied where there was some evidence on which conclusions of living together could be reached. (See para 9)

30. However, striking a different note, in Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr. reported in MANU/SC/0579/1988 : AIR 1988 SC 644, a two- Judge Bench of this Court held that an attempt to exclude altogether personal law of the parties in proceedings under Section 125 is improper. (See para 6). The learned Judges also held (paras 4 & 8) that the expression 'wife' in Section 125 of the Code should be interpreted to mean only a legally wedded wife.

31. Again in a subsequent decision of this Court in Savitaben Somabhat Bhatiya v. State of Gujarat and Ors. reported in MANU/SC/0193/2005 : AIR 2005 SC 1809, this Court held however desirable it may be to take note of plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of 'wife'. The Bench held that this inadequacy in law can be amended only by the Legislature. While coming to the aforesaid finding, the learned Judges relied on the decision in the Yamunabai case (supra).

32. It is, therefore, clear from what has been discussed above that there is a divergence of judicial opinion on the interpretation of the word 'wife' in Section 125.

33. We are inclined to take a broad view of the definition of 'wife' having regard to the social object of Section 125 in the Code of 1973. However, sitting in a two- Judge Bench, we cannot, we are afraid, take a view contrary to the views expressed in the abovementioned two cases.

34. However, law in America has proceeded on a slightly different basis. The social obligation of a man entering into a live- in relationship with another woman, without the formalities of a marriage, came up for consideration in the American courts in the leading case of Marvin v. Marvin (1976) 18 Cal. 660. In that context, a new expression of 'palimony' has been coined, which is a combination of 'pal' and 'alimony', by the famous divorce lawyer in the said case, Mr. Marvin Mitchelson.

35. In the Marvin case (supra), the plaintiff, Michelle Marvin, alleged that she and Lee Marvin entered into an oral agreement which provided that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." The parties allegedly further agreed that Michelle would "render her services as a companion, homemaker, housekeeper and cook." Michelle sought a judicial declaration of her contract and property rights, and sought to impose a constructive trust upon one half of the property acquired during the course of the relationship. The Supreme Court of California held as follows:

(1) The provisions of the Family Law Act do not govern the distribution of property acquired during a non- marital relationship; such a relationship remains subject solely to judicial decision.

(2) The courts should enforce express contracts between non- marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.

(3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

36. Though in our country, law has not developed on the lines of the Marvin case (supra), but our social context also is fast changing, of which cognizance has to be taken by Courts in interpreting a statutory provision which has a pronounced social content like Section 125 of the Code of 1973.

37. We think the larger Bench may consider also the provisions of the Protection of Women from Domestic Violence Act, 2005. This Act assigns a very broad and expansive definition to the term 'domestic abuse' to include within its purview even economic abuse. 'Economic abuse' has been defined very broadly in sub- explanation (iv) to explanation I of Section 3 of the said Act to include deprivation of financial and economic resources.

38. Further, Section 20 of the Act allows the Magistrate to direct the respondent to pay monetary relief to the aggrieved person, who is the harassed woman, for expenses incurred and losses suffered by her, which may include, but is not limited to, maintenance under Section 125 Cr.P.C. [Section 20(1)(d)].

39. Section 22 of the Act confers upon the Magistrate, the power to award compensation to the aggrieved person, in addition to other reliefs granted under the Act.

40. In terms of Section 26 of the Act, these reliefs mentioned above can be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent.

41. Most significantly, the Act gives a very wide interpretation to the term 'domestic relationship' as to take it outside the confines of a marital relationship, and even includes live- in relationships in the nature of marriage within the definition of 'domestic relationship' under Section 2(f) of the Act.

42. Therefore, women in live- in relationships are also entitled to all the reliefs given in the said Act.

43. We are thus of the opinion that if the abovementioned monetary relief and compensation can be awarded in cases of live- in relationships under the Act of 2005, they should also be allowed in a proceedings under Section 125 of Cr.P.C. It seems to us that the same view is confirmed by Section 26 of the said Act of 2005.

44. We believe that in light of the constant change in social attitudes and values, which have been incorporated into the forward- looking Act of 2005, the same needs to be considered with respect to Section 125 of Cr.P.C. and accordingly, a broad interpretation of the same should be taken.

45. We, therefore, request the Hon'ble Chief Justice to refer the following, amongst other, questions to be decided by a larger Bench. According to us, the questions are:

1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125 Cr.P.C?

2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125 Cr.P.C. having regard to the provisions of Domestic Violence Act, 2005?

3. Whether a marriage performed according to customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125 Cr.P.C.?

46. We are of the opinion that a broad and expansive interpretation should be given to the term 'wife' to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C., so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.

47. We also believe that such an interpretation would be a just application of the principles enshrined in the Preamble to our Constitution, namely, social justice and upholding the dignity of the individual.

MANU/UP/0008/1914

IN THE HIGH COURT OF ALLAHABAD

Decided On: 08.08.1914

Farzand Ali Vs. Hakim Ali

Back to Section 133 of Code of Criminal Procedure, 1973

JUDGMENT

Theodore Caro Pigott, J.

1. This is an application in revision in respect of certain proceedings taken by Magistrate under Section 133 and the succeeding sections of the Code of Criminal Procedure. The matter appears to have been brought to the notice of the Magistrate by a petition presented by a person of the name of **Hakim Ali**. That petition stated in substance that **Farzand Ali**, who is the applicant now before me, had recently enlarged his dwelling- house by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to **Farzand Ali**, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. **Farzand Ali**, as he was entitled to do, nominated two jurymen. I note that he nominated two co- religionists of his own. The Magistrate appears to have inquired from **Hakim Ali** whether he could suggest the names of two other suitable persons to serve on the jury, and thereupon **Hakim Ali** presented a petition suggesting the names of two Hindu residents of another village The Magistrate then proceeded to nominate a foreman. It has been brought to my notice in the course of argument that the foreman originally nominated by the Magistrate declined to serve, that the Magistrate thereupon nominated another gentleman, a Muhammadan, and that this nomination was objected to on behalf of **Farzand Ali**. I have not pursued the history of this objection further because no plea is taken in the petition before me with regard to the appointment of the foreman. After the majority of the jury had decided the question referred to them in a sense unfavourable to **Farzand Ali**, the Magistrate proceeded to make his order absolute in accordance with law. Objection is now taken before this Court that the entire proceedings before the Magistrate, from the date of the order constituting the jury, are illegal and void, by reason of the fact that two of the jurors were appointed on the suggestion of the petitioner **Hakim Ali** There is authority for this proposition in the cases of Upendra Nath Bhuttacharjee v. Khitish Chandra Bhuttacharjee I.L.R. (1896) Cal. 499, Kailash Chandra Sen v. Ram Lall Mittra I.L.R. (1893) Cal. 869 in some older cases of the same court referred to in the above decisions, and I have also been referred to the case of Mir Imam Abdul Aziz v. Queen Empress Punj. Rec. 1897 Cri. L.J. 4. Now it is certainly expedient that in all proceedings initiated under Section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute. In the present case the question before the Magistrate was whether there had been an obstruction to a public way, to the injury or inconvenience of members of the public entitled to use the same. **Hakim Ali** had no locus standi in the matter, once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate

to the existence of the nuisance. In so far, therefore, as the rulings to which I have been referred lay down the principle that it is expedient that Magistrates should be on their guard against fallowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties, I am in entire accord with the same. I still more emphatically approve of the principle laid down in the Punjab case above referred to, that it would be highly improper on the part of the Magistrate to appoint to serve on a jury of this sort, the friends or supporters of the person at whose instance the proceedings under Chapter X of the Code of Criminal Procedure are being taken. At the same time, it must be remembered that it is often not an easy matter for a Magistrate to secure the services of a foreman and two independent jurymen to undertake in the public interests an inquiry of this sort, it may be in some village distant from head quarters. If the rulings to which I have been referred are supposed to lay down the principle that it is illegal for a Magistrate to address any inquiry t) the person who first came forward to draw his attention to the existence of the alleged public nuisance, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury, then lam unable to concur in any such principle. It clearly goes beyond anything, which is to be found in the provisions of the Code of Criminal Procedure itself, and it also goes beyond the requirements of the effective and impartial administration of justice. The criterion, therefore, which I would apply to a case of this sort, is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law, as if he were a party to the litigation, and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of the aforesaid person. Even in the cases to which I have been referred it is sufficiently clear that the underlying principle, that the revisional jurisdiction of this Court should be exercised only to correct a manifest failure of justice, was clearly recognized. The record before me does not show that **Farzand Ali** at any time objected in the court below to the two Hindu jurors who were nominated at the suggestion of **Hakim Ali**. Even in his petition to this Court he has not suggested, much less proved by affidavit, that these persons could be regarded as friends or supporters of **Hakim Ali**. I have, therefore, no materials before me which would justify the conclusion that these Hindu jurors were other than respectable and impartial residents of the neighbourhood and suitable persons to have been called upon to act as such; on the contrary, the silence of the applicant in revision justifies the opposite presumption. So far therefore from being prepared to hold that the Magistrate's proceedings were illegal or void, I do not find them to be vitiated by an such impropriety or irregularity as would justify the interference of this Court. The application is therefore dismissed.

MANU/SC/0050/1983

Back to Section 144 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Writ Petition Nos. 6890 and 7204 of 1982 and 3491 of 1983

Decided On: 20.10.1983

Acharya Jagdishwaranand Avadhuta and Ors. Vs. Commissioner of Police, Calcutta and Ors.

Hon'ble Judges/Coram:

A.N. Sen, P.N. Bhagwati and Ranganath Mishra, JJ.

JUDGMENT

Ranganath Misra, J.

1. The petitioner in Writ Petition No. 6890/82 a monk of the Ananda Marga and currently General Secretary, Public Relations Department of the Ananda Marga Pracharak Sangh, has filed this petition under Article 32 of the Constitution for a direction to the **Commissioner** of **Police Calcutta** and the State of West Bengal to allow processions to be carried in the public streets and meetings to be held in public places by the followers of the Ananda Marga cult accompanied by the performance of Tandava dance within the State of West Bengal. There are two connected writ petitions being Writ Petition Nos. 7204/82 and 3491/83 by the Diocese Secretary of West Bengal Region and another follower of Ananda Marga. All these Petitions raise this common question and have been heard at a time. For convenience the petition by the General Secretary, Public Relations Department of the Ananda Marga Pracharak Sangh has been treated as the main petition and references in the Judgment have been confined to it.

2. In the original petition certain factual assertions have been made and after counter affidavits were filed several further affidavits have been placed before the Court on behalf of the petitioner and counter affidavits too have been filed. Shorn of unnecessary details, the averments on behalf of the respective contenders are as follows :

3. Shri Pravat Ranjan Sarkar otherwise known as Shri Ananda Murti, founded a socio- spiritual organisation claimed to have been dedicated to the service of humanity in different spheres of life such as physical mental and spiritual irrespective of caste, creed or colour, in the year 1955. In the initial period the Headquarters of this organisation was located near Ranchi in the State of Bihar but later it has been shifted to a place within the City of **Calcutta** in West Bengal. It has been pleaded that Ananda Marga contains no dogmatic beliefs and teaches the yogic and spiritual science to every aspirant. In order to realise the Supreme, Ananda Marga does not believe that it is necessary to abandon home profession or occupation and spiritual sadhana is possible at any place and concurrently with fulfilling all duties and responsibilities of family life. It has been pleaded that Ananda Marga shows the way and explains the methods for spiritual advancement and this helps man to practice his dharma. According to the petitioner Lord Shiva had performed Tandava Dance in 108 forms but Shaivite literature has given details of 64 kinds only. Seven forms out of these 64 appear to have been commonly accepted and they are called Kalika, Gouri,

Sandhya, Sambhara, Tripura, Urdhava and Ananda. The first of these forms elaborates the main aspects of shiva while the seventh, i.e. the Ananda Tandava portrays all the manifold responsibilities of the Lord. Ananda Tandava is claimed to have taken place at Tillai, the ancient name of Chidambaram now situated in the State of Tamil Nadu. It is the petitioner's stand that the word Tandava is derived from the root Tandu which means to jump about and Shiva was the originator of Tandava about 6500 years ago. Ananda Murtiji as the petitioner maintains, is the Supreme Father of the Ananda Margis. It is custody mary for every Ananda Margi after being duly initiated to describe Ananda Murtiji as his father. One of the prescriptions of religious rites to be daily performed by an Ananda Margi is Tandava Dance and this is claimed to have been so introduced from the year 1966 by the preceptor. This dance is to be performed with a skull, a small, symbolic knife and a Trishul. ' It is also customary to hold a lathi and a damroo. It is explained that the knife or the sword symbolises the force which cuts through the fetters of the mundane world and allows human beings to transcend towards perfection; the trishul or the trident symbolises the fight against static forces in the three different spheres of human existence - spiritual, mental and physical; the lathi which is said to be a straight stick stands out as the symbol of straightforwardness or simplicity; the damroo is the symbol to bring out rhythmic harmony between eternal universal music and the entitative sound; and the skull is the symbol of death reminding every man that life is short and therefore, every moment of life should be utilised in the service of mankind and salvation should be sought. The petitioner has further maintained that Ananda Margis greet their spiritual preceptor Shri Ananda Murti with a dance of Tandava wherein one or two followers use the skull and the symbolic knife and dance for two or three minutes. At intervals processions are intended to be taken out in public places accompanied by the Tandava dance as a religious practice.

4. Though in subsequent affidavits and in the course of argument an attempt was made by Mr. Tarkunde to assert that Ananda Marga is a new religious order; we do" not think there is any justification to accept such a contention when it runs counter to the pleadings in paragraphs 4 and 17 of the writ petition. In paragraph 4 it was specifically pleaded that "Ananda Marga is more a denomination than an institutionalised religion", and in paragraph 17 it was pleaded that "Ananda Margis are Shaivites ... " We shall, therefore, proceed to deal with this petition on the footing that, as pleaded by the petitioner, Ananda Marga is a religious denomination of the Shaivite order which is a well known segment of Hindu religion.

5. Though the petitioner had pleaded that Tandava dance has been practiced and performed by every Ananda Margi for more than three decades, it has been conceded in the course of the hearing that Tandava Dance was introduced for the first time as a religious rite for Ananda Margis in or around 1966. Therefore, by the time of institution of this writ petition the practice was at best prevalent for about 16 years.

6. The **Commissioner** of **Police**, respondent 1 before us is alleged to have made repetitive orders Under Section 144 of the CrPC, 1973 ('Code' for short) from August 1979 directing that "no member of a procession or assembly of five or more persons should carry any fire arms, explosives, swords, spears, knives, tridents, lathis or any article which may be used as weapon of offence or any article likely to cause annoyance to the public for example skulls...." A petition was filed before the **Calcutta** High Court under Article 226 of the Constitution by the General Secretary of Ananda Marga for a writ of mandamus against the respondents for a direction not to Interfere with or place restraints on the freedom of conscience and free profession, practice and

propagation of their religion, including Tandava Dance in matter No. 903 of 1980. The **Calcutta** High Court rejected the said petition on September 23, 1980 and observed:

It is open to any one in this country to practice any religion but the religious practice must not be inconsistent with the susceptibility or sensibility or fairness or public order. Tandava dance as such may not be objectionable. In the streets of **Calcutta** all kinds of demonstrations and procession are being held every day which may on many occasions cause disturbance to others and interrupt the free flow of traffic. In spite of the same such demonstrations and processions are allowed to take place particularly every day by the authority concerned. If the petitioners or any member of their group want to hold a procession or reception or demonstration accompanied by any dance or music, that by itself may not be objectionable. However, brandishing fire torches or skulls or daggers in the public places including streets cannot come under ' the same category. Here other things are involved. The interests of other members of the public are involved, the sense of security of the others is also involved. The authorities concerned have to keep in mind the question of the feelings of other members of the public and the question of the possibility of any attempt to retaliate or counter- act to the same are also to be considered. Taking into consideration all these factors I am of the opinion that the petitioners do not have any legal right and they have not established any legal right to carry fire torches, skulls and daggers in public places or public streets and do not intend to pass any order entitling the petitioners to do so. However, the petitioners shall be entitled to go in procession or hold any demonstration without any such fire tourches, daggers or skulls. However, this would be subject to prevailing law of the land in the particular area. For example, in the High Court, Dalhousie Square and Assembly order Under Section 144 of the Criminal Procedure Code is promulgated from time to time. This order would not entitle the petitioners to hold any such procession demonstration in violation of such promulgation if any. This order would also not entitle the petitioners to hold any procession or demonstration without the permission of the authority concerned when such permission is required for such purposes under any existing law.

On March 29, 1982, respondent 1 made a fresh order Under Section 144 of the Code wherein the same restraints as mentioned in the earlier order were imposed. An application for permission to take out a procession on the public street accompanied with Tandava dance was rejected and that led to the filing of this petition.

7. The petitioner asserts that tandava dance is an essential part of the religious rites of the Ananda Margis and that they are entitled to practise the same both in private as also in public places and interference by the respondents is opposed to the fundamental rights guaranteed under Articles 25 and 26 of the Constitution. The order Under Section 144 of the Code has been assailed mainly on the ground that it does not state the material facts of the case though the statute requires such statement as a condition precedent to the making of the order. Repetitive orders Under Section 144 of the Code, it has been contended, are not contemplated by the Code and, therefore, making of such orders is an abuse of the law and should not be countenanced.

8. Two separate returns have been made to the rule nisi. Respondent 1 has filed a counter affidavit alleging that Ananda Marga is an organisation which believes in violence and if Ananda Margis are permitted to carry open swords or daggers in public processions it is bound or likely, to disturb public peace and tranquillity and is fraught with the likelihood of breach of public order and would affect public morality. Carrying of human skulls and indulging in provocative dances with human skulls is not only repulsive to public taste and morality, but is bound, and is likely, to raise fears in the minds of the people particularly children thereby affecting public order,

morality, peace and tranquility. It has been further pleaded that the petitioner, or for the matter of that, Ananda Margis can have no fundamental right to carry weapons in the public, in procession or otherwise, nor have they any right to perform tandava dance with daggers and human skulls. It is stated that Ananda Marga is a politico- religious organisation started in 1961 by Shri Pravat Ranjan Sarkar alias Sri Ananda Murti, who is a self- styled tantrik yogi. Reference has been made to an incident of 1971 which led to prosecution of Sri Ananda Murti and some of his followers. It is stated that militancy continues to be the main feature of the organisation. Prior to promulgation of the prohibitory orders, it has been pleaded, Ananda Margis took out processions carrying lethal weapons like tridents lathis as well as human skulls and knives from time to time and caused much annoyance to the public in general and onlookers in particular, and this tended to disturb public peace, tranquillity and public order. In spite of the prohibitory orders in force from August 10, 1979, a procession was taken out on the following day within the city of **Calcutta** by Ananda Margis with lathis, tridents, knives, skulls, and the procession became violent. The assembly was declared unlawful and the **police** force was obliged to intervene. The **police** personnel on duty including a Deputy **Commissioner** of **Police** received injuries. Reference to several other incidents has also been made in the counter- affidavit of the **Police Commissioner**. The State Government has supported the stand of the **Police Commissioner** in its separate affidavit.

9. We have already indicated that the claim that Ananda Marga is a separate religion is not acceptable in view of the clear assertion that is was not an institutionalised religion but was a religious denomination. The principle indicated by Gajendragadkar, CJ, while speaking for the Court in Sastri Yagnapurushadji and **Ors**. v. Muldas Bhudardos Vaishya and Anr. MANU/SC/0040/1966: [1966]3SCR242 also supports the conclusion that Ananda Marga cannot be a separate religion by itself. In that case the question for consideration was whether the followers of Swaminarayan belonged to a religion different from that of Hinduism. The learned Chief Justice observed :

Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it, a sect was born which was governed by its own tenets but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy.

The averments in the writ petition would seem to indicate a situation of this type. We have also taken into consideration the writings of Shri Ananda Murti in books like Carya- Carya, Namah Shivaya Shantaya, A Guide to Human Conduct, and Ananda Vachanamritam. These writings by Shri Ananda Murti are essentially founded upon the essence of Hindu philosophy. The test indicated by the learned Chief Justice in the case referred to above and the admission in paragraph 17 of the writ petition that Ananda Margis belong to the Shaivite order lead to the clear conclusion that Ananda Margis belong to the Hindu religion. Mr. Tarkunde for the petitioner had claimed protection of Article 25 of the Constitution but in view of our finding that Ananda Marga is not a separate religion, application of Article 25 is not attracted.

10. The next aspect for consideration is whether Ananda Marga can be accepted to be a religious denomination. In The **Commissioner** Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt MANU/SC/0136/1954: [1954]1SCR1005 Mukherjee, J. (as the learned Judge then was), spoke for the Court thus:

As regards Article 26, the first question is, what is the precise meaning or connotation of the expression 'religious denomination' and whether a Math could come within this expression. The word 'denomination' has been defined in the Oxford Dictionary to mean 'a collection of individuals classed together under the same name : a religious sect or body having a common faith and organisation and designated by a distinctive name'.

This test has been followed in The Durgah Committee, Ajmer and Anr. v, Syed Hussain Ali and **Ors**. MANU/SC/0063/1961 : [1962]1SCR383 . In the majority judgment in S. P. Mittal etc. v. Union of India and **Ors**. [1933] 1 S.C.R. 729 reference to this aspect has also been made and it has been stated :

The words 'religious denomination' in Article 26 of the Constitution must take their colour from the word 'religion' and if this be so, the expression 'religious denomination' must also satisfy three conditions :

(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well- being, that is, a common faith;

(2) common organisation; and

(3) designation by a distinctive name.

11. Ananda Marga appears to satisfy all the three conditions, viz., it is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well- being; they have a common organisation and the collection of these individuals has a distinctive name. Ananda Marga, therefore, can be appropriately treated as a religious denomination, within the Hindu religion. Article 26 of the Constitution provides that subject to public order morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion. Mukherjea, J. in Lakshmindra Thirtha Swamiar's case (supra) adverted to the question as to what were the matters of religion and stated:

What then are matters of religion ! The word 'religion' has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case (Davie v. Benson 133 US 333), it has been said "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and Character and of obedience to His will. It is often "confounded with cults of form or worship of a particular sect, but is distinguishable from the latter". We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Article 44(2) of the Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress...

Restrictions "by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order morality and health. Clause (2) (a) of Article 25 reserved the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by Sub- clause (b) under which the State can legislate for social welfare and reform even though by So doing it might interfere with religious practices....

The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. It the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)....

12. Courts have the power to determine whether a particular rite of observance is regarded as essential by the tenets of a particular religion. In Laxshmindra Thirtha Swamiar's case, Mukherjea, J. observed :

This difference in judicial opinion brings out forcibly the difficult task which a Court has to perform in cases of this type where the freedom" of religious convictions genuinely entertained by men come into conflict with the proper Political attitude which is expected from citizens in matters of unity and solidarity of the State organization.

13. The same question arose in the case of Ratilal Panachand Gandhi v. State of Bombay and **Ors**. MANU/SC/0138/1954 : [1954]1SCR1055 . The Court did go into the question whether certain matters appertained to religion and concluded by saying that "these are certainly not matters of religion and the objection raised with regard to the validity of these provisions seems to be altogether baseless." In Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and **Ors**. MANU/SC/0028/1963 : [1964]1SCR561 this Court went into the question as to whether the tenets of the Vallabh denomination and its religious practices require that the worship by the devotees should be performed at the private temples and therefore, the existence of public temples was inconsistent with the said tenets and practices, and on an examination of this question, negatived the plea.

14. The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis. We have already indicated that tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 . the Ananda Marga order was first established It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr. Tarkunde's argument that taking out religious processions with tandava dance is an essential religious rite of Ananda Margis. In paragraph 17 of the writ petition the petitioner pleaded that "Tandava Dance lasts for a few

minutes where two or three persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other." In paragraph 18 it has been pleaded that "when the Ananda Margis greet their spiritual preceptor , at the airport, etc. they arrange for a brief welcome dance of tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes." In paragraph 26 it has been pleaded that "Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis." On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of tandava dance by every follower of Ananda Marga. Even conceding that tandava dance has been prescribed as a religious rite for every follower of the Ananda Marg it does not follow as a necessary corollary that tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public. Atleast none could be shown to us by Mr. Tarkunde despite an enquiry by us in that behalf. We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.

15. One we reach this conclusion, the claim that the petitioner has a fundamental right within the meaning of Articles 25 or 26 to perform tandava dance in public streets and public places has to be rejected. In view of this finding it is no more necessary to consider whether the prohibitory order was justified in the interest of public order as provided in Article 25.

16. It is the petitioner's definite case that the prohibitory orders Under Section 144 of the Code are being repeated at regular intervals from August 1979. Copies of several prohibitory orders made from time to time have been produced before us and it is not the case of the respondents that such repetitive prohibitory orders have not been made. The order Under Section 144 of the Code made in March 1982 has also been challenged on the ground that the material facts of the case have not been stated. Section 144 of the Code, as far as relevant, provides: "(1) In cases where in the opinion of a District Magistrate,' a Sub- Divisional Magistrate, or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may ,by a written order stating the material facts of the case and served in the manner provided by Section 134, direct..." It has been the contention of Mr. Tarkunde that the right to make the order is conditioned upon it being a written one and the material facts of the case being stated. Some High Courts have taken the view that this is a positive requirement and the validity of the order depends upon compliance of this provision. In our opinion it is not necessary to go into this question as counsel for the respondents conceded that this is one of the requirements of the provision and if the power has to be exercised it should be exercised in the manner provided on pain of invalidating for non- compliance. There is currently in force a prohibitory order in the same terms and hence the question cannot be said to be academic. The other aspect, viz., the propriety of repetitive prohibitory orders is, however, to our mind a serious matter and since long arguments have been advanced , we propose to deal with it. In this case as fact from October 1979 till 1982 at the interval of almost two months orders Under Section 144(1) of the Code have been made from time to time. It is not disputed before us that the power conferred under this section is intended for immediate prevention of breach of peace or speedy remedy. An order made under this section is to remain valid for two months from the date of its making as provided in Sub- section (4) of Section 144. The proviso to Sub- section (4) authorises the State Government in case it considers it necessary so to do for preventing danger to human life, health

or safety, or for preventing a riot or any affray, to direct by notification that an order made by a Magistrate may remain in force for a further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired. The effect of the proviso, therefore, is that the State Government would be entitled to give the prohibitory order an additional term of life but that would be limited to six months Beyond the two months' period in terms of Sub- section (4) of Section 144 of the Code. Several decisions of different High Courts have rightly taken the view that it is not legitimate to go on making successive orders after earlier orders have lapsed by efflux of time. A Full Bench consisting of the entire Court of 12 Judges in Gopi Mohun Mullick v. Taramoni Chowdhrani ILR 5 Cal. 7 examining the provisions of Section 518 of the Code of 1861 (corresponding to present Section 144) took the view that such an action was beyond the Magistrate's powers. Making of successive orders was disapproved by the Division Bench of the **Calcutta** High Court in Bishessur Chuckerbutty and Anr. v. Emperor AIR 1916 Cal. 47. Similar view was taken in Swaminatha Mudaliar v. Gopalakrishna Naidu; AIR 1916 Mad. 1106 Taturam Sahu v. The State of Orissa MANU/OR/0039/1953 : AIR1953Ori96 Ram Das Gaur v. The City Magistrate, Varanasi MANU/UP/0096/1960 : AIR1960All397 and Ram Naraain Sah and Anr. v. Parmeshwar Prasad Sah and **Ors**. MANU/BH/0136/1942 : AIR1942Pat414 . We have no doubt that the ratio of these, decisions represents a correct statement of the legal position. The proviso to Sub- section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order Under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the **Police** Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code. If is relevant to advert to the decision of this Court in Babulal Parate v. State of Maharashtra and **Ors**. MANU/SC/0155/1961 : 1961CriLJ16 where the vires of Section 144 of the Code was challenged. Upholding the provision, this Court observed :

Public order has to be maintained in advance in order to ensure it and, therefore it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order....

17. It was again emphasized :

But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order....

This Court had, therefore, appropriately stressed upon the feature that the provision of Section 144 of the code was intended to meet an emergency. This postulates a situation temporary in character and, therefore, the duration of an order Under Section 144 of the Code could never have been intended to be semi- permanent in character.

18. Similar view was expressed by this Court in Gulam Abbas and **Ors**. v. State of U.P. and **Ors**. [1981] 2 Cr. L.J. 1835 where it was said that "the entire basis of action Under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of

for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity...." Certain observations in Gulam Abbas's decision regarding the nature of the order Under Section 144 of the Code - judicial or executive - to the extent they run counter to the decision of the Constitution Bench in Babulal Parat's case, may require reconsideration but we agree that the nature of the order Under Section 144 of the Code is intended to meet emergent situation. Thus the clear and definite view of this Court is that an order Under Section 144 of the Code is not intended to be either permanent or semi- permanent in character. The consensus of judicial opinion in the High Courts of the country is thus in accord with the view expressed by this Court. It is not necessary on that ground to quash the impugned order of March 1982 as by efflux of time k has already ceased to be effective.

19. It is appropriate to take note of the fact that the impugned order Under Section 144 of the Code did not ban processions or gatherings at public places even by Ananda Margis. The prohibition was with reference to the carrying of daggers, trishuls and skulls. Even performance of tandava dance in public places, which we have held is not an essential part of religious rites to be observed by Ananda Margis, without these, has not been prohibited.

20. The writ petitions have to fail on our finding that performance of tandava dance in procession in the public streets or in gatherings in public places is not an essential religious rite of the followers of Ananda Marga. In the circumstance there will be no order as to costs.

MANU/SC/0200/1980

Back to Section 145 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 474 of 1980

Decided On: 28.07.1980

Rajpati Vs. Bachan and Ors.

Hon'ble Judges/Coram:

A.P. Sen and S. Murtaza Fazal Ali, JJ.

JUDGMENT

S. Murtaza Fazal Ali, J.

1. This appeal by special leave involves a short point of law. Proceedings under Section 145 was started by the Magistrate against the respondents on the basis of a police report. After passing a preliminary order on the 29th July, 1976 (wherein the Magistrate had recorded reasons for his being satisfied that a breach of the peace existed), the Magistrate called upon the parties to file their written statements and then after a full enquiry as provided by Section 145 the Magistrate passed the final order on 17th July, 1978 declaring the appellant to be in possession of the land in dispute. Against this order, the respondents moved the High Court under Section 482 Cr.P.C. for quashing the order of the Magistrate. The High Court found that as there was no clear finding by the Magistrate in the final order that there was an apprehension of breach of the peace, therefore, the final order was bad and the High Court accordingly allowed the petition and remitted the case to the Magistrate.

2. We have heard counsel for the parties and in our opinion the High Court erred in holding that the final order of the Magistrate was vitiated in absence of a finding that breach of the peace existed at the time the order was passed. It is not disputed that in the preliminary order there was a clear finding by the Magistrate that apprehension of breach of the peace did exist which was sufficient to give jurisdiction to the Magistrate to initiate the proceedings. When the parties filed their written statements, they did not state that no dispute between the parties existed but whereas one party said that there was no apprehension of breach from their side, the other side took the stand that there was an apprehension of breach of the peace.

3. Thus, the stand taken by the two parties was contradictory; hence it must be taken for granted that the apprehension of breach of peace continued to exist and it was not a case where it could be said that no dispute existed, as contemplated under Section 145(5) Cr.P.C.

4. After considering the record and evidence produced by the parties, the Magistrate passed the final order in favour of the appellant.

5. The High Court thought that it was absolutely essential for the Magistrate to give a finding that a breach of peace existed even in the final order. It may have been proper if the Magistrate had given a finding on this aspect of the matter also but in the circumstances, it can be safely presumed that apprehension of breach of peace existed and such a finding was implicit in the final order passed by the Magistrate so it was not necessary for the Magistrate to repeat what he had said in the preliminary order in the final order also. Moreover, mere absence of finding by the Magistrate in the final order in the circumstances as mentioned above cannot be such a manifest defect so as to attract the extraordinary jurisdiction of the High Court under Section 482 of Cr.P.C.

6. It is, therefore, manifest that a finding of existence of breach of the peace is not necessary at the time when a final order is passed nor is there any provision in the CrPC requiring such a finding in the final order. Once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceedings unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of Sub- section (5) of Section 145 of the CrPC. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under Sub- section (6) of Section 145. As already indicated the contradictory stands taken by the parties clearly show that there was no question of the dispute having ended so as to lead to cancellation of the order under Sub- section (5) of Section 145 nor was such a case set up by any party before the Magistrate or before the High Court. Further, it is well settled that under Section 145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order, the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. In R.H. Bhutani v. Miss Mani J. Desai and Ors. MANU/SC/0343/1968 : 1969CriLJ13 , this Court pointed out as follows:

The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied on these two conditions, the section requires him to pass a preliminary order under Sub- section (1) and thereafter to make an enquiry under Sub- section, (4) and pass a final order under Sub- section (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under Section 145 is limited to the question to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties....

The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate.

(Emphasisours)

7. In Hari Ram and Ors. v. Banwari Lal and Ors. A.I.R.1967 Punj. 378 it was held that once a Magistrate finds that there is a breach of peace it is not necessary that the dispute should continue to exist at other stages of the proceedings also. In this connection, the High Court observed as follows:

Of course, Magistrate can under Sub- section (1) of Section 145, Criminal Procedure Code, assume jurisdiction only if he is satisfied that at the time of passing the preliminary order a dispute likely to cause a breach of the peace exists concerning any land etc. Once that is done the Magistrate is thereafter expected to call upon the parties concerned in such dispute to attend his court in person or by pleader and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The enquiry, therefore, after the initial satisfaction of the Magistrate and after the assumption of jurisdiction by him, has to be directed only as respects the fact of actual possession. At that time he has not to record a finding again about the existence of a dispute likely to cause a breach of the peace.

(Emphasisours)

8. To the same effect is a decision of the Hyderabad High Court in Ramarao v. Shivram and Ors. A.I.R.1954 Hyd 93 where Srinivasachari J. observed as follows :-

As regards this contention I am of opinion that once the Magistrate has given a finding to the effect that there is apprehension of breach of peace and that he has jurisdiction to take proceedings under Section 145, Cr.P.C., he can continue the proceedings. It is not necessary that at each stage he should be satisfied that there exists an imminent apprehension of breach of peace

(Emphasisours)

9. We find ourselves in complete agreement with the observations made by the Punjab and Hyderabad High Courts, extracted above, which lay down the correct law on the subject.

10. Assuming, however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. It was therefore not correct on the part of the High Court to have interfered with the

order of the Magistrate on a purely technical ground when the aggrieved party had a clear remedy in the civil court.

11. For these reasons therefore, we are satisfied that the order passed by the High Court is legally erroneous and cannot be allowed to stand. The appeal is accordingly allowed, The order of the High Court is set aside and the order of the Magistrate is confirmed.

MANU/SC/0343/1968

Back to Section 145 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 17 of 1968

Decided On: 23.04.1968

R.H. Bhutani Vs. Man J. Desai and Ors.

Hon'ble Judges/Coram:

S.M. Sikri, J.M. Shelat and Vashishtha Bhargava, JJ.

JUDGMENT

J.M. Shelat, J.

1. At all material times respondent 1 had her office premises in Nawab Building, Fort, Bombay, which consisted of two cabins. On July 10, 1964, she entered into an agreement with the appellant permitting him to occupy one of the cabins on leave and licence for a period of eleven months. On June 9, 1965, the agreement was extended for a period of eleven months. The appellant's case was that it was further extended for another eleven months as from May, 10, 1966 and respondent 1 accordingly accepted Rs. 450 as compensation for May 1966. Respondent 1 thereafter demanded higher compensation which he refused to pay and thereupon respondent 1 refused to execute the renewal and threatened to eject him forcibly if he did not vacate. His case further was that in the morning of June 11, 1966 respondent 1 broke open the staple of the cabin, removed the door from its hinges, removed all his belongings lying in the cabin and dumped them in the passage outside. She then handed over possession of the cabin to respondents 2 and 3 purporting to do so under an agreement of licence dated June 1, 1966. When he went to the cabin he found the cabin occupied by respondents 2 and 3. On his asking them to place back his belongings and to restore possession to him, the respondents threatened him with dire consequences. He, therefore, went to the police station but the police refused to take action and only recorded his N. C. complaint. From the police station he and his friend, Mahomed Salim returned to the cabin when, on their demanding possession of the cabin, the respondents attacked them. In the course of that attack, the said Salim received injuries. He and the said Salim once again went to the police station but the police again refused to take action and recorded another N. C. complaint and sent Salim to the hospital for examination. Due to the persistent refusal by the police to help him to get back the cabin, the appellant approached higher authorities in consequence of which the police at last recorded a case of assault against respondent 1. They then arrested respondent 1 but released her on bail. Respondent 1, however, kept some persons near the cabin to prevent the appellant from recovering possession. There was, therefore, every likelihood of a breach of the peace had he gone to the cabin to regain possession. In these circumstances he filed an application before the Additional Chief Presidency Magistrate under Section 145 of the Code of Criminal Procedure.

2. The Magistrate then directed the parties to file affidavits and to adduce such further evidence as they desired. Accordingly, the parties filed affidavits of various persons who had their offices in the same building. The appellant, besides other affidavits, also filed an affidavit of one Nathani, the Manager of his company at whose instance, it was the case of respondent 1, the appellant had agreed to hand over and actually did hand over possession of the cabin in the morning of June 11, 1966. That affidavit, however, did not support respondent 1 but, on the contrary, denied that Nathani had agreed that the appellant would vacate or that the appellant at his instance had agreed to do so.

3. In her written statement, respondent 1 denied that the said licence was renewed a second time in May 1966. Her case was that at the request of the appellant she had permitted him to continue in possession till May 1966 on his promising to vacate by the end of that month, that on June 11, 1966, the appellant vacated the cabin, kept his belongings in the passage and thereupon she permitted respondents 2 and 3 to occupy it as, relying on the appellant's promise that he would vacate by the end of May 1966, she had already entered into an agreement of licence on June 1, 1966 with respondent 3. She denied that any incident, as alleged by the appellant, had occurred on that day or that the appellant or the said Salim was assaulted by her or by respondent 2 or 3. She, therefore, denied that any dispute existed on that day or that there was any likelihood of a breach of the peace. Respondents 2 and 3 also filed their written statements on the lines taken by respondent 1. But after filing them, they did not participate any more in the proceedings as they had since then vacated the said cabin. Possession, therefore, of the cabin since then remained with respondent 1. Respondent 1 in the meantime filed a suit in the City Civil Court and took out a notice of motion for restraining the appellant from interfering with her possession of the cabin. The Court dismissed the notice of motion refusing to rely on the said agreement.

4. In the proceedings before the Magistrate the main question was whether the appellant was in actual possession on June 11, 1966 and whether he was forcibly and wrongfully dispossessed by respondent 1 or whether he had vacated and surrendered the cabin to respondent 1. After considering the affidavits and the evidence led by the parties, the Magistrate reached the following findings: (1) that respondent 1 started harassing the appellant from the beginning of June 1966 and gave threats to forcibly dispossess him if he did not vacate: (2) that the appellant's version that the respondent had forcibly and wrongfully taken possession of the cabin in the morning of June 11, 1966 was true and (3) that when the appellant and the said Salim went to the cabin, the respondents manhandled them as a result of which Salim received injuries.

5. On these findings he held that the appellant was in actual possession on June 11, 1966 and that under the second proviso to Section 145 (4), though he had been dispossessed on June 11, he must be deemed to be in possession on June 20, 1966 when the Magistrate passed his preliminary order. By his final order dated June 22, 1967 passed under Sub- section (6), the Magistrate directed restoration of possession to the appellant till he would be evicted in due course of law and prohibited the respondents from interfering with his possession till then.

6. In the revision before the High Court, the respondents raised two contentions: (1) that the Magistrate, in entertaining the said application and passing the said preliminary order, misconceived the scope of proceedings under Section 145, and (2) that he had no jurisdiction to pass the said preliminary order as in the events that had happened there was no existing dispute likely to result in a breach of the peace. The High Court accepted these contentions and set aside the order of the Magistrate. In doing so, it observed that the object of Section 145 was to preserve peace and to provide a speedy remedy against a likely breach of peace where there is an existing dispute regarding possession of an immovable property until such dispute is adjudicated upon by a proper tribunal. That section, therefore can be invoked where these two conditions exist, namely an existing dispute and an apprehension of breach of peace. The Magistrate, therefore, had to be satisfied as to the existence of these two conditions when he passed the preliminary order. The High Court then observed that assuming that the appellant was forcibly and wrongfully dispossessed and the said Salim was assaulted by respondent 1 and her men, it could not even then necessarily mean that there was an existing dispute relating to possession of the cabin which was likely to cause breach of peace on June 20, 1966 when the Magistrate passed his preliminary order. The acts of respondent 1 might constitute an offence for which the appellant had filed a complaint under Section 341 of the Penal Code and the police had arrested respondent 1 and released her on bail. In the light of these facts the Magistrate ought to have held that on that day there did not any longer exist any dispute regarding possession of the said cabin which was likely to lead to a breach of the peace. The High Court, further, observed that the preliminary order did not also record the reasons for the Magistrate's satisfaction as to the two conditions and that all that it stated was that on the facts stated in the said application he was satisfied that there was a dispute which was likely to cause breach of the peace. The High Court also observed that all that the application showed was that there was forcible dispossession and an attempted assault; that from these two facts it was difficult to see how, without any further enquiry, the Magistrate could come to the conclusion that there was likelihood of breach of peace unless it was assumed that in every case of a dispute over possession of an immovable property and forcible dispossession there would be continuous possibility of breach of peace. The High Court complained that the Magistrate did not call for a police report and simply relied on the bare allegations of an interested party. On this reasoning it held that the Magistrate had misconceived the scope of proceedings under Section 145 and passed the preliminary order as if it was a process issued by him in a non- cognisable case. The High Court also noted that respondent 1 had placed respondent 3 in possession, that respondent 3 had remained in possession for nearly a year by the time the Magistrate passed his final order, that the final order would, therefore, affect his vested rights, and that this fact coupled with the fact of the appellant's complaint under Section 341 of the Penal Code on June 13, 1966 ought to have been considered by the Magistrate before passing the final order. As aforesaid, the High Court set aside the Magistrate's order whereupon the appellant obtained special leave and filed this appeal challenging the correctness of the High Court's order.

7. Before proceeding further, we may mention that respondents 2 and 3 had vacated the premises long before the Magistrate passed the final order. There was, therefore, no question of the Magistrate having to consider the question of their having been in possession for about a year or their having any vested rights under the agreement dated June 1, 1966, It may also be recalled that the City Civil Court had refused to rely on the said agreement and to pass an interim injunction restraining the appellant from disturbing the possession of respondent 1.

8. The object of Section 145, no doubt is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined by a competent court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under Sub- section (1) and thereafter to make an enquiry under Sub- section (4) and pass a final order under Sub- section (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under Section 145 is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties.

Under the second proviso, the party who is found to have been forcibly and wrongfully dispossessed within two mouths next preceding the date of the preliminary order may for the purpose of the enquiry be deemed to have been in possession on the date of that order. The opposite party may of course prove that dispossession took place more than two months next preceding the date of that order and in that case the Magistrate would have to cancel his preliminary order. On the other hand, if he is satisfied that dispossession was both forcible and wrongful and took place within the prescribed period, the party dispossessed would be deemed to be in actual possession on the date of the preliminary order and the Magistrate would then proceed to make his final order directing the dispossessor to restore possession and prohibit him from interfering with that possession until the applicant is evicted in due course of law. This is broadly the scheme of Section 145.

9. The satisfaction under Sub- section (1) is of the Magistrate. The question whether on the materials before him, he should initiate proceedings or not is, therefore, in his discretion which, no doubt, has to be exercised in accordance with the well recognised rules of law in that behalf. No hard and fast rule can, therefore, be laid down as to the sufficiency of material for his satisfaction. The language of the sub- section is clear and unambiguous that he can arrive at his satisfaction both from the police report or "from other information" which must include an application by the party dispossessed. The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate.

10. The question is whether the preliminary order passed by the Magistrate was in breach of Section 145 (1), that is, in the absence of either of the two conditions precedent. One of the grounds on which the High Court interfered was that the Magistrate failed to record in his preliminary order the reasons for his satisfaction. The section, no doubt, requires him to record reasons. The Magistrate has expressed his satisfaction on the basis of the facts set out in the application before him and after he had examined the appellant on oath. That means that those fads were prima facie sufficient and were the reasons leading to his satisfaction.

11. The other reason which, according to the High Court, vitiated the order was that the Magistrate acted only on the allegations in the appellant's application without making any further enquiry and issued the order as if he was issuing a process in a N. C. case. But counsel for the respondents conceded that before passing the order the Magistrate had examined the appellant on oath and it was then only that he made the order recording his satisfaction. But apart from the allegations in the application as to his forcible and wrongful dispossession and assault, there was the fact that on June 11, 1966 the appellant had gone twice to the police station, requested the police to take action and had lodged two N.C. complaints. This material being before the Magistrate, it was hardly fair to blame the Magistrate that he had passed his preliminary order lightly or without being satisfied as to the existence of the two conditions required by the sub-section.

12. Was the High Court next justified in observing that the Magistrate ought to have got a police report on the allegations made in the application before he passed his said order? Such a view has been taken in some decisions. In Emperor v. Phutanja, 25 Cri LJ 1109: MANU/NA/0062/1924 : AIR 1925 Nag 142 the view taken was that it was a safe general rule for a Magistrate to refuse to take action under Section 145 except on a police report and that the absence of such a report is almost conclusive indication of the absence of any likelihood of breach of peace. A similar opinion has also been expressed in Ganesh v. Venkateswara, 1964 2 Cri LJ 100 where, relying on Raja of Karvetnagar v. Sowcar Lodd Govind Doss, MANU/TN/0106/1906 : ILR (1906) 29 Mad 561, the Mysore High Court observed that law and order being the concern of the police it is but natural that the Magistrate should either be moved by the police or if moved by a private party he should call for a police report regarding the likelihood of breach of peace. But the High Court of Madras in the case of Raja of Karvetnagar, MANU/TN/0106/1906 : ILR (1906) 29 Mad 561 , did not lay down any such proposition but merely sounded a note of caution that in the absence of a police report the statements of an interested party should not be relied on without caution and without corroboration. The proposition that the Magistrate before proceeding under Section 145 (1) must, as a rule, call for a police report where be is moved by a private party or that the absence of a police report is a sure indication of the absence of possibility of breach of peace is not warranted by the clear language of the section which permits the Magistrate initiate proceedings either on the police report or "on other information". The words "other information" are wide enough to include an application by a private party. The jurisdiction under Section 145 being, no doubt, of an emergency nature, the Magistrate must act with caution but that does not mean that where on an application by one of the parties to the dispute he is satisfied that the requirements of the section are existent, he cannot initiate proceedings without a police report. The view taken in the aforesaid two decisions unnecessarily and without any warrant from the language of Sub- section (1) limits the discretion of the Magistrate and renders the words "other information" either superfluous or qualifies them to mean other information verified by the police. In our view, once the Magistrate, having examined the applicant on oath, was satisfied that his application disclosed the existence of the dispute and the likelihood of breach of peace, there was no bar against his acting under Section 145 (1).

13. The next ground for the High Court's interference was that assuming that the appellant was forcibly and wrongfully dispossessed and the said Salim was assaulted, the said dispossession was completed, a complaint of assault was lodged and the police had already taken action before

the preliminary order was passed on June 20, 1966. Therefore, it was said, there was no longer any dispute on the date of the order likely to lead to breach of peace and consequently the order did not corn- ply with the requirements of Section 145 (1) and was without jurisdiction. This reasoning would mean that if a party takes the law into his hands and deprives forcibly and wrongfully the other party of his possession and completes his act of dispossession, the party so dispossessed cannot have the benefit of Section 145, as by the time he files his application and the Magistrate passes his order, the dispossession would be complete and, therefore, there would be no existing dispute likely to cause breach of peace. Such a construction of Section 145, in our view, is not correct for it does not take into consideration the second proviso to subsection (4) which was introduced precisely to meet such cases. The Magistrate has first to decide who is in actual possession at the date of his preliminary order. If, however, the party in de facto possession is found to have obtained possession by forcibly and wrongfully dispossessing the other party within two months next preceding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the dispossessor from interfering with that possession until eviction of that person in due course of law. The proviso is founded on the principle that forcible and wrongful dispossession is not to be recognised under the criminal law. So that it is not possible to say that such an act of dispossession was completed before the date of the order. To say otherwise would mean that if a party who is forcibly and wrongfully dispossessed does not in retaliation take the law into his hands, he should be at disadvantage and cannot have the benefit of Section 145.

14. The word "dispossessed" in the second proviso means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise than in due course of law, it would be a case of both forcible and wrongful dispossession: [cf. Edwick v. Hawkes, (1881) 18 Ch D 199 and Jiba v. Chandulal, MANU/MH/0149/1925 : AIR 1926 Bom 91]. Sub- section (6) of Section 145 in such a case permits the Magistrate to direct restoration of possession with the legal effect that is valid until eviction in due course of law. In AIR 1926 Bom 9 the High Court of Bombay held that it would be unfair to allow the other party the advantages of his forcible and wrongful possession and the fact that time has elapsed since such dispossession and that the dispossessor has since then been in possession or has filed a suit for a declaration of title and for injunction restraining disturbance of his possession is no ground for the Magistrate to refuse to pass an order for restoration of possession once he is satisfied that the dispossessed party was in actual or deemed possession under the second proviso. Similarly, in A.N. Shah v. Nageswara Rao, MANU/TN/0094/1946 : AIR 1947 Mad 133, it was held that merely because there has been no further violence after one of the parties had wrongfully and forcibly dispossessed the other it cannot be said that there cannot be breach of peace and that, therefore, proceedings under Section 145 should be dropped. It may be that a party may not take the law in his hands in reply to the other party forcibly and wrongfully dispossessing him. That does not mean that he is not to have the benefit of the remedy under Section 145. The second proviso to subsection (4) and Sub- section (6) contemplate not a fugitive act of trespass or interference with the possession of the applicant, the dispossession there referred to is one that amounts to a completed act of forcible and wrongful driving out a party from his possession: [of. Subarna Sunami v. Kartika Kudal, MANU/OR/0054/1954 : AIR1954Ori183]. It is thus fairly clear that the fact that dispossession of the appellant was a completed act and the appellant had filed a criminal complaint and the police

had taken action thereunder do not mean that the Magistrate could not proceed under Section 145 and give directions permissible under Sub- section (6).

15. In our view, the High Court erred in holding that merely because dispossession of the appellant was complete before June 20, 1966, there was no dispute existing on that day which was likely to lead to breach of peace or that the Magistrate was, therefore, prevented from passing his preliminary order and proceeding thence to continue the enquiry and pass his final order. In our view, reading Section 145 as a whole, it is clear that even though respondent 1 had taken over possession of the said cabin, since that incident took place within the prescribed period of two months next before the date of the preliminary order, the appellant was deemed to be in possession on the date of that order and the Magistrate was competent to pass the final order directing restoration of possession and restraining respondent 1 from interfering with that possession until the appellant's eviction in due course of law.

16. We, therefore, allow the appeal, set aside the High Court's order and restore that of the Trial Magistrate.

MANU/SC/0173/1979

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 10 of 1979

Decided On: 13.09.1979

Mathuralal Vs. Bhanwarlal and Ors.

Back to Section 145 of Code of Criminal Procedure, 1973

Back to Section 146 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram

D.A. Desai and O. Chinnappa Reddy, JJ.

JUDGMENT

O. Chinnappa Reddy, J.

1. On the report of the Station House Officer, Manak Chowk, Ratlam, that there was a dispute between Mathuralal and Bhanwarlal concerning a house situated in Kambalpatti, Ghas Bazar, Ratlam, which was likely to cause a breach of the peace, the Sub Divisional Magistrate, Ratlam, passed a preliminary order under Section 145(1) of the CrPC 1973, on 1st March, 1978. On 2nd March, 1978, the learned Magistrate attached the subject of dispute under Section 145(1) Criminal Procedure Code considering the case to be one of emergency. Thereafter, when the learned Magistrate wanted to proceed with the enquiry under Section 145 Criminal Procedure Code, an objection was raised by Mathuralal that such an enquiry was incompetent once the subject of the dispute had been attached under Section 146 Criminal Procedure Code. The objection was overruled by the learned Magistrate. Successive Revisions taken before the Sessions Judge and the High Court having borne no fruit, Mathuralat has filed the present appeal by special leave of this Court. The High Court, we may mention here, thought that the matter was concluded against the appellant by the decision of this Court in Chandu Naik and Ors. v. Sitaram B. Naik and Anr. MANU/SC/0382/1977 : 1978CriLJ356

2. Shri Mukherji, learned Counsel for the appellant urged that under Section 146 of the Criminal Procedure Code of 1973, an attachment of the subject of dispute could be effected in three situations : (i) if the Magistrate at any time after making the order under Section 145(1) considered the case to be one of emergency, or (ii) if he decided that none of the parties was then in such possession as was referred to in Section 145, or (iii) if he was unable to satisfy himself as to which of them was then in such possession of the subject of dispute. The attachment so effected, regardless of the situation consequent upon which it was effected, was to subsist until a competent Court determined the rights of the parties with regard to the person entitled to possession. This, he urged, clearly indicated that after an attachment was effected it was the Civil Court and not the Magistrate that was to have further jurisdiction in the matter. He contrasted the provisions of Section 146(1) of the present code with the provisions of Section 146(1) and the third proviso to Section 145(4) of the Criminal Procedure Code of 1898 as amended by Act 26 of 1955. He drew our attention to the circumstance that the third proviso to Section 145(4) of the old Code empowered the Magistrate, if he considered the case one of emergency, to attach the subject of dispute pending his decision under that Section, while Section 146(1) of the previous Code

empowered the Magistrate to attach the subject of dispute if the Magistrate was of the opinion that none of the parties was then in possession or if the Magistrate was unable to decide as to which of them was in such possession and thereafter to refer to the Civil Court for decision the question whether any and which of the parties was in possession of the subject of dispute. Therefore, he said, under the previous Code, in the case of attachment because of emergency the Magistrate was himself competent to decide the question of possession and in the other two cases he was to refer the dispute to the Civil Court, whereas, under the present Code, in all the three situations the Magistrate was to leave the matter for adjudication by the Civil Court. Thus, the submission of Shri Mukherji was that while under the previous Code it was permissible to attach the subject of dispute pending enquiry by the Magistrate as contemplated by Section 145, such attachment pending decision by the Magistrate was not permissible under the provisions of the present Code. According to him so soon as the Magistrate effected an attachment he had nothing further to do except await the decision or the directions of the Civil Court.

3. Though at first blush there appeared to be force in the submissions of Shri Mukherji, a closer scrutiny of the provisions of Sections 145 and 146 exposes their unsoundness. It may perhaps be desirable, at this stage to extract the provisions of Sections 145 and 146, to the extent that they are relevant, in the Code of 1898 before it was amended in 1955, in the Code of 1898 after it was amended in 1955 and in the Code, of 1973 :

(Their Lordships then quoted Secs. 145 and 146 as they stood prior to amendment in 1955; after the amendment of 1955 and of the Code of 1973 and proceeded on to observe- - Editor)

4. Quite obviously, Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace because of a dispute concerning any land or water or their boundaries. If Section 146 is torn out of its setting and read independently of Section 145, it is capable of being construed to mean that once an attachment is effected in any of the three situations mentioned therein, the dispute can only be resolved by a competent Court and not by the Magistrate effecting the attachment. But Section 146 cannot be so separated from Section 145. It can only be read in the context of Section 145. Contextual construction must surely prevail over isolationist construction. Otherwise, it may mislead. That is one of the first principles of construction. Let us therefore look at Section 145 and consider Section 146 in that context. Section 145 contemplates, first, the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists concerning any land or water or their boundaries, and, next, the issuance of an order, known to lawyers practising in the Criminal Courts as a preliminary order, stating the grounds of his satisfaction and requiring the parties concerned to attend his Court and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute. A preliminary order is considered so basic to a proceeding under Section 145 that a failure to draw up a preliminary order has been held by several High Courts to vitiate all the subsequent proceedings. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Sections 145 and 146. In fact, the first of the situations in which an attachment may be effected under Section 146 of the 1973 Code has to be "at any time after making the order under Sub-section (1) of Section 145" while the other two situations have, necessarily, to be at the final stage of the proceeding initiated by the preliminary order. Now, the preliminary order is required to enjoin the parties not only to appear before the Magistrate on a specified date but also to put in their written statements. Sub- section (3) of Section 145 prescribes the mode of service of the preliminary order on the parties. Sub- section (4) casts a duty on the Magistrate to peruse the

written statements of the parties, to receive the evidence adduced by them, to take further evidence if necessary and, if possible, to decide which of the parties was in possession on the date of the preliminary order. If the Magistrate decides that one of the parties was in possession he is to make a final order in the manner provided by Sub- section (6). Provision for the two situations where the Magistrate is unable to decide which of the parties was in possession of where he is of the view that neither of them was in possession is made in Section 146 under which he may attach the subject of dispute until the determination of the rights of parties by a competent Court. The scheme of Sections 145 and 146 is that the Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements. Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the preliminary order. On the other hand if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such possession he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations he attaches the property. Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties to go to the Civil Court. Proceeding may however be stopped at any time if one or other of the parties satisfies the magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the magistrate disappears. The magistrate then cancels the preliminary order. This is provided by Section 145 Sub- section (5). Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course. Now, in a case of emergency, a magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There is no express stipulation in Section 146 that the jurisdiction of the magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145 Sub- section 4 is against any such implication. Suppose a magistrate draws up a preliminary order under Section 145(1) and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

5. Let us examine if a comparative study of the provisions as they stood, before 1955 and after 1955 under the old Code and as they now stand under the 1973 Code lead us to a conclusion other than that indicated in the preceding paragraph. From the comparative table of the provisions, it is seen that there were two principal changes made by the 1955 amendment. The first was that

the preliminary order was also to require the parties to put in documents and the affidavits of such persons as they intended to rely upon in support of their claims. The magistrate was to decide the case on a consideration of the written statements the documents and the affidavits put in by the parties and after hearing them. The position earlier was that the parties had the right to adduce evidence and the magistrate could take further evidence if he so desired. The second change was that in the two situations where he was unable to satisfy himself as to which of the parties was in possession or where he decided that none of the parties was in possession, after attaching the property, the magistrate was himself to refer the dispute to the Civil Court instead of leaving it to the parties to go to the Civil Court. He was to obtain the finding of the Civil Court and thereafter conclude the proceeding under Section 145 Criminal Procedure Code in conformity with the decision of the Civil Court. The revised procedure introduced by the 1955 amendment was not found to work satisfactorily and, therefore, it was, apparently, thought desirable to revert to the old procedure. The provisions of Sections 145 and 146 of the 1973 Code are substantially the same as the corresponding provisions before the 1955 amendment. The only noticeable change is that the second proviso to Section 145(4) (as it stood before the 1955 amendment) has now been transposed to Section 146 but without the words "pending his decision under this Section" and with the words "at any time after making the order under Section 145(1)" super- added. The change, clearly, is in the interests of convenient draftsmanship. All situations in which an attachment may be made are now mentioned together in Section 146. The words "pending his decision under this section" have apparently been omitted as unnecessary since Section 145 provides how the proceeding initiated by a preliminary order must proceed and end and therefore an attachment made at any time after making under Section 145(1)' can only continue until the termination of the proceeding. At the termination of the proceeding, if he finds one of the parties was in possession as stipulated, the magistrate must make an order as provided in Section 145(6) and withdraw the attachment as provided in Section 146(1) since there can be no dispute likely to cause a breach of the peace once an order in terms of Section 145(6) is made.

6. In our view, it is wrong to hold that the magistrate's Jurisdiction ends as soon as an attachment is made on the ground of emergency. A large number of cases decided by several High Courts some taking one view and the other a different view were read to us, We do not consider it necessary to refer to them except to acknowledge that we derived considerable assistance from the judgment of Lahiri, J., in Kshetra Mohan Sarkar v. Paran Chandra Mandal(l), in arriving at our conclusion. We may also add that the question now at issue did not arise for consideration in Chandu Naik and Ors. v. Sitaram B. Naik and Anr. (supra). What was decided there was that a proceeding under Section 145 Criminal Procedure Code did not abate because of Section 8 of the Maharashtra Vacant Land (Prohibition of unauthorised Occupation and Summary Eviction) Act, 1975. In the result the appeal is dismissed.

MANU/PH/0338/1980

IN THE HIGH COURT OF PUNJAB AND HARYANA

FULL BENCH

Decided On: 23.05.1980

Joginder Singh Vs. The State of Punjab

Back to Section 154 of Code of Criminal Procedure, 1973

Back to Section 360 of Code of Criminal Procedure, 1973

Back to Section 361 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

S.S. Sandhawalia, C.J., Satish Chandra Mittal and Ajit Singh Bains, JJ.

JUDGMENT

Authored By : S.S. Sandhawalia, Satish Chandra Mittal, Ajit Singh Bains

S.S. Sandhawalia, C. J.

1. Whether the prescription of a minimum sentence of imprisonment in Section 61(1)(c) of the Punjab Excise Act, 1914 would operate as an absolute bar against the application of Sections 360 and 361 of the Criminal Procedure Code, 1973 or of Sections 4 and 6 of the Probation of Offenders Act, 1958 ?- is the somewhat meaningful question which is before the Full Bench in two references, which would be disposed of by this judgment.

2. It is manifest from the above that the question here is pristinely legal and the individual facts of the two cases before us would be of no great relevance. It would, therefore, suffice to mention that in Joginder Singh's case, the petitioner was convicted under Section 61(1)(c) of the Punjab Excise Act, 1914 for having been found in possession of a working still and sentenced to the statutory minimum sentence of one year's rigorous imprisonment and a fine of Rs. 1000/- . On appeal, the learned Sessions Judge upheld the conviction and the sentence. Apparently finding no sub- stance on the merits of the case, the admission of the revision petition was expressly confined to the issue of sentence only by the learned Judge admitting the same. The question posed at the outset was first raised before J.V. Gupta, J. who referred it for decision to a Division Bench which in turn has directed it to be placed before a Full Bench, in view of the earlier reference in Khazan Singh's case.

3. In Khazan Singh's case, the petitioner was convicted under Section 61(1)(c) of the Punjab Excise Act and sentenced to l1/2 year's rigorous imprisonment and a fine of Rs. 5,000/- . On appeal, the learned Additional Sessions Judge, Hoshiarpur dismissed the case on merits, but reduced the

sentence to the statutory minimum of one year's rigorous imprisonment and Rs. 5,000/- only as fine. At the motion stage, C.S. Tiwana, J., whilst admitting the petition, confined it expressly to the question of sentence in the context of the issue, whether the benefit of Section 360 of the Criminal Procedure Code, 1973 could be granted to the petitioner.

4. Perhaps, at the very outset, it may be pointedly noticed that within this jurisdiction, judicial opinion has so far been uniform that the mere prescription of a minimum sentence under Section 61(1)(c) of the Punjab Excise Act, 1914, does not totally bar the discretion of the court to grant probation to the convict either under the Criminal Procedure Code itself or expressly under the relevant sections of the Probation of Offenders Act, 1958. In the State of Haryana v. Ramji Lal Devi Sahai MANU/PH/0249/1971, the Division Bench after a lucid examination of the question held that in an appropriate case, it was open to the court to take resort to the provisions of Section 4 of the Probation of Offenders Act 1958, even with regard to a conviction under Section 61(1)(c) of the Punjab Excise Act, 1914. Reliance therein was specifically placed on an early unreported Division Bench judgment of this Court in Prita v. State, Criminal Revn. No. 754 of 1962 decided on 23- 10- 1963 wherein also a Division Bench had ruled that there was no legal bar to the application of Section 562 of the old Criminal Procedure Code, to a case in which conviction had been recorded under Section 61(1)(c) of the Punjab Excise Act, 1914. There is, however, no gainsaying the fact that in the exhaustive reference order in Khazan Singh's case, C.S. Tiwana, J. has tended to take a view contrary to the aforesaid decisions and has sought to project the matter from a different angle by reference to Section 4 of the Criminal Procedure Code, 1973, placing particular emphasis on Sub- section (2) thereof. This aspect of the case would be adverted to in detail later.

5. Before entering into the examination of the question before us, I may first dispose of an issue on which there was little or no controversy. On behalf of the petitioners, it was contended that the provisions of Sections 300 and 361 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code') are mandatory in nature. This appears to us as too well settled to deserve any elaboration. In Surendra Kumar v. State of Rajasthan MANU/SC/0271/1979 : 1979CriLJ907 their lordships assumed Section 360 of the Code to be mandatory in nature and gave the benefit thereof to the appellant in a short judgment. The same view has been reiterated in Bishnu Deo Shaw v. State of West Bengal MANU/SC/0089/1979 : 1979CriLJ841 . Lastly, apparently on a concession, Bhagwati, J. sitting singly seems to have taken the same view in Nirmal Singh v. State of PunjabMANU/SC/0680/1977 : (1977) 79 PLR 580(SC).

6. Apart from precedent, it deserves notice that Section 361 of the Code prescribes that where in any case the court could have dealt with an accused person under Section 360 of the Code, but has not done so, it shall record in its judgment special reasons for not having done so, which again would be a pointer to' the mandatory nature of the provision. I would, therefore, hold the provisions of Section 360 of the Code are mandatory in nature.

7. Having held so, one may proceed to examine the matter with reference to the language of Section 360 of the Code itself. The argument that the prescription of a minimum sentence of imprisonment would ipso facto exclude the applicability of this Section, cannot easily hold water. It deserves highlighting that the provisions of Section 360 of the Code in itself laid down the limitation within which it is to operate. It is attracted as regards persons above 21 years of age only when the conviction is for an offence punishable with fine only or with imprisonment for a term of seven years or less. As regards persons below 21 years of age or any woman, the provision is a little more liberal, and can be applied even for conviction of an offence not punishable with death or imprisonment for life, if no previous conviction is proved against the offender. It would, therefore, be evident that Section 360 of the Code itself refers only to the maximum sentences provided for the offence for which an accused person may be convicted with regard to its applicability. Its provisions do not lay down anywhere that in the case of the prescription of minimum sentence, Section 360 of the Code would not be applicable. It may, therefore, be inapt to impose such a bar by a process of interpretation, when the provisions of the section whilst prescribing its applicability, have laid down no such limitation.

8. The aforesaid argument is further strengthened when reference is made to the recent insertion of Section 20AA of the Prevention of Food Adulteration Act, 1954. It deserves recalling that under Section 16 of the said Act, a minimum sentence had been provided since long. This was apparently never construed by the courts as a legal bar to the application of either the Probation of Offenders- Act or of Section 360 of the Code. Therefore, it was only by an express intendment that a legal bar was created by virtue of Section 20AA of the Prevention of Food Adulteration Act, 1954, which was enacted in 1976. This is in the following terms:

20AA. Application of the Probation of Offenders Act, 1958 and Section 360 of the Code of Criminal Procedure, 1973.- Nothing contained in the Probation of Offenders Act, 1958 (20 of 1958), or Section 360 of the Code of Criminal Procedure Code, 1973 (2 of 1974) shall apply to a person convicted of an offence under this Act unless that person is under eighteen years of age.

It would follow by necessary implication that before the enactment of the aforesaid provision inevitably both Section 360 of the Code and the Probation of Offenders Act, 1958, were attracted to offences under Section 16 despite the fact that it prescribed a minimum sentence therefor.

9. Reference may again be made to Section 18 of the Probation of Offenders Act which is in the following terms:

Saving of operation of certain enactments- Nothing in this Act shall affect the provisions of Section 31 of the Reformatory Schools Act, 1887, or Sub- section (2) of Section 5 of the Prevention of Corruption Act, 1947, or the Suppression of Immoral Traffic in Women and Girls Act, 1956, or of any law in force in any State relating to juvenile offenders or borstal schools.

It is evident from the above that specific mention is made herein of Sub- section (2) of Section 5 of the Prevention of Corruption Act, 1947. For facility of reference this may also be set down:

5. "Criminal misconduct in discharge of official duty.-

(1) A public servant is said to commit the offence of criminal misconduct-

x x x x x x x x x

(2) Any public servant who commits criminal misconduct (* * *), shall be punishable with imprisonment for a term which shall not be less then one year but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less then one year.

x x x x x x x x x

Plainly this provision provides for a minimum sentence which can be deviated from only for special reasons. Now if the legislature had either assumed or intended that probationary provisions are not to be at all applied to cases where a minimum sentence of imprisonment is prescribed, there would be no rationale in specifying Section 5(2) of the Prevention of Corruption Act, 1947 in Section 18 of the Probation of Offenders Act, 1958. There is no dearth of statutory provisions which now provide for minimum sentences of imprisonment. The fact that out of all of them, Section 5(2) of the Prevention of Corruption Act, 1947 was incorporated in Section 18 of the Probation of Offenders Act, 1958, would clearly indicate that as regards other offences for which the minimum sentence is prescribed, the provisions of the Probation of Offenders Act can possibly be invoked. It follows that if one mere prescription of a minimum sentence alone were to automatically exclude the probationary provisions, then no express specification of Section 5(2) of the Prevention of Corruption Act, 1947 was necessary in Section 18 of the Probation of Offenders Act, 1958.

10. Now apart from rationale and statutory provisions, it appears to me that the issue before us is so completely covered by way of analogy by the binding precedents of the final Court that it would preclude any further elaboration Undoubtedly, Section 16 of the Prevention of Food Adulteration Act, 1954 again provides for a minimum sentence of imprisonment. Equally, undeniable it is, that this statute is a Special Act which does not in itself provide for the procedure of criminal trials for offences committed thereunder and Section 4(2) of the Code of Criminal Procedure, 1973 is plainly applicable to it. The position is identical as regards Section 61(1)(c) of the Punjab Excise Act, 1914. This again provides a minimum sentence and the Excise Act is a special statute not prescribing the procedure for trials thereunder and is squarely within the ambit of Section 4(2) of the Code of Criminal Procedure, 1973 with regard thereto. Therefore, it is plain that the position as regards offences under Section 16 of the Prevention of Food Adulteration Act, 1954 and Section 61(1)(c) of the Punjab Excise Act, 1914, is one of total identity. This being so, the issue arose virtually in similar analogous terms before their lordships under Section 16 of the Prevention of Food Adulteration Act, 1954. In Isher Dass v. State of Punjab MANU/SC/0136/1972 : 1972CriLJ874 , Khanna, J. speaking for the Bench posed the question in the following terms:

The question which arises for determination is whether despite the fact that a minimum sentence of imprisonment for a term of six months and a fine of rupees one thousand has been prescribed by the legislature for a person found guilty of the offence under the Prevention of Food Adulteration Act, the Court can resort to the provisions of the Probation of Offenders Act....

And, after a detailed discussion on principle and the relevant statutory provisions, returned the following answer:

"The provisions of Probation of Offenders Act, in our opinion, point to the conclusion that their operation is not excluded in the case of persons found guilty of offences under the Prevention of Food Adulteration Act. Assuming that there was reasonable doubt or ambiguity, the principle to be applied in construing a penal act is that such doubt or ambiguity should be resolved in favour of the person who would be liable to the penalty (see Maxwell on Interpretation of Statutes P. 239 (12th Edition). It has also to be borne in mind that the Probation of Offenders Act was enacted in 1958 sub- sequent to the enactment in 1954 of the Prevention of Food Adulteration Act. As the legislature enacted the Probation of Offenders Act despite the existence on the statute book of the Prevention of Food Adulteration Act, the operation of the provisions of Probation of Offenders Act cannot be whittled down or circumscribed because of the provisions of the earlier enactment, viz, Prevention of Food Adulteration Act. Indeed as mentioned earlier, the non obstante clause in Section 4 of the Probation of Offenders Act is a clear manifestation of the intention of the legislature that the provisions of the Probation of Offenders Act would have effect notwithstanding any other law for the time being in force..." In the light of the aforesaid observations, it may perhaps also be noticed that both the provisions of Sections 360 and 361 of the Criminal Procedure Code, 1973 and the Probation of Offenders Act were enacted long after the Punjab Excise Act. 1914 and the relevant amendments thereto.

11. It would inevitably, follow from the above that in view of the aforementioned precedent of the final Court, the provisions of Sections 4 and 6 of the Probation of Offenders Act would in strictness be applicable to offence under Section 61(1)(c) of the Punjab Excise Act, 1914 as well. Once that is so, one fails to see as to how the position under Sections 360 and 361 of the Criminal Procedure Code 1973 can in any way be different and as to why these would not also be applicable within the limitations prescribed thereunder;-

12. As already stands noticed earlier, the position within this Court again is not different. A bare look at Section 562 of the old Criminal Procedure Code, 1898 and the provisions of Section 360 of the new Code would make it manifest that the two provisions, if not in pari materia, are practically the same. In Prita v. The State, Cri. Revn. No. 754 of 1962 decided on 23- 10- 1963 (Punj.) the question was raised before the Division Bench that there was a legal bar to the application of Section 562 of the old Code of Criminal Procedure, 1898 to a case in which conviction had been recorded under Section 61(1)(c) of the Punjab Excise Act, 1914, because of the prescription of a minimum sentence therein. Repelling this contention, the Bench held as follows:

The answer to the legal point referred to the Bench, therefore, is that there is no legal bar to the application of Section 562 of the Code to a case in which conviction has been registered under Section 61(1)(c) of the Punjab Excise Act....

An analogous, if not identical issue was again raised before the Division Bench in State of Haryana v. Ramji Lal Devi SahaiMANU/PH/0249/1971, that the provisions of Section 4 of the Probation of Offenders Act could not be applied to a conviction under Section 61(1)(c) of the Punjab Excise Act, 1914 in view of the prescription of a minimum sentence therein as also because of Part III Chapter XXI, Volume III of the Rules and Orders of the Punjab High Court. Negativing the argument, it was concluded as follows:

For the reasons recorded above we hold that, in an appropriate case, it is, open to the Court to take resort to the provisions of Section 4 of the Probation of Offenders Act, 1958 and keep in abeyance the imposition of punishment envisaged under Section 61(1)(c) of the Punjab Excise Act, 1914....

It may be pointedly noticed that not a hint of criticism was offered on behalf of the respondent-State to the correctness of the aforesaid judgments of this Court. We are inclined to unreservedly affirm their ratio.

13. Even though, there is an unbroken line of precedent without a hint of dissent on the point, it nevertheless becomes necessary to examine the view projected by C.S. Tiwana, J in his detailed order of reference in Khazan Singh's case (supra). The tenor of the same would indicate that the learned Judge is inclined to take a contrary view and has presented the issue in a refreshing manner from an altogether different angle. Primary reliance has been placed therein on Section 4(2) of the Code of Criminal Procedure, 1973, which may be quoted for facility of reference:

(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." It would be evident from the above that the Code of Criminal Procedure would be generally attracted to the investigation and trial of offences under the special statutes including the Punjab Excise Act, 1914, but subject to the provisions of the said Act. However, no special procedural provisions have been laid therein. Holding that the imposition of sentence was part of the trial, the learned Judge seems to opine that the provision of sentence under Section 61(1)(c) of the Punjab Excise Act, 1914 was a special procedural provision which would exclude or override Sections 360 and 361 of the Criminal Procedure Code, 1973.

14. Apparently, to escape the ambit of the aforesaid reference order (Khazan Singh's case), Mr. H.S. Brar, learned Counsel for the petitioner had attempted to urge that the imposition of a sentence was not a part of a trial at all which according to him stands concluded by the rendering of a judgment of conviction or acquittal. A reference was made by him to Sections 435(2), 353 and 437(7) of the Criminal Procedure Code, 1973, for seeking some sketchy support for the aforesaid contention. Counsel also fell back on a few passing observations in Public Prosecutor v. Chockalinga MANU/TN/0159/1928made in the context of the transfer of cases under Section 526 of the old Code of Criminal Procedure, 1898. Reliance was also placed on In re China Somayya MANU/TN/0257/1932 : AIR 1933 Mad 251 : 34 Cri LJ 117, wherein with regard to the pronouncing of a judgment by a successor Magistrate it was held that the same was not illegal.

15. I am of the view that it is not at all possible to sub- scribe to the hyper- technical argument that the imposition of a sentence is not part of a criminal trial. Indeed it appears to me on principle as an integral part thereof and indeed the final culmination of a trial. Now it seems that the foothold for the tenuous argument raised by Mr. Brar can be easily explained away by the history of the legislation. It would perhaps be undeniable that under the prior Code of Criminal Procedure, 1898, the findings of conviction and sentence were part and parcel of the same judgment and indeed indivisible from each other. Under that Code, it would obviously be impossible to draw any line between the order of conviction and the sentence imposed thereunder. that Code prescribed the mode in which judgment was to be rendered and in a case of conviction inevitably, the sentence therefore must follow and be the culminating or the concluding part of the judgment. It was only later in the Criminal Procedure Code, 1973 that in view of the desirability of giving a convict a specific opportunity for a hearing on the point of sentence that a thin line was drawn betwixt a conviction simpliciter and the imposition of the sentence later. This, however, to my mind would in no way lead to the untenable inference that whilst rendering of the judgment of conviction is part of the trial, the hearing provided now on the point of sentence and the imposition thereof is something extraneous or alien to the same criminal trial. On principle, therefore, there is no option but to hold that the sentencing process is as much a part of the criminal trial as the necessary preceding steps thereto.

16. What appears to be plain on principle and rationale seems to be equally evident by the provisions of Sections 247 and 248 of the present Code.

"247. The accused shall then be called upon to enter upon his defence and produce his evidence; and the provisions of Section 243 shall apply to the case.

C.- Conclusion of trial.

"248. (1) If, in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order bf acquittal.

(2) Where in any case under this Chapter the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of Section 325 or Section 360 he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.

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The very language of the aforesaid provisions, the detailed reference to the sentencing process and the heading of the Section would show that in fact the imposition of sentence is the finale or the conclusion of a criminal trial and therefore must be construed as an integral part thereof.

17. On this point, apart from principle and the specific statutory provisions, the position appears to be equally plain on precedent. A plethora of judgments have held to the same effect and it would be instructive in this connection to refer to Rex v. Grant. (1951) 1 KB 500; Basil Ranger Lawrence v. Emperor MANU/PR/0103/1933; The State v. Naramuddin Ahmed MANU/GH/0024/1954and Queen Empress v. McCarthy MANU/UP/0025/1887 : ILR (1887) All 420.

18. In fairness to Mr. Brar, I may mention that the statutory provisions relied upon by him are no warrant for holding that the imposition of sentence is not part of a trial. Similarly the two Madras judgments MANU/TN/0159/1928 : AIR 1929 Mad 201 : 30 Cri LJ 908 and MANU/TN/0257/1932(supra), which were relied upon by him, appear to be distinguishable. In Public Prosecutor v. Chockalinga Ambalam MANU/TN/0159/1928the observation was made in the context of transfer of a case under Section 526(8) of the old Code of Criminal Procedure, 1898, whilst in China Somayya v. Emperor MANU/TN/0257/1932 : AIR 1933 Mad 251: 34 Cri LJ 117 the case related to the validity of a judgment pronounced by the successor magistrate. The question was not directly and pointedly raised in the said cases and if they are to be viewed as authorities for the proposition that even the rendering of a judgment is not part of a criminal trial, then I would respectfully dissent from the same.

19. Even though I hold that the sentencing process is an integral part of the trial, with respect, I am unable to agree that this would in any way affect the issue of the applicability of Sections 360 and 361 of the Code of Criminal Procedure, 1973 to the sentencing process. Indeed, it may be said that if sentencing is an integral part of the trial then the Code which governs it would inevitably be applicable to this part also with the same force as it is to the other parts of the trial. Consequently, the provisions of Sections 360 and 361 of the Criminal Procedure Code, 1973 would be as much attracted as the other provisions of the Code to a sentence under a special statute. What perhaps deserves highlighting is the fact that Sections 360 and 361 of the 1973 Code do not prescribe any sentence for any offence. They inevitably come into play in a situation where the sentence is prescribed by any other statute be it the Indian Penal Code or any other special penal statute. Therefore, Sections 360 and 361 of the Code are in no way in conflict with or in sub-stitution of any section of a special statute which prescribes the sentence for an offence. To my

mind, they are plainly supplementary to the sentencing provision whether spelled out in the basic penal law; namely Indian Penal Code or other special statute like the Punjab Excise Act to which by virtue of Section 4, the provisions of the Criminal Procedure Code would be applicable. Therefore, even though a Special Act may provide the sentence for an offence whether fixing a minimum therefore or otherwise, this would be no reason for saying that these provisions would be excluded or be inapplicable. I am unable to sub- scribe to the view that a sentencing provision like Section 61(1)(c) of the Punjab Excise Act, 1914 is a special procedural provision which would, override Sections 360 and 361 of the Code of Criminal Procedure, 1973.

20. In the above context, it may particularly be noticed that Section 397 of the Indian Penal Code provides a minimum sentence in cases not punishable with death or life imprisonment. If the prescription of the minimum sentence alone were to operate as a bar to the application of Sections 360 and 361 of the Criminal Procedure Code, 1973 then even to a sentence under Section 397 of the Indian Penal Code, these provisions will have to be excluded. No judgment or principle could be advanced before us to show as to why the Code of Criminal Procedure, which in its totality would apply to the offences under the Indian Penal Code, would, as regards Sections 360 and 361 of the Criminal Procedure Code, 1973 be inapplicable to a conviction under Section 397 thereof merely because it lays down a minimum sentence therefor. To hold that even as regards offences under the Indian Penal Code. Sections 360 and 361 of the Criminal Procedure Code, 1973 would be inapplicable, seems to me as rather plainly untenable.

21. To conclude on the legal aspect, therefore, it must be held that the mere prescription of the minimum sentence under Section 61(1)(c) of the Punjab Excise Act 1914 is no bar to the applicability of Sections 360 and 361 of the Criminal Procedure Code, 1973 and the same is not a special reason for denying the benefit of probation to a person convicted thereunder. In the alternative it is equally no bar to the applicability of Sections 4 and 6 of the Probation of Offenders Act. The answer to the question posed at the outset is rendered in the negative.

22. Though as a matter of law. the aforesaid answer has been rendered a note of caution must necessarily be sounded as regards the sentencing policy thereunder. Herein again, the observations of the final Court appear to me as conclusive. With regard to the Prevention of Food Adulteration Act, their lordships have set their face firmly against any facile application of the Probation of Offenders Act to offences thereunder prior to 1976 when the legislature itself intervened to create a legal bar. Indeed, whilst holding that as a matter of law. probation could be resorted to with regard to offences under the Prevention of Food Adulteration Act. a virtual ban on a resort thereto has been laid in actual practice. In Isher Das v. State of Punjab MANU/SC/0136/1972. it was observed as follows:

Adulteration of food is a menace to public health. The Prevention of Food Adulteration Act has been enacted with the aim of eradicating that anti- social evil and for ensuring purity in the articles of food. In view of the above object of the Act and the intention of the legislature as revealed by a fact that a minimum sentence of imprisonment for a period of six months and a fine

of rupees one thousand has been prescribed, the courts should not lightly resort to the provisions of the Probation of Offenders Act in the case of persons above 21 years of age found guilty of offences under the Prevention of Food Adulteration Act....

Reiterating the aforesaid view, Krishna Iyer,.1. speaking for the constitution Bench in Pyarali K. Tejani v. Mahadeo Ramchandra Dange MANU/SC/0146/1973 : 1974CriLJ313 , seems to take even a stricter view in the following words:

"The kindly application of the probation principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose anti- social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual pro-vocation nor motive against particular persons but planned profit- making from numbers of consumers furnishes the incentive not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (47th report) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments.

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...In the current Indian conditions the probation movement has not yet attained sufficient strength to correct these intractable . May be, under more developed conditions a different approach may have to be made. For the present, we cannot accede to the invitation to let off the accused on probation.

The aforesaid view has been reiterated with force again in Prem Ball ah v. State MANU/SC/0157/1976 : 1977CriLJ12 .

23. It appears to be plain that what has been said above in the context of edible food and economic offences applies with even greater emphasis to the commercial production of illicit liquor illegally by running working stills. The dangers herein are inherent and sometimes more immediately fatal then those under the Prevention of Food Adulteration Act. The spate of deaths resulting from the clandestine imbibing of poisonous illicit liquor, as often reported in the press provides a red- light signal. The legislative trend is again evident in enhancing the minimum sentence under Section 61(1)(c) of the Punjab Excise Act, 1914 to two years' rigorous imprisonment and fine of Rs. 5,000/- by the Amendment Act No. 31 of 1976. The following observations of my learned brother S.C. Mital, J. in Harnam Singh v. State of Punjab MANU/PH/0137/1976are most apposite in this context:

On principle, prescribing of the minimum punishment may not deprive the court of its power to release a person on probation, but the fact remains that by so doing the Legislature has clearly expressed its intention of punishing the offender with deterrent effect. It is common knowledge

that illicit liquor is manufactured not only unscientifically but also under unhygienic conditions. Drinking of such liquor is hazardous to public health. The persons indulging in illicit distillation are motivated by greed of money to such an extent that they have no regard for human life. The other sordid aspect of this trade is that it is carried out by preparing schemes involving active participation of several persons. For the foregoing reasons the release of a person on probation indulging in illicit distillation of liquor has to be for very exceptional reason, which is lacking in this case. In the result it is not at all expedient to release Harnam Singh on probation.

24. It will be plain from the aforesaid catena of authorities that it is only in exceptional circumstances and for specific weighty reasons recorded that the broad policy of declining the benefit of probation to an accused person in these cases can be possibly deviated from.

25. Adverting now to the merits of the two cases before us, it bears repetition that they were admitted on the point of sentence only. Learned Counsel for the' petitioners were wholly unable to point out anything exceptional which could possibly merit the invoking of the beneficent provisions of probations either under Section 360 of the Indian Penal Code or under the Probation of Offenders Act itself. Applying the principle laid above, we do not find the least justification for interfering with the sentences imposed by the courts below. The revision petitions are hereby dismissed.

Satish Chandra Mittal, J.

26. I agree.

Ajit Singh Bains, J.

27. I also agree.

MANU/SC/1166/2013

Back to Section 154 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 68 of 2008, Contempt Petition (Civil) No. D26722 of 2008 in Writ Petition (Criminal) No. 68 of 2008, SLP (Crl.) No. 5986 of 2006, SLP (Crl.) No. 5200 of 2009, Criminal Appeal No. 1410 of 2011 and Criminal Appeal No. 1267 of 2007 (Under Article 32 of the Constitution of India)

Decided On: 12.11.2013

Lalita Kumari Vs. Govt. of U.P. and Ors.

Hon'ble Judges/Coram:

P. Sathasivam, C.J.I., B.S. Chauhan, Ranjana Prakash Desai, Ranjan Gogoi and S.A. Bobde, JJ.

JUDGMENT

P. Sathasivam, C.J.I.

1. The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same?"

2. The present writ petition, under Article 32 of the Constitution, has been filed by one Lalita Kumari (minor) through her father, viz., Shri Bhola Kamat for the issuance of a writ of Habeas Corpus or direction(s) of like nature against the Respondents herein for the protection of his minor daughter who has been kidnapped. The grievance in the said writ petition is that on 11.05.2008, a written report was submitted by the Petitioner before the officer in- charge of the police station concerned who did not take any action on the same. Thereafter, when the Superintendent of Police was moved, an FIR was registered. According to the Petitioner, even thereafter, steps were not taken either for apprehending the accused or for the recovery of the minor girl child.

3. A two- Judge Bench of this Court in, Lalita Kumari v. Government of Uttar Pradesh and Ors. (2008) 7 SCC 164, after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and

for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.

4. Pursuant to the above directions, when the matter was heard by the very same Bench in Lalita Kumari v. Government of Uttar Pradesh and Ors. (2008) 14 SCC 337, Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, projected his claim that upon receipt of information by a police officer in- charge of a police station disclosing a cognizable offence, it is imperative for him to register a case under Section 154 of the Code and placed reliance upon two- Judge Bench decisions of this Court in State of Haryana v. Bhajan Lal MANU/SC/0115/1992 : 1992 Supp. (1) SCC 335, Ramesh Kumari v. State (NCT of Delhi) MANU/SC/8037/2006 : (2006) 2 SCC 677 and Parkash Singh Badal v. State of Punjab MANU/SC/5415/2006 : (2007) 1 SCC 1. On the other hand, Mr. Shekhar Naphade, learned senior Counsel for the State of Maharashtra submitted that an officer in- charge of a police station is not obliged under law, upon receipt of information disclosing commission of a cognizable offence, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. In support of his submission, he placed reliance upon two-Judge Bench decisions of this Court in P. Sirajuddin v. State of Madras MANU/SC/0158/1970 : (1970) 1 SCC 595, Sevi v. State of Tamil Nadu MANU/SC/0218/1981 : 1981 Supp SCC 43, Shashikant v. Central Bureau of Investigation MANU/SC/8639/2006 : (2007) 1 SCC 630, and Rajinder Singh Katoch v. Chandigarh Admn. MANU/SC/8052/2007 : (2007) 10 SCC 69. In view of the conflicting decisions of this Court on the issue, the said bench, vide order dated 16.09.2008, referred the same to a larger bench.

5. Ensuing compliance to the above direction, the matter pertaining to Lalita Kumari was heard by a Bench of three- Judges in Lalita Kumari v. Government of Uttar Pradesh and Ors. MANU/SC/0157/2012 : (2012) 4 SCC 1 wherein, this Court, after hearing various counsel representing Union of India, States and Union Territories and also after adverting to all the conflicting decisions extensively, referred the matter to a Constitution Bench while concluding as under:

97. We have carefully analysed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue: whether under Section 154 Code of Criminal Procedure, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the FIR.

98. The learned Counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of Santosh Kumar and Suresh Gupta where preliminary inquiry had been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary inquiry before registering the FIR.

99. The issue which has arisen for consideration in these cases is of great public importance. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned- - the courts, the investigating agencies and the citizens.

100. Consequently, we request the Hon'ble the Chief Justice to refer these matters to a Constitution Bench of at least five Judges of this Court for an authoritative judgment.

6. Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also.

7. Heard Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, Mr. K.V. Vishwanathan, learned Additional Solicitor General for the Union of India, Mr. Sidharth Luthra, learned Additional Solicitor General for the State of Chhattisgarh, Mr. Shekhar Naphade, Mr. R.K. Dash, Ms. Vibha Datta Makhija, learned senior counsel for the State of Maharashtra, U.P. and M.P. respectively, Mr. G. Sivabalamurugan, learned Counsel for the accused, Dr. Ashok Dhamija, learned Counsel for the CBI, Mr. Kalyan Bandopodhya, learned senior counsel for the State of West Bengal, Dr. Manish Singhvi, learned AAG for the State of Rajasthan and Mr. Sudarshan Singh Rawat.

8. In order to answer the main issue posed before this Bench, it is useful to refer the following Sections of the Code:

154. Information in cognizable cases.- - (1) 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 be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub- section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case

himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable case. (1) 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 XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

157. Procedure for investigation: (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

(2) In each of the cases mentioned in Clauses (a) and (b) of the proviso to Sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that subsection, and, in the case mentioned in Clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

Contentions:

9. At the foremost, Mr. S.B. Upadhyay, learned senior counsel, while explaining the conditions mentioned in Section 154 submitted that Section 154(1) is mandatory as the use of the word 'shall' is indicative of the statutory intent of the legislature. He also contended that there is no discretion left to the police officer except to register an FIR. In support of the above proposition, he relied on the following decisions, viz., B. Premanand and Ors. v. Mohan Koikal and Ors. MANU/SC/0249/2011 : (2011) 4 SCC 266, M/s. Hiralal Rattanlal Etc. Etc. v. State of U.P. and Anr. Etc. Etc. MANU/SC/0553/1972 : (1973) 1 SCC 216 and Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee, Godhra and Ors. MANU/SC/0125/1975 : (1975) 2 SCC 482.

10. Mr. Upadhyay, by further drawing our attention to the language used in Section 154(1) of the Code, contended that it merely mentions 'information' without prefixing the words 'reasonable' or 'credible'. In order to substantiate this claim, he relied on the following decisions, viz., Bhajan Lal (supra), Ganesh Bhavan Patel and Anr. v. State of Maharashtra MANU/SC/0083/1978 : (1978) 4 SCC 371, Aleque Padamsee and Ors. v. Union of India and Ors. MANU/SC/2975/2007 : (2007) 6 SCC 171, Ramesh Kumari (supra), Ram Lal Narang v. State (Delhi Administration) MANU/SC/0216/1979 : (1979) 2 SCC 322 and Lallan Chaudhary and Ors. v. State of Bihar and Anr. MANU/SC/4524/2006 : (2006) 12 SCC 229. Besides, he also brought to light various adverse impacts of allowing police officers to hold preliminary inquiry before registering an FIR.

11. Mr. K.V. Viswanathan, learned Additional Solicitor General appearing on behalf of Union of India submitted that in all the cases where information is received under Section 154 of the Code, it is mandatory for the police to forthwith enter the same into the register maintained for the said purpose, if the same relates to commission of a cognizable offence. According to learned ASG, the police authorities have no discretion or authority, whatsoever, to ascertain the veracity of such information before deciding to register it. He also pointed out that a police officer, who proceeds to the spot under Sections 156 and 157 of the Code, on the basis of either a cryptic information or source information, or a rumour etc., has to immediately, on gathering information relating to the commission of a cognizable offence, send a report (ruqqa) to the police station so that the same can be registered as FIR. He also highlighted the scheme of the Code relating to the registration of FIR, arrest, various protections provided to the accused and the power of police to close investigation. In support of his claim, he relied on various decisions of this Court viz., Bhajan Lal

(supra), Ramesh Kumari (supra) and Aleque Padamsee (supra). He also deliberated upon the distinguishable judgments in conflict with the mandatory proposition, viz., State of Uttar Pradesh v. Bhagwant Kishore Joshi MANU/SC/0066/1963 : (1964) 3 SCR 71, P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), Jacob Mathew v. State of Punjab and Anr. MANU/SC/0457/2005 : (2005) 6 SCC 1. He concluded his arguments by saying that if any information disclosing a cognizable offence is led before an officer in- charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. Further, he emphasized upon various safeguards provided under the Code against filing a false case.

12. Dr. Ashok Dhamija, learned Counsel for the CBI, submitted that the use of the word "shall" under Section 154(1) of the Code clearly mandates that if the information given to a police officer relates to the commission of a cognizable offence, then it is mandatory for him to register the offence. According to learned Counsel, in such circumstances, there is no option or discretion given to the police. He further contended that the word "shall" clearly implies a mandate and is unmistakably indicative of the statutory intent. What is necessary, according to him, is only that the information given to the police must disclose commission of a cognizable offence. He also contended that Section 154 of the Code uses the word "information" simpliciter and does not use the qualified words such as "credible information" or "reasonable complaint". Thus, the intention of the Parliament is unequivocally clear from the language employed that a mere information relating to commission of a cognizable offence is sufficient to register an FIR. He also relied on Bhajan Lal (supra), Ramesh Kumari (supra), Aleque Padamsee (supra), Lallan Chaudhary (supra), Superintendent of Police, CBI v. Tapan Kumar Singh MANU/SC/0299/2003 : (2003) 6 SCC 175, M/s. Hiralal Rattanlal (supra), B. Premanand (supra), Khub Chand v. State of Rajasthan MANU/SC/0015/1966 : AIR 1967 SC 1074, P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra), State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal MANU/SC/0121/2010 : (2010) 3 SCC 571. He also pointed out various safeguards provided in the Code against filing a false case. In the end, he concluded by reiterating that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Further, he also clarified that the preliminary inquiry conducted by the CBI, under certain situations, as provided under the CBI Crime Manual, stands on a different footing due to the special provisions relating to the CBI contained in the Delhi Special Police Establishment Act, 1946, which is saved under Sections 4(2) and 5 of the Code.

13. Mr. Kalyan Bandopadhyay, learned senior Counsel appearing on behalf of the State of West Bengal, submitted that whenever any information relating to commission of a cognizable offence is received, it is the duty of the officer in- charge of a police station to record the same and a copy of such information, shall be given forthwith, free of cost, to the informant under Section 154(2) of the Code. According to him, a police officer has no other alternative but to record the information in relation to a cognizable offence in the first instance. He also highlighted various subsequent steps to be followed by the police officer pursuant to the registration of an FIR. With regard to the scope of Section 154 of the Code, he relied on H.N. Rishbud and Inder Singh v. State of Delhi MANU/SC/0049/1954 : AIR 1955 SC 196, Bhajan Lal (supra), S.N. Sharma v. Bipen

Kumar Tiwari MANU/SC/0182/1970 : (1970) 1 SCC 653, Union of India v. Prakash P. Hinduja MANU/SC/0446/2003 : (2003) 6 SCC 195, Sheikh Hasib alias Tabarak v. State of Bihar MANU/SC/0180/1971 : (1972) 4 SCC 773, Shashikant (supra), Ashok Kumar Todi v. Kishwar Jahan and Ors. MANU/SC/0162/2011 : (2011) 3 SCC 758, Padma Sundara Rao (Dead) and Ors. v. State of T.N. and Ors. MANU/SC/0182/2002 : (2002) 3 SCC 533, P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra) and Mannalal Khatic v. The State MANU/WB/0117/1967 : AIR 1967 Cal 478.

14. Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, submitted that Section 154(1) of the Code mandates compulsory registration of FIR. He also highlighted various safeguards inbuilt in the Code for lodging of false FIRs. He also pointed out that the only exception relates to cases arising under the Prevention of Corruption Act as, in those cases, sanction is necessary before taking cognizance by the Magistrates and the public servants are accorded some kind of protection so that vexatious cases cannot be filed to harass them.

15. Mr. G. Sivabalamurugan, learned Counsel for the Appellant in Criminal Appeal No. 1410 of 2011, after tracing the earlier history, viz., the relevant provisions in the Code of Criminal Procedure of 1861, 1872, 1882 and 1898 stressed as to why the compulsory registration of FIR is mandatory. He also highlighted the recommendations of the Report of the 41st Law Commission and insertion of Section 13 of the Criminal Law (Amendment) Act, 2013 with effect from 03.02.2013.

16. Mr. R.K. Dash, learned senior counsel appearing for the State of Uttar Pradesh, though initially commenced his arguments by asserting that in order to check unnecessary harassment to innocent persons at the behest of unscrupulous complainants, it is desirable that a preliminary inquiry into the allegations should precede with the registration of FIR but subsequently after considering the salient features of the Code, various provisions like Sections 2(4)(h), 156(1), 202(1), 164, various provisions from the U.P. Police Regulations, learned senior counsel contended that in no case recording of FIR should be deferred till verification of its truth or otherwise in case of information relating to a cognizable offence. In addition to the same, he also relied on various pronouncements of this Court, such as, Mohindro v. State of Punjab MANU/SC/1010/2001 : (2001) 9 SCC 581, Ramesh Kumari (supra), Bhajan Lal (supra), Parkash Singh Badal (supra), Munna Lal v. State of Himachal Pradesh MANU/HP/0033/1991 : 1992 Crl. L.J. 1558, Giridhari Lal Kanak v. State and Ors. MANU/MP/0620/2001 : 2002 Crl. L.J. 2113 and Katteri Moideen Kutty Haji v. State of Kerala MANU/KE/0071/2002 : 2002 (2) Crimes 143. Finally, he concluded that when the statutory provisions, as envisaged in Chapter XII of the Code, are clear and unambiguous, it would not be legally permissible to allow the police to make a preliminary inquiry into the allegations before registering an FIR under Section 154 of the Code.

17. Mr. Sidharth Luthra, learned Additional Solicitor General appearing for the State of Chhattisgarh, commenced his arguments by emphasizing the scope of reference before the Constitution Bench. Subsequently, he elaborated on various judgments which held that an

investigating officer, on receiving information of commission of a cognizable offence under Section 154 of the Code, has power to conduct preliminary inquiry before registration of FIR, viz., Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra) and Rajinder Singh Katoch (supra). Concurrently, he also brought to our notice the following decisions, viz., Bhajan Lal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra), and Aleque Padamsee (supra), which held that a police officer is duty bound to register an FIR, upon receipt of information disclosing commission of a cognizable offence and the power of preliminary inquiry does not exist under the mandate of Section 154. Learned ASG has put forth a comparative analysis of Section 154 of the Code of Criminal Procedure of 1898 and of 1973. He also highlighted that every activity which occurs in a police station [Section 2(s)] is entered in a diary maintained at the police station which may be called as the General Diary, Station Diary or Daily Diary. He underlined the relevance of General Diary by referring to various judicial decisions such as Tapan Kumar Singh (supra), Re: Subbaratnam and Ors. AIR 1949 Madras 663. He further pointed out that, presently, throughout the country, in matrimonial, commercial, medical negligence and corruption related offences, there exist provisions for conducting an inquiry or preliminary inquiry by the police, without/before registering an FIR under Section 154 of the Code. He also brought to our notice various police rules prevailing in the States of Punjab, Rajasthan, U.P., Madhya Pradesh, Kolkata, Bombay, etc., for conducting an inquiry before registering an FIR. Besides, he also attempted to draw an inference from the Crime Manual of the CBI to highlight that a preliminary inquiry before registering a case is permissible and legitimate in the eyes of law. Adverting to the above contentions, he concluded by pleading that preliminary inquiry before registration of an FIR should be held permissible. Further, he emphasized that the power to carry out an inquiry or preliminary inquiry by the police, which precedes the registration of FIR will eliminate the misuse of the process, as the registration of FIR serves as an impediment against a person for various important activities like applying for a job or a passport, etc. Learned ASG further requested this Court to frame guidelines for certain category of cases in which preliminary inquiry should be made.

18. Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the State of Maharashtra, submitted that ordinarily the Station House Officer (SHO) should record an FIR upon receiving a complaint disclosing the ingredients of a cognizable offence, but in certain situations, in case of doubt about the correctness or credibility of the information, he should have the discretion of holding a preliminary inquiry and thereafter, if he is satisfied that there is a prima facie case for investigation, register the FIR. A mandatory duty of registering FIR should not be cast upon him. According to him, this interpretation would harmonize two extreme positions, viz., the proposition that the moment the complaint disclosing ingredients of a cognizable offence is lodged, the police officer must register an FIR without any scrutiny whatsoever is an extreme proposition and is contrary to the mandate of Article 21 of the Constitution of India, similarly, the other extreme point of view is that the police officer must investigate the case substantially before registering an FIR. Accordingly, he pointed out that both must be rejected and a middle path must be chosen. He also submitted the following judgments, viz., Bhajan Lal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra), and Aleque Padamsee (supra) wherein it has been held that if a complaint alleging commission of a cognizable offence is received in the police station, then the SHO has no other option but to register an FIR under Section 154 of the Code. According to learned senior counsel, these verdicts require reconsideration as they have

interpreted Section 154 de hors the other provisions of the Code and have failed to consider the impact of Article 21 on Section 154 of the Code.

19. Alongside, he pointed out the following decisions, viz., Rajinder Singh Katoch (supra), P. Sirajuddin (supra), Bhagwant Kishore Joshi (supra) and Sevi (supra), which hold that before registering an FIR under Section 154 of the Code, it is open to the police officer to hold a preliminary inquiry to ascertain whether there is a prima facie case of commission of a cognizable offence or not. According to learned senior counsel, Section 154 of the Code forms part of a chain of statutory provisions relating to investigation and, therefore, the scheme of provisions of Sections 41, 157, 167, 169, etc., must have a bearing on the interpretation of Section 154. In addition, he emphasized that giving a literal interpretation would reduce the registration of FIR to a mechanical act. Parallelly, he underscored the impact of Article 21 on Section 154 of the Code by referring to Maneka Gandhi v. Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248, wherein this Court has applied Article 21 to several provisions relating to criminal law. This Court has also stated that the expression "law" contained in Article 21 necessarily postulates law which is reasonable and not merely statutory provisions irrespective of its reasonableness or otherwise. Learned senior counsel pleaded that in the light of Article 21, provisions of Section 154 of the Code must be read down to mean that before registering an FIR, the police officer must be satisfied that there is a prima facie case for investigation. He also emphasized that Section 154 contains implied power of the police officer to hold preliminary inquiry if he bona fide possess serious doubts about the credibility of the information given to him. By pointing out Criminal Law (Amendment) Act, 2013, particularly, Section 166A, Mr. Naphade contended that as far as other cognizable offences (apart from those mentioned in Section 166A) are concerned, police has a discretion to hold preliminary inquiry if there is some doubt about the correctness of the information.

20. In case of allegations relating to medical negligence on the part of the doctors, it is pointed out by drawing our attention to some of the decisions of this Court viz., Tapan Kumar Singh (supra), Jacob Mathew (supra) etc., that no medical professional should be prosecuted merely on the basis of the allegations in the complaint. By pointing out various decisions, Mr. Naphade emphasized that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that at least prima facie allegations levelled against the accused in the complaint are credible. He also contended that no single provision of a statute can be read and interpreted in isolation, but the statute must be read as a whole. Accordingly, he prayed that the provisions of Sections 41, 57, 156, 157, 159, 167, 190, 200 and 202 of the Code must be read together. He also pointed out that Section 154(3) of the Code enables any complainant whose complaint is not registered as an FIR by the officer in- charge of the police station to approach the higher police officer for the purpose of getting his complaint registered as an FIR and in such a case, the higher police officer has all the powers of recording an FIR and directing investigation into the matter. In addition to the remedy available to an aggrieved person of approaching higher police officer, he can also move the concerned Magistrate by making a complaint under Section 190 thereof. He further emphasized that the fact that the legislature has provided adequate remedies against refusal to register FIR and to hold investigation in cognizable offences, is indicative of legislative intent that the police officer is not bound to record FIR merely because the ingredients of a cognizable offence are disclosed in the complaint, if he

has doubts about the veracity of the complaint. He also pointed out that the word "shall" used in the statute does not always mean absence of any discretion in the matter. For the said proposition, he also highlighted that this Court has preferred the rule of purposive interpretation to the rule of literal interpretation for which he relied on Chairman Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee MANU/SC/0061/1977 : (1977) 2 SCC 256, Lalit Mohan Pandey v. Pooran Singh MANU/SC/0422/2004 : (2004) 6 SCC 626, Prativa Bose v. Kumar Rupendra Deb Raikat MANU/SC/0251/1963 : (1964) 4 SCR 69. He further pointed out that it is impossible to put the provisions of Section 154 of the Code in a straightjacket formula. He also prayed for framing of some guidelines as regards registration or non- registration of FIR. Finally, he pointed out that the requirement of Article 21 is that the procedure should be fair and just. According to him, if the police officer has doubts in the matter, it is imperative that he should have the discretion of holding a preliminary inquiry in the matter. If he is debarred from holding such a preliminary inquiry, the procedure would then suffer from the vice of arbitrariness and unreasonableness. Thus, he concluded his arguments by pleading that Section 154 of the Code must be interpreted in the light of Article 21.

21. Ms. Vibha Datta Makhija, learned senior counsel appearing for the State of Madhya Pradesh submitted that a plain reading of Section 154 and other provisions of the Code shows that it may not be mandatory but is absolutely obligatory on the part of the police officer to register an FIR prior to taking any steps or conducting investigation into a cognizable offence. She further pointed out that after receiving the first information of an offence and prior to the registration of the said report (whether oral or written) in the First Information Book maintained at the police station under various State Government Regulations, only some preliminary inquiry or investigative steps are permissible under the statutory framework of the Code to the extent as is justifiable and is within the window of statutory discretion granted strictly for the purpose of ascertaining whether there has been a commission or not of a cognizable offence. Hence, an investigation, culminating into a Final Report under Section 173 of the Code, cannot be called into question and be quashed due to the reason that a part of the inquiry, investigation or steps taken during investigation are conducted after receiving the first information but prior to registering the same unless it is found that the said investigation is unfair, illegal, mala fide and has resulted in grave prejudice to the right of the accused to fair investigation. In support of the above contentions, she traced the earlier provisions of the Code and current statutory framework, viz., Criminal Law (Amendment) Act, 2013 with reference to various decisions of this Court. She concluded that Section 154 of the Code leaves no area of doubt that where a cognizable offence is disclosed, there is no discretion on the part of the police to record or not to record the said information, however, it may differ from case to case.

22. The issues before the Constitution Bench of this Court arise out of two main conflicting areas of concern, viz.,

(i) Whether the immediate non- registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused.

Discussion:

23. The FIR is a pertinent document in the criminal law procedure of our country and its main object from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilty.

24. Historical experience has thrown up cases from both the sides where the grievance of the victim/informant of non- registration of valid FIRs as well as that of the accused of being unnecessarily harassed and investigated upon false charges have been found to be correct.

25. An example of the first category of cases is found in State of Maharashtra v. Sarangdharsingh Shivdassingh Chavan and Anr. MANU/SC/1055/2010 : (2011) 1 SCC 577 wherein a writ petition was filed challenging the order of the Collector in the District of Buldhana directing not to register any crime against Mr. Gokulchand Sananda, without obtaining clearance from the District Anti-Money Lending Committee and the District Government Pleader. From the record, it was revealed that out of 74 cases, only in seven cases, charge sheets were filed alleging illegal moneylending. This Court found that upon instructions given by the Chief Minister to the District Collector, there was no registration of FIR of the poor farmers. In these circumstances, this Court held the said instructions to be ultra vires and quashed the same. It is argued that cases like above exhibit the mandatory character of Section 154, and if it is held otherwise, it shall lead to grave injustice.

26. In Aleque Padamsee (supra), while dealing with the issue whether it is within the powers of courts to issue a writ directing the police to register a First Information Report in a case where it was alleged that the accused had made speeches likely to disturb communal harmony, this Court held that "the police officials ought to register the FIR whenever facts brought to their notice show that a cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code." As such, the Code itself provides several checks for refusal on the part of the police authorities under Section 154 of the Code.

27. However, on the other hand, there are a number of cases which exhibit that there are instances where the power of the police to register an FIR and initiate an investigation thereto are misused

where a cognizable offence is not made out from the contents of the complaint. A significant case in this context is the case of Preeti Gupta v. State of Jharkhand MANU/SC/0592/2010 : (2010) 7 SCC 667 wherein this Court has expressed its anxiety over misuse of Section 498A of the Indian Penal Code, 1860 (in short 'the Indian Penal Code') with respect to which a large number of frivolous reports were lodged. This Court expressed its desire that the legislature must take into consideration the informed public opinion and the pragmatic realities to make necessary changes in law.

28. The above said judgment resulted in the 243rd Report of the Law Commission of India submitted on 30th August, 2012. The Law Commission, in its Report, concluded that though the offence under Section 498A could be made compoundable, however, the extent of misuse was not established by empirical data, and, thus, could not be a ground to denude the provision of its efficacy. The Law Commission also observed that the law on the question whether the registration of FIR could be postponed for a reasonable time is in a state of uncertainty and can be crystallized only upon this Court putting at rest the present controversy.

29. In order to arrive at a conclusion in the light of divergent views on the point and also to answer the above contentions, it is pertinent to have a look at the historical background of the Section and corresponding provisions that existed in the previous enactments of the Code of Criminal Procedure.

Code of Criminal Procedure, 1861

139. Every complaint or information preferred to an officer in charge of a police station, shall be reduced into writing and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government.

Code of Criminal Procedure, 1872

112. Every complaint preferred to an officer in charge of a police station, shall be reduced into writing, and shall be signed, sealed or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the local government.

Code of Criminal Procedure, 1882

154. 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 be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such form as the government may prescribe in this behalf.

Code of Criminal Procedure, 1898

154. 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 be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf.

Code of Criminal Procedure, 1973

154. Information in cognizable cases: 1) Every information relating to the commission of a cognizable offence, it given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[Provided that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer:

Provided further that:

(a) in the event that the person against whom an offence under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal code is alleged to have been committed or attempted is temporarily or permanently mentally or physically disabled then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under Clause (a) of Sub- section (5A) of Section 164 as soon as possible.]

(Inserted by Section 13 of 'The Criminal Law (Amendment) Act, 2013 w.e.f. 03.02.2013)

(2) A copy of the information as recorded under Sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub- section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

A perusal of the above said provisions manifests the legislative intent in both old codes and the new code for compulsory registration of FIR in a case of cognizable offence without conducting any Preliminary Inquiry.

30. The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in- charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial government for recording such first information.

31. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154, i.e., the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156, i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of investigative powers by the police.

32. Provisions contained in Chapter XII of the Code deal with information to the police and their powers to investigate. The said Chapter sets out the procedure to be followed during investigation. The objective to be achieved by the procedure prescribed in the said Chapter is to set the criminal law in motion and to provide for all procedural safeguards so as to ensure that

the investigation is fair and is not mala fide and there is no scope of tampering with the evidence collected during the investigation.

33. In addition, Mr. Shekhar Naphade, learned senior counsel contended that insertion of Section 166A in Indian Penal Code indicates that registration of FIR is not compulsory for all offences other than what is specified in the said Section. By Criminal Law (Amendment) Act 2013, Section 166A was inserted in Indian Penal Code which reads as under:

Section 166A- - Whoever, being a public servant.-

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) fails to record any information given to him under Sub- section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326A, Section 326B, Section 354, Section 354B, Section 370, Section 370A, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, Section 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years and shall also be liable to fine.

Section 166A(c) lays down that if a public servant (Police Officer) fails to record any information given to him under Section 154(1) of the Code in relation to cognizable offences punishable under Sections 326A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E or Section 509, he shall be punished with rigorous imprisonment for a term which shall not be less than six months but may extend to two years and shall also be liable to fine. Thus, it is the stand of learned Counsel that this provision clearly indicates that registration of FIR is imperative and police officer has no discretion in the matter in respect of offences specified in the said section. Therefore, according to him, the legislature accepts that as far as other cognizable offences are concerned, police has discretion to hold a preliminary inquiry if there is doubt about the correctness of the information.

34. Although, the argument is as persuasive as it appears, yet, we doubt whether such a presumption can be drawn in contravention to the unambiguous words employed in the said provision. Hence, insertion of Section 166A in the Indian Penal Code vide Criminal Law (Amendment) Act 2013, must be read in consonance with the provision and not contrary to it. The insertion of Section 166A was in the light of recent unfortunate occurrence of offences against

women. The intention of the legislature in putting forth this amendment was to tighten the already existing provisions to provide enhanced safeguards to women. Therefore, the legislature, after noticing the increasing crimes against women in our country, thought it appropriate to expressly punish the police officers for their failure to register FIRs in these cases. No other meaning than this can be assigned to for the insertion of the same.

35. With this background, let us discuss the submissions in the light of various decisions both in favour and against the referred issue.

Interpretation of Section 154:

36. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. All that we have to see at the very outset is what does the provision say? As a result, the language employed in Section 154 is the determinative factor of the legislative intent. A plain reading of Section 154(1) of the Code provides that any information relating to the commission of a cognizable offence if given orally to an officer- in- charge of a police station shall be reduced into writing by him or under his direction. There is no ambiguity in the language of Section 154(1) of the Code.

37. At this juncture, it is apposite to refer to the following observations of this Court in M/s. Hiralal Rattanlal (supra) which are as under:

22...In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear....

The above decision was followed by this Court in B. Premanand (supra) and after referring the abovesaid observations in the case of Hiralal Rattanlal (supra), this Court observed as under:

9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. SEBI MANU/SC/0693/2004 : (2004) 11 SCC 641.

The language of Section 154(1), therefore, admits of no other construction but the literal construction.

38. The legislative intent of Section 154 is vividly elaborated in Bhajan Lal (supra) which is as under:

30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub- section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that

'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

39. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

'Shall'

40. The use of the word "shall" in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence.

41. In Khub Chand (supra), this Court observed as under:

7...The term "shall" in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations....

42. It is relevant to mention that the object of using the word "shall" in the context of Section 154(1) of the Code is to ensure that all information relating to all cognizable offences is promptly registered by the police and investigated in accordance with the provisions of law.

43. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

44. Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word "shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in- charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

45. In view of the above, the use of the word 'shall' coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in- charge of the police station. Reading 'shall' as 'may', as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code should be strictly construed and the word 'shall' should be given its natural meaning. The golden rule of interpretation can be given a go- by only in cases where the language of the section is ambiguous and/or leads to an absurdity.

46. In view of the above, we are satisfied that Section 154(1) of the Code does not have any ambiguity in this regard and is in clear terms. It is relevant to mention that Section 39 of the Code casts a statutory duty on every person to inform about commission of certain offences which includes offences covered by Sections 121 to 126, 302, 64A, 382, 392 etc., of the Indian Penal Code. It would be incongruous to suggest that though it is the duty of every citizen to inform about commission of an offence, but it is not obligatory on the officer- incharge of a Police Station to register the report. The word 'shall' occurring in Section 39 of the Code has to be given the same meaning as the word 'shall' occurring in Section 154(1) of the Code.

'Book'/'Diary'

47. It is contented by learned ASG appearing for the State of Chhattisgarh that the recording of first information under Section 154 in the 'book' is subsequent to the entry in the General Diary/Station Diary/Daily Diary, which is maintained in police station. Therefore, according to learned ASG, first information is a document at the earliest in the general diary, then if any preliminary inquiry is needed the police officer may conduct the same and thereafter the information will be registered as FIR.

48. This interpretation is wholly unfounded. The First Information Report is in fact the "information" that is received first in point of time, which is either given in writing or is reduced to writing. It is not the "substance" of it, which is to be entered in the diary prescribed by the State Government. The term 'General Diary' (also called as 'Station Diary' or 'Daily Diary' in some States) is maintained not under Section 154 of the Code but under the provisions of Section 44 of the Police Act, 1861 in the States to which it applies, or under the respective provisions of the Police Act(s) applicable to a State or under the Police Manual of a State, as the case may be. Section 44 of the Police Act, 1861 is reproduced below:

44. Police- officers to keep diary.- - It shall be the duty of every officer in charge of a police- station to keep a general diary in such form as shall, from time to time, be prescribed by the State Government and to record therein all complaints and charged preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for any inspect such diary.

49. It is pertinent to note that during the year 1861, when the aforesaid Police Act, 1861 was passed, the Code of Criminal Procedure, 1861 was also passed. Section 139 of that Code dealt with registration of FIR and this Section is also referred to the word "diary", as can be seen from the language of this Section, as reproduced below:

139. Every complaint or information preferred to an officer in charge of a Police Station, shall be reduced into writing, and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government.

Thus, Police Act, 1861 and the Code of Criminal Procedure, 1861, both of which were passed in the same year, used the same word "diary".

50. However, in the year 1872, a new Code came to be passed which was called the Code of Criminal Procedure, 1872. Section 112 of the Code dealt with the issue of registration of FIR and is reproduced below:

112. Every complaint preferred to an officer in charge of a Police station shall be reduced into writing, and shall be signed, sealed, or marked by the person making it; and the substance thereof

shall be entered in a book to be kept by such officer in the form prescribed by the Local Government.

51. It is, thus, clear that in the Code of Criminal Procedure, 1872, a departure was made and the word 'book' was used in place of 'diary'. The word 'book' clearly referred to FIR book to be maintained under the Code for registration of FIRs.

52. The question that whether the FIR is to be recorded in the FIR Book or in General Diary, is no more res integra. This issue has already been decided authoritatively by this Court.

53. In Madhu Bala v. Suresh Kumar MANU/SC/0806/1997 : (1997) 8 SCC 476, this Court has held that FIR must be registered in the FIR Register which shall be a book consisting of 200 pages. It is true that the substance of the information is also to be mentioned in the Daily diary (or the general diary). But, the basic requirement is to register the FIR in the FIR Book or Register. Even in Bhajan Lal (supra), this Court held that FIR has to be entered in a book in a form which is commonly called the First Information Report.

54. It is thus clear that registration of FIR is to be done in a book called FIR book or FIR Register. of course, in addition, the gist of the FIR or the substance of the FIR may also be mentioned simultaneously in the General Diary as mandated in the respective Police Act or Rules, as the case may be, under the relevant State provisions.

55. The General Diary is a record of all important transactions/events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day- today basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR Book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously.

56. It is relevant to point out that FIR Book is maintained with its number given on an annual basis. This means that each FIR has a unique annual number given to it. This is on similar lines as the Case Numbers given in courts. Due to this reason, it is possible to keep a strict control and track over the registration of FIRs by the supervisory police officers and by the courts, wherever necessary. Copy of each FIR is sent to the superior officers and to the concerned Judicial Magistrate.

57. On the other hand, General Diary contains a huge number of other details of the proceedings of each day. Copy of General Diary is not sent to the Judicial Magistrate having jurisdiction over the police station, though its copy is sent to a superior police officer. Thus, it is not possible to keep strict control of each and every FIR recorded in the General Diary by superior police officers and/or the court in view of enormous amount of other details mentioned therein and the numbers changing every day.

58. The signature of the complainant is obtained in the FIR Book as and when the complaint is given to the police station. On the other hand, there is no such requirement of obtaining signature of the complainant in the general diary. Moreover, at times, the complaint given may consist of large number of pages, in which case it is only the gist of the complaint which is to be recorded in the General Diary and not the full complaint. This does not fit in with the suggestion that what is recorded in General Diary should be considered to be the fulfillment/compliance of the requirement of Section 154 of registration of FIR. In fact, the usual practice is to record the complete complaint in the FIR book (or annex it with the FIR form) but record only about one or two paragraphs (gist of the information) in the General Diary.

59. In view of the above, it is useful to point out that the Code was enacted under Entry 2 of the Concurrent List of the Seventh Schedule to the Constitution which is reproduced below:

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

On the other hand, Police Act, 1861 (or other similar Acts in respective States) were enacted under Entry 2 of the State List of the Seventh Schedule to the Constitution, which is reproduced below:

2. Police (including railway and village police) subject to the provisions of Entry 2A of List I.

60. Now, at this juncture, it is pertinent to refer Article 254(1) of the Constitution, which lays down the provisions relating to inconsistencies between the laws made by the Parliament and the State Legislatures. Article 254(1) is reproduced as under:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Thus it is clear from the mandate of Article 254(1) of the Constitution that if there is any inconsistency between the provisions of the Code and the Police Act, 1861, the provisions of the Code will prevail and the provisions of the Police Act would be void to the extent of the repugnancy.

61. If at all, there is any inconsistency in the provisions of Section 154 of the Code and Section 44 of the Police Act, 1861, with regard to the fact as to whether the FIR is to be registered in the FIR book or in the General Diary, the provisions of Section 154 of the Code will prevail and the provisions of Section 44 of the Police Act, 1861 (or similar provisions of the respective corresponding Police Act or Rules in other respective States) shall be void to the extent of the repugnancy. Thus, FIR is to be recorded in the FIR Book, as mandated under Section 154 of the Code, and it is not correct to state that information will be first recorded in the General Diary and only after preliminary inquiry, if required, the information will be registered as FIR.

62. However, this Court in Tapan Kumar Singh (supra), held that a GD entry may be treated as First information in an appropriate case, where it discloses the commission of a cognizable offence. It was held as under:

15. It is the correctness of this finding which is assailed before us by the Appellants. They contend that the information recorded in the GD entry does disclose the commission of a cognizable offence. They submitted that even if their contention, that after recording the GD entry only a preliminary inquiry was made, is not accepted, they are still entitled to sustain the legality of the investigation on the basis that the GD entry may be treated as a first information report, since it disclosed the commission of a cognizable offence.

16. The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the Appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. It is, therefore, not necessary for us to consider the authorities cited at the Bar on the question of validity of the preliminary inquiry and the validity of the search and seizure.

Xxx

19. The High Court fell into an error in thinking that the information received by the police could not be treated as a first information report since the allegation was vague inasmuch as it was not

stated from whom the sum of rupees one lakh was demanded and accepted. Nor was it stated that such demand or acceptance was made as motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show in exercise of his official function, favour or disfavour to any person or for rendering, attempting to render any service or disservice to any person. Thus there was no basis for a police officer to suspect the commission of an offence which he was empowered under Section 156 of the Code to investigate.

63. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR Book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

'Information'

64. The legislature has consciously used the expression "information" in Section 154(1) of the Code as against the expression used in Section 41(1)(a) and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under Section 154(1) of the Code is not qualified by the prefix "reasonable" or "credible". The non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.

65. The above view has been expressed by this Court in Bhajan Lal (supra) which is as under:

32...in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non- qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word.

66. In Parkash Singh Badal (supra), this Court held as under:

65. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2(o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act of entering the information in the said form is known as registration of a crime or a case.

66. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub- section (3) of Section 154 of the Code.

67. It has to be noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Sections 41(1)(a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer in charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the Code. An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

67. In Ramesh Kumari (supra), this Court held as under:

4. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in State of Haryana v. Bhajan Lal. This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under:

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub- section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression 'information' without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, 'reasonable complaint' and 'credible information' are used. Evidently, the non qualification of the word 'information' in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with

those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word 'information' without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

(Emphasis in original)

Finally, this Court in para 33 said:

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

5. The views expressed by this Court in paras 31, 32 and 33 as quoted above leave no manner of doubt that the provision of Section 154 of the Code is mandatory and the officer concerned is duty- bound to register the case on the basis of such information disclosing cognizable offence.

68. In Ram Lal Narang (supra), this Court held as under:

14. Under the Code of Criminal Procedure, 1898, whenever an officer in charge of the police station received information relating to the commission of a cognizable offence, he was required to enter the substance thereof in a book kept by him, for that purpose, in the prescribed form (Section 154 Code of Criminal Procedure). Section 156 of the Code of Criminal Procedure invested the Police with the power to investigate into cognizable offences without the order of a Court. If, from the information received or otherwise, the officer in charge of a police station suspected the commission of a cognizable offence, he was required to send forthwith a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and then to proceed in person or depute one of his subordinate officers to proceed to the spot, to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender (Section 157 Code of Criminal Procedure). He was required to complete the investigation without unnecessary delay, and, as soon as it was completed, to forward to a Magistrate empowered to take cognizance of the offence upon a police report, a report in the prescribed

form, setting forth the names of the parties, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case [Section 173(1) Code of Criminal Procedure]. He was also required to state whether the accused had been forwarded in custody or had been released on bail. Upon receipt of the report submitted under Section 173(1) Code of Criminal Procedure by the officer in charge of the police station, the Magistrate empowered to take cognizance of an offence upon a police report might take cognizance of the offence [Section 190(1)(b) Code of Criminal Procedure]. Thereafter, if, in the opinion of the Magistrate taking cognizance of the offence, there was sufficient ground for proceeding, the Magistrate was required to issue the necessary process to secure the attendance of the accused (Section 204 Code of Criminal Procedure). The scheme of the Code thus was that the FIR was followed by investigation, the investigation led to the submission of a report to the Magistrate, the Magistrate took cognizance of the offence on receipt of the police report and, finally, the Magistrate taking cognizance issued process to the accused.

15. The police thus had the statutory right and duty to "register" every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well- established. In King Emperor v. Khwaja Nazir Ahmad the Privy Council observed as follows:

Just as it is essential that everyone accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Courts to intervene in an appropriate case when moved under Section 491 of the Code of Criminal Procedure to give directions in the nature of Habeas Corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then... In the present case, the police have under Sections 154 and 156 of the Code of Criminal Procedure, a statutory right to investigate a cognizable offence without requiring the sanction of the Court....

Ordinarily, the right and duty of the police would end with the submission of a report under Section 173(1) Code of Criminal Procedure upon receipt of which it was up to the Magistrate to take or not to take cognizance of the offence. There was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after the submission of a report under Section

173(1) Code of Criminal Procedure and after the Magistrate had taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after the submission of the report under Section 173(1) or after the Magistrate had taken cognizance of the offence. As we shall presently point out, it was generally thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Section 173(1) had already been submitted and a Magistrate had already taken cognizance of the offence. The Law Commission in its 41st report recognized the position and recommended that the right of the police to make further investigation should be statutorily affirmed. The Law Commission said:

14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re- open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused.

Accordingly, in the Code of Criminal Procedure, 1973, a new provision, Section 173(8), was introduced and it says:

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub- section (2).

69. In Lallan Chaudhary (supra), this Court held as under:

8. Section 154 of the Code thus casts a statutory duty upon the police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

9. In Ramesh Kumari v. State (NCT of Delhi) this Court has held that the provision of Section 154 is mandatory. Hence, the police officer concerned is duty- bound to register the case on receiving

information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case.

10. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code.

A perusal of the above- referred judgments clarify that the reasonableness or creditability of the information is not a condition precedent for the registration of a case.

Preliminary Inquiry

70. Mr. Naphade relied on the following decisions in support of his arguments that if the police officer has a doubt about the veracity of the accusation, he has to conduct preliminary inquiry, viz., E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3, Maneka Gandhi (supra), S.M.D. Kiran Pasha v. Government of Andhra Pradesh MANU/SC/0473/1989 : (1990) 1 SCC 328, D.K. Basu v. State of W.B. MANU/SC/0157/1997 : (1997) 1 SCC 416, Uma Shankar Sitani v. Commissioner of Police, Delhi and Ors. : (1996) 11 SCC 714, Preeti Gupta (supra), Francis Coralie Mullin v. Administrator, Union Territory of Delhi MANU/SC/0517/1981 : (1981) 1 SCC 608, Common Cause, A Registered Society v. Union of India MANU/SC/0437/1999 : (1999) 6 SCC 667, District Registrar and Collector, Hyderabad v. Canara Bank MANU/SC/0935/2004 : (2005) 1 SCC 496 and Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra MANU/SC/0268/2005 : (2005) 5 SCC 294.

71. Learned senior counsel for the State further vehemently contended that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that prima facie the allegations levelled against the accused in the complaint are credible. In this regard, Mr. Naphade cited the following decisions, viz. Tapan Kumar Singh (supra), Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), Vineet Narain v. Union of India MANU/SC/0827/1998 : (1998) 1 SCC 226, Elumalai v. State of Tamil Nadu MANU/TN/0610/1983 : 1983 LW (CRL) 121, A. Lakshmanarao v. Judicial Magistrate, Parvatipuram MANU/SC/0076/1970 : AIR 1971 SC 186, State of Uttar Pradesh v. Ram Sagar Yadav and Ors. MANU/SC/0118/1985 : (1985) 1 SCC 552, Mona Panwar v. High Court of Judicature of Allahabad MANU/SC/0087/2011 : (2011) 3 SCC 496, Apren Joseph v. State of Kerala MANU/SC/0078/1972 : (1973) 3 SCC 114, King Emperor v. Khwaja Nazir Ahmad MANU/PR/0007/1944 : AIR 1945 PC 18 and Sarangdharsingh Shivdassingh Chavan (supra).

72. He further pointed out that the provisions have to be read in the light of the principle of malicious prosecution and the fundamental rights guaranteed under Articles 14, 19 and 21. It is the stand of learned senior counsel that every citizen has a right not to be subjected to malicious prosecution and every police officer has an in- built duty under Section 154 to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not prima facie satisfied, as regards commission of a cognizable offence and proceeds to register an FIR and carries out an investigation, it would result in putting the liberty of a citizen in jeopardy. Therefore, learned senior counsel vehemently pleaded for a preliminary inquiry before registration of FIR.

73. In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section 154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. The requirement of Section 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.

74. The insertion of Sub- section (3) of Section 154, by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

75. The maxim expression unius est exclusion alterius (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

76. Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law.

77. The term inquiry as per Section 2(g) of the Code reads as under:

2(g) - "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

Hence, it is clear that inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as 'Preliminary Inquiry' and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/Daily Diary has been made.

78. Though there is reference to the term 'preliminary inquiry' and 'inquiry' under Sections 159 and Sections 202 and 340 of the Code, that is a judicial exercise undertaken by the Court and not by the Police and is not relevant for the purpose of the present reference.

79. Besides, learned senior counsel relied on the special procedures prescribed under the CBI manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of the CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that the CBI is constituted under a Special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derive its power to investigate from this Act.

80. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

Section 4. Trial of offences under the Indian Penal Code and other laws. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

It is thus clear that for offences under laws other than Indian Penal Code, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial etc., of those offences. Section 4(2) of the Code protects such special provisions.

81. Moreover, Section 5 of the Code lays down as under:

Section 5. Saving- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Thus, special provisions contained in the DSPE Act relating to the powers of the CBI are protected also by Section 5 of the Code.

82. In view of the above specific provisions in the Code, the powers of the CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code.

Significance and Compelling reasons for registration of FIR at the earliest

83. The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later.

84. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly, under the Code, actions of the police etc., are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence etc., for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the concerned officer to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized etc.

85. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating

to commission of a non- cognizable offence also has to be registered under Section 155 of the Code.

86. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

87. The Code contemplates two kinds of FIRs. The duly signed FIR under Section 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.

88. The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

a) It is the first step to 'access to justice' for a victim.

b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.

c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.

d) It leads to less manipulation in criminal cases and lessens incidents of 'ante- dates' FIR or deliberately delayed FIR.

89. In Thulia Kali v. State of Tamil Nadu MANU/SC/0276/1972 : (1972) 3 SCC 393, this Court held as under:

12...First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the

above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained....

90. In Tapan Kumar Singh (supra), it was held as under:

20. It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

91. In Madhu Bala (supra), this Court held:

6. Coming first to the relevant provisions of the Code, Section 2(d) defines "complaint" to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Under Section 2(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(r) "police report" means a report forwarded by a police officer to a Magistrate under Sub- section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Section 156 of the Code with which we are primarily concerned in these appeals reads as under....

9. The mode and manner of registration of such cases are laid down in the Rules framed by the different State Governments under the Indian Police Act, 1861. As in the instant case we are concerned with Punjab Police Rules, 1934 (which are applicable to Punjab, Haryana, Himachal Pradesh and Delhi) framed under the said Act we may now refer to the relevant provisions of those Rules. Chapter XXIV of the said Rules lays down the procedure an officer in charge of a police station has to follow on receipt of information of commission of crime. Under Rule 24.1 appearing in the Chapter every information covered by Section 154 of the Code must be entered in the First Information Report Register and the substance thereof in the daily diary. Rule 24.5 says that the First Information Report Register shall be a printed book in Form 24.5(1) consisting of 200 pages and shall be completely filled before a new one is commenced. It further requires that the cases shall bear an annual serial number in each police station for each calendar year. The other requirements of the said Rules need not be detailed as they have no relevance to the point at issue.

10. From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint" the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to "register a case" makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable "case" and the Rules framed under the Indian Police Act, 1861 it (the police) is duty- bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same.

92. According to the Statement of Objects and Reasons, protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.

93. The Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath also noticed the plight faced by several people due to non- registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The Committee observed:

7.19.1 According to the Section 154 of the Code of Criminal Procedure, the office incharge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non- registration of cases is a serious complaint against the police. The National Police Commission in its 4th report lamented that the police "evade registering cases for taking up investigation where specific complaints are lodged at the police stations". It referred to a study conducted by the Indian Institute of Public Opinion, New Delhi regarding "Image of the Police in India" which observed that over 50% of the Respondents mention non- registration of complaints as a common practice in police stations.

7.19.2 The Committee recommends that all complaints should be registered promptly, failing which appropriate action should be taken. This would necessitate change in the mind - set of the political executive and that of senior officers.

7.19.4 There are two more aspects relating to registration. The first is minimization of offences by the police by way of not invoking appropriate sections of law. We disapprove of this tendency. Appropriate sections of law should be invoked in each case unmindful of the gravity of offences involved. The second issue is relating to the registration of written complaints. There is an increasing tendency amongst the police station officers to advise the informants, who come to give oral complaints, to bring written complaints. This is wrong. Registration is delayed resulting in valuable loss of time in launching the investigation and apprehension of criminals. Besides, the complainant gets an opportunity to consult his friends, relatives and sometimes even lawyers and often tends to exaggerate the crime and implicate innocent persons. This eventually has adverse effect at the trial. The information should be reduced in writing by the SH, if given orally, without any loss of time so that the first version of the alleged crime comes on record.

7.20.11 It has come to the notice of the Committee that even in cognizable cases quite often the Police officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non- cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint

received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer.

94. It means that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes.

95. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non- registration of such a large number of FIRs leads to a definite lawlessness in the society.

96. Therefore, reading Section 154 in any other form would not only be detrimental to the Scheme of the Code but also to the society as a whole. It is thus seen that this Court has repeatedly held in various decided cases that registration of FIR is mandatory if the information given to the police under Section 154 of the Code discloses the commission of a cognizable offence.

Is there a likelihood of misuse of the provision?

97. Another, stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.

98. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the Court.

99. It is also relevant to note that in Joginder Kumar v. State of U.P. and Ors. MANU/SC/0311/1994 : (1994) 4 SCC 260, this Court has held that arrest cannot be made by police in a routine manner. Some important observations are reproduced as under:

20...No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

100. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that "merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation" and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.

101. This can also be seen from the fact that Section 151 of the Code allows a police officer to arrest a person, even before the commission of a cognizable offence, in order to prevent the commission of that offence, if it cannot be prevented otherwise. Such preventive arrests can be valid for 24 hours. However, a Maharashtra State amendment to Section 151 allows the custody of a person in that State even for up to a period of 30 days (with the order of the Judicial Magistrate) even before a cognizable offence is committed in order to prevent commission of such offence. Thus, the arrest of a person and registration of FIR are not directly and/or irreversibly linked and they are entirely different concepts operating under entirely different parameters. On the other hand, if a police officer misuses his power of arrest, he can be tried and punished under Section 166.

102. Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The Section itself states that a police officer can start investigation when he has a 'reason to suspect the commission of an offence'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

103. Likewise, giving power to the police to close an investigation, Section 157 of the Code also acts like a check on the police to make sure that it is dispensing its function of investigating cognizable offences. This has been recorded in the 41st Report of the Law Commission of India on the Code of Criminal Procedure, 1898 as follows:

14.1...If the offence does not appear to be serious and if the station- house officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.

14.2. A noticeable feature of the scheme as outlined above is that a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.

Therefore, the Scheme of the Code not only ensures that the time of the police should not be wasted on false and frivolous information but also that the police should not intentionally refrain from doing their duty of investigating cognizable offences. As a result, the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature.

104. It is the stand of Mr. Naphade, learned senior Counsel for the State of Maharashtra that when an innocent person is falsely implicated, he not only suffers from loss of reputation but also from mental tension and his personal liberty is seriously impaired. He relied on the Maneka Gandhi (supra), which held the proposition that the law which deprives a person of his personal liberty must be reasonable both from the stand point of substantive as well as procedural aspect is now firmly established in our Constitutional law. Therefore, he pleaded for a fresh look at Section 154 of the Code, which interprets Section 154 of the Code in conformity with the mandate of Article 21.

105. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

Exceptions:

106. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

107. In the context of medical negligence cases, in Jacob Mathew (supra), it was held by this Court as under:

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

108. In the context of offences relating to corruption, this Court in P. Sirajuddin (supra) expressed the need for a preliminary inquiry before proceeding against public servants.

109. Similarly, in Tapan Kumar Singh (supra), this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

110. Therefore, in view of various counter claims regarding registration or non- registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/Directions:

111. In view of the aforesaid discussion, we hold:

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

112. With the above directions, we dispose of the reference made to us. List all the matters before the appropriate Bench for disposal on merits.

MANU/SC/8179/2007

Back to Section 156 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1685 of 2007 (Arising out of SLP (Crl.) No. 6404/2007)

Decided On: 07.12.2007

Sakiri Vasu Vs. State of U.P. and Ors.

Hon'ble Judges/Coram:

A.K. Mathur and Markandey Katju, JJ.

JUDGMENT

Markandey Katju, J.

1. Leave granted.

2. This appeal is directed against the impugned judgment and order dated 13.7.2007 passed by the Allahabad High Court in Criminal Misc. Writ Petition No. 9308 of 2007.

3. Heard learned Counsel for the parties and perused the record.

4. The son of the appellant was a Major in the Indian Army. His dead body was found on 23.8.2003 at Mathura Railway Station. The G.R.P, Mathura investigated the matter and gave a detailed report on 29.8.2003 stating that the death was due to an accident or suicide.

5. The Army officials at Mathura also held two Courts of Inquiry and both times submitted the report that the deceased Major S. Ravishankar had committed suicide at the railway track at Mathura junction. The Court of Inquiry relied on the statement of the Sahayak (domestic servant) Pradeep Kumar who made a statement that "deceased Major Ravishankar never looked cheerful; he used to sit on a chair in the verandah gazing at the roof with blank eyes and deeply involved in some thoughts and used to remain oblivious of the surroundings". The Court of Inquiry also relied on the deposition of the main eye- witness, gangman Roop Singh, who stated that Major Ravishankar was hit by a goods train that came from Delhi.

6. The appellant who is the father of Major Ravishankar alleged that in fact it was a case of murder and not suicide. He alleged that in the Mathura unit of the Army there was rampant corruption about which Major Ravishankar came to know and he made oral complaints about it to his superiors and also to his father. According to the appellant, it was for this reason that his son was murdered.

7. The first Court of Inquiry was held by the Army which gave its report in September, 2003 stating that it was a case of suicide. The appellant was not satisfied with the findings of this Court of Inquiry and hence on 22.4.2004 he made a representation to the then Chief of the Army Staff, General N.C. Vij, as a result of which another Court of Inquiry was held. However, the second Court of Inquiry came to the same conclusion as that of the first inquiry namely, that it was a case of suicide.

8. Aggrieved, a writ petition was filed in the High Court which was dismissed by the impugned judgment. Hence this appeal.

9. The petitioner (appellant herein) prayed in the writ petition that the matter be ordered to be investigated by the Central Bureau of Investigation (in short 'CBI'). Since his prayer was rejected by the High Court, hence this appeal by way of special leave.

10. It has been held by this Court in CBI and Anr. v. Rajesh Gandhi and Anr. MANU/SC/0030/1997 : 1997CriLJ63 that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

12. Thus in Mohd. Yousuf v. Smt. Afaq Jahan and Anr. MANU/SC/8888/2006 : 2006CriLJ788 , this Court observed:

The clear position therefore is that any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigating under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

13. The same view was taken by this Court in Dilawar Singh v. State of Delhi MANU/SC/3678/2007 : 2007CriLJ4709 (vide para 17). We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) Cr.P.C., and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order orders as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) Cr.P.C.

14. Section 156(3) states:

Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.

The words `as abovementioned' obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the Police Station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order re- opening of the investigation even after the police submits the final report, vide State of Bihar v. A.C. Saldanna MANU/SC/0253/1979 : 1980CriLJ98 .

17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well- settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his 'Statutory Construction' (3rd edn. page 267):

If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission.

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein.

21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in ITO, Cannanore v. M.K. Mohammad Kunhi AIR 1969 SC 430, this Court held that the income tax appellate tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

22. Similar examples where this Court has affirmed the doctrine of implied powers are Union of India v. Paras Laminates MANU/SC/0173/1991 : [1990]186ITR722(SC) , Reserve Bank of India v. Peerless General Finance and Investment Company Ltd. MANU/SC/0165/1996 : [1996]1SCR58 , Chief Executive Officer and Vice Chairman Gujarat Maritime Board v. Haji Daud Haji Harun Abu MANU/SC/1719/1996 : (1996)11SCC23 , J.K. Synthetics Ltd. v. Collector of Central Excise MANU/SC/0972/1996 : 1996(86)ELT472(SC) , State of Karnataka v. Vishwabharati House Building Co- op Society MANU/SC/0033/2003 : [2003]1SCR397 etc.

23. In Savitri v. Govind Singh Rawat MANU/SC/0104/1985 : 1986CriLJ41 this Court held that the power conferred on the Magistrate under Section 125 Cr.P.C. to grant maintenance to the wife implies the power to grant interim maintenance during the pendency of the proceeding, otherwise she may starve during this period.

24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and/or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., we are of the opinion that they are implied in the above provision.

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr.P.C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 Cr.P.C. simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the concerned police officers, and if that is of no avail, under Section 156(3) Cr.P.C. before the Magistrate or by filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under Section 482 Cr.P.C.

28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere.

29. In Union of India v. Prakash P. Hinduja and Anr. MANU/SC/0446/2003 : 2003CriLJ3117 , it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156(3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in- charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate).

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation has not been made by the officer- in- charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer- in- charge of the police station and such superior officer can, if he so wishes, do the investigation vide CBI v. State of Rajasthan and Anr. MANU/SC/0042/2001 : 2001CriLJ968 , R.P. Kapur v. S.P. Singh MANU/SC/0070/1960 : [1961]2SCR143 etc. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide State of Bihar v. A.C. Saldanna (supra).

31. No doubt the Magistrate cannot order investigation by the CBI vide CBI v. State of Rajasthan and Anr. (Supra), but this Court or the High Court has power under Article 136 or Article 226 to order investigation by the CBI. That, however should be done only in some rare and exceptional case, otherwise, the CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them.

32. In the present case, there was an investigation by the G.R.P., Mathura and also two Courts of Inquiry held by the Army authorities and they found that it was a case of suicide. Hence, in our opinion, the High Court was justified in rejecting the prayer for a CBI inquiry.

33. In Secretary, Minor Irrigation & Rural Engineering Services U.P. and Ors. v. Sahngoo Ram Arya and Anr. MANU/SC/0441/2002 : 2002CriLJ2942 , this Court observed that although the High Court has power to order a CBI inquiry, that power should only be exercised if the High Court after considering the material on record comes to a conclusion that such material discloses prima facie a case calling for investigation by the CBI or by any other similar agency. A CBI inquiry cannot be ordered as a matter of routine or merely because the party makes some allegation.

34. In the present case, we are of the opinion that the material on record does not disclose a prima facie case calling for an investigation by the CBI. The mere allegation of the appellant that his son was murdered because he had discovered some corruption cannot, in our opinion, justify a CBI inquiry, particularly when inquiries were held by the Army authorities as well as by the G.R.P. at Mathura, which revealed that it was a case of suicide.

35. It has been stated in the impugned order of the High Court that the G.R.P. at Mathura had investigated the matter and gave a detailed report on 29.8.2003. It is not clear whether this report was accepted by the Magistrate or not. If the report has been accepted by the Magistrate and no appeal/revision was filed against the order of the learned Magistrate accepting the police report, then that is the end of the matter. However, if the Magistrate has not yet passed any order on the police report, he may do so in accordance with law and in the light of the observations made above.

36. With the above observations, this appeal stands dismissed.

37. Let a copy of this judgment be sent by the Secretary General of this Court to the Registrar Generals/Registrars of all the High Courts, who shall circulate a copy of this Judgment to all the Hon'ble Judges of the High Courts.

MANU/SC/0322/1988

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) Nos. 49 and 129 of 1987

Decided On: 14.10.1988

Mukund Lal and Ors. Vs. Union of India (UOI) and Ors.

Back to Section 161 of Code of Criminal Procedure, 1973

Back to Section 172 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

M.P. Thakkar and B.C. Ray, JJ.

JUDGMENT

M.P. Thakkar, J.

1. Constitutional validity of a part of a provision enjoining a police officer engaged in an investigation under Chapter XII of the CrPC (Cr.P.C.) has been called into question. The provision which so enjoins an investigation officer is embodied in Section 172, Clause (1) whereof imposes the duty. It is a part of this provision namely Clause (3) which is the target of the challenge made by one of the two accused in a Criminal case. The High Court having repulsed the challenge, the accused have approached this Court by way of the present petition in order to reiterate the challenge on the premise that the High Court had erred in sustaining the validity of the impugned provision.

2. The analysis of Section 172 (Section 172(3)- "Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or 145 as the case may be, of the Indian Evidence Act, 1872 shall apply), Clause (3) whereof has given rise to the challenge to its constitutionally reveals:

(1) That it embodies a complete scheme relating to the matter of maintaining a diary.

(2) Clause (1) imposes the obligation to do so and provides for the contents thereof.

(3) The Court is empowered to call for such diaries to aid it in inquiry or trial subject to the rider that it can not be used as evidence thereat.

(4) Merely because the Court calls for the diary, the accused (or his agent) can not claim the right to peruse it.

(5) The accused can peruse that particular part 2 of the diary in the context of Section 161 (Section 161 "Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon) of the Indian Evidence Act or Section 145 (Section 145 "A witness may be cross- examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, called to those parts of it which are to be used for the purpose of contradicting him) thereof in case:

(a) if it is used by the police officer concerned to refresh his memory;

or

(b) if the Court uses it for contradicting the police official concerned.

3. The High Court has repelled the plea by recourse to the reasoning reflected in the relevant passage extracted hereinbelow:

So far as Section 172(3) is concerned, the embargo on the right of the accused or his representative in calling for the diary or seeing any part of it is only a partial one and not absolute because if a part of the diary has been used by the police officer to refresh his memory or the court uses it for the purpose of contradicting such police officer, the provisions of Section 161 and 145 of the Indian Evidence Act, will be applicable. So far as the other parts are concerned, the accused need not necessarily have a right of access to them because in a criminal trial or enquiry, whatever is sought to be proved against the accused, will have to be proved by the evidence other than the diary itself and the diary can only be used for a very limited purpose by the Court or the police officer as stated above. Even then, a safeguard has already been provided in the Section itself to protect the right of the accused. The investigating Officer deposes before the Court on the basis of the entries in the diary. If the accused or his counsel thinks that he is stating something against the diary or is trying to hide something which may be in the diary he can put question in that respect to the Investigating Officer, and if the accused or his counsel has any doubt about the veracity of the statement made by the Investigation Officer, he may always request the court to look into the diary and verify the facts and, this right of the accused can always be safeguarded. It is true that it is for the court to decide whether the facts stated are borne out by the diary or not,

but then this much reliance has always to be placed on the court and it has to be trusted as it is trusted in the case under Section 123 of the Evidence Act in order to decide whether any privilege can be claimed with respect to the documents in question. Even according to the authorities relied upon by the learned Counsel for the petitioner pertaining to Section 123 of the Evidence Act, it is the right of the court to decide whether the privileged document contains any material affecting the public interest or a particular affair of the State, which need not be disclosed.

When in the enquiry or trial, everything which may appear against the accused has to be established and brought before the Court by evidence other than the diary and the accused can have the benefit of cross- examining the witnesses and the court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, I am clearly of the opinion, that the provisions under Section 172(3) Cr.P.C. cannot be said to be unconstitutional.

We fully endorse the reasoning of the High Court and concur with its conclusion. We are of the opinion that the provision embodied in Sub- section (3) of Section 172 of the Cr.P.C. cannot be characterised as unreasonable or arbitrary. Under Sub- section (2) of Section 172 Cr.P.C. the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary, if there is any inconsistency or contradiction arising in the context of the case dairy the Court can use the entries for the purpose of contradicting the Police Officer as provided in Sub- section (3) of Section 172 of the Cr.P.C. Ultimately there can be no better custodian or guardian of the interest of justice than the Court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognised, the embargo engrafted in Sub- section (3) of Section 172 of the Cr.P.C. would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public Interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in Mohinder Singh v. Emperor MANU/LA/0069/1931 : AIR 1932 Lah 103:

The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced.

and also as observed in Mahabirji Birajman Mandir v. Prem Narain Shukla and Ors. MANU/UP/0141/1965 : AIR1965All494 .

The case diary contains not only the statements of witnesses recorded under Section 161 Cr.P.C. and the site plan or other documents prepared by the Investigating Officer, but also reports or observations of the Investigating Officer or his superiors. These reports are of a confidential nature and privilege can be claimed thereof. Further, the disclosure of the contents of such reports cannot help any of the parties to the litigation, as the report invariably contains the opinion of such officers and their opinion is inadmissible in evidence.

4. The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded.

This is a factor which must be accorded its due weight. There would be no prejudice or failure of justice to the accused person since the court can be trusted to look into the police diary for the purpose of protecting his interest. Therefore, the public interest requirement from the perspective of safeguarding the interest of all persons standing trial, is not compromised. On the other hand the public interest requirement from the perspective of enabling the investigation agency to investigate the crime against the society in order that the interest of the community to ensure that a culprit is traced and brought to book is also safeguarded. The argument inspired by the observations in Raj Narain's case MANU/SC/0032/1975 : [1975]3SCR333 and S.P. Gupta's case MANU/SC/0080/1981 : [1982]2SCR365 in the context of claim for privilege in regard to Section 123 of Evidence Act, which have no direct bearing, is also effectively answered in the light of the foregoing discussion as the 'Public Interest' aspect is also taken care of. In the ultimate analysis, it is not possible to sustain the plea of the petitioners, which is rooted in the mistrust of the court itself, that the provision is unreasonable and arbitrary. There is also another dimension of the issue. Section 172 embodies a composite scheme. The duty cast under Clause (1) and the rider added by Clause(13) thereof from integral part of the scheme. Clause (3) cannot be struck down in isolation whilst retaining Clause (1). The legislature in its wisdom has cast this obligation only subject to the rider. Clause (3) cannot be viewed in isolation. Under the circumstances, we concur with the view of the High Court and repulse the challenge. These are the reasons which impelled us to dismiss the petitions.

MANU/SC/0163/1981

IN THE SUPREME COURT OF INDIA

Writ Petition Nos. 5670 and 6216 of 1980

Decided On: 10.03.1981

Khatri and Ors. Vs. State of Bihar and Ors.

Back to Section 162 of Code of Criminal Procedure, 1973

Back to Section 172 of Code of Criminal Procedure, 1973

Back to Section 304 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

Baharul Islam and P.N. Bhagwati, JJ.

ORDER

1. The question which arises before us for consideration is whether certain documents called for by the Court by its order dated 16th February, 1981 are liable to be produced by the State or their production is barred under some provision of law. The documents called for are set out in the order dated 16th February, 1981 and they are as follows:

1. the CID report submitted by L.V. Singh,. DIG, CID (Anti- Dacoity) on December 9, 1980;

2. the CID reports on all the 24 cases submitted by L.V. Singh and his associates between January 10 and January 20, 1981;

3. the letters number 4/R dated 3rd January, 1981 and number 20/R dated 7th January, 1981 from L.V. Singh to the IG, Police;

4. the files containing all correspondence and notings exchange between L.V. Singh, DIG and M.K. Jha, Additional IG, regarding the CID inquiry into the Windings, and

5. the file (presently in the office of the IG, S.K. Chatterjee) containing the reports submitted by Inspector and Sub- Inspector of CID to Gajendra Narain, DIG, Bhagalpur, on 18th July or thereabouts and his letter to K.D. Singh, SP, CID, Patna which has the hand- written observations of M.K. Jha.

2. The State has objected to the production of these documents on the ground that they are protected from disclosure under Sections 162 and 172 of the CrPC 1973 and the petitioners are

not entitled to see them or to make any use of them in the present proceeding. This contention raises a question of some importance and it has been debated with great farvour on both sides but we do not think it presents any serious difficulty in its resolution, if we have regard to the terms of Sections 162 and 172 of the Criminal Procedure Code on which reliance has been placed on behalf of the State.

3. We will first consider the question in regard to the reports submitted by Sh. L.V. Singh, Deputy Inspector General CID (Anti- Dacoity) on 2nd December, 1980 and the reports submitted by him 1 and his associates Sh. R.R. Prasad, S.P. (Anti- Dacoity) and Smt. Manjuri Jaurahar, S.P. (Anti-Dacoity) between 10th and 20th January, 1981. These reports have been handed over to us for our perusal by Mr. K.G. Bhagat learned advocate appearing on behalf of the State and it is clear from these reports, and that has also been 1 stated before us on behalf of the State, that by an order dated 28- 29th November, 1980 made by the State Government under Section 3 of the Indian Police Act 1861, Sh. (sic) L.V. Singh was directed by the State Government to investigate into 24 cases of blinding of under- trial prisoners and it was in discharge of this official duty entrusted to him that he with the associates Sh. R.R. Prasad and Smt. Manjuri Jaurahar investigated these cases and made these reports. These reports set out the conclusions reached by him as a result of his investigation into these cases. The question is whether the production of these reports is hit by Sections 162 and' 172 of the Criminal Procedure Code. It may be pointed out that these are the only provisions of law under which the State resists production of these reports. The State has not claimed privilege in regard to these reports under Section 123 or Section 124 of the Indian Evidence Act. All that is necessary therefore is to examine the applicability of Sections 162 and 172 of the Criminal Procedure Code in the present base.

4. Before we refer to the provisions of Sections 162 and 172 of the Criminal Procedure Code, it would be convenient to set out briefly a few relevant provisions of that Code. Section 2 is the definition Section and Clause (g) of that Section defines 'Inquiry' to mean "every inquiry, other than a trial conducted under this Code by a Magistrate or Court". Clause (h) of Section 2 gives the definition of 'investigation' and it says that investigation includes "all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf". Section (4) provide

4(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating inquiring into, trying or otherwise dealing with such offences.

5. It is apparent from this Section that the provisions of the Criminal Procedure Code are applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with. Then we come straight to Section 162

which occurs in chapter XII dealing with the powers of the Police to investigate into offences. That Section, so far as material, reads as under.

162 (1) No statement made by any person to a police officer in the course of an investigation under this chapter, shall, if reduced to 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; 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.

(2) Nothing in this Section shall be deemed to apply to any statement falling within the provisions of Clause (1) of Section 32 of the Indian Evidence Act, 1872, or to affect the provisions of Section 27 of that Act.

It bars the use of any statement made before a police officer in the course of an investigation under chapter XII, whether recorded in a police dairy or otherwise, but by the express terms of Section, this bar is applicable only were such statement is sought to be used 'at any inquiry or trial in respect of any offence under investigation at the time when such statement was made'. If the statement made before a police officer in course of an investigation under chapter XII is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of Section 162 would not be attracted.

This section has been enacted for the benefit of the accused, as pointed out by this Court in Tehsildar Singh and Anr. v. The State of Uttar Pradesh MANU/SC/0053/1959 : (1959) Supp. 2 S.C.R. 875, it is intended "to protect the accused against the user of statements of witnesses made before the police during investigation, at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence." This court, in Tehsildar Singh's case approved the following observations of Braund, J. in Emperor v. Aftab Mohd. Khan MANU/UP/0243/1939 : AIR1940All291 .

As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it, and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths.

and expressed its agreement with the view taken by the Division Bench of the Nagpur High Court in Baliram Tikaram Marathe v. Emperor MR (1945) Nag 1 that "the object of the section is to protect the accused both against overzealous police officers and untruthful witnesses." Protection against the use of statement made before the police during investigation is, therefore, granted to the accused by providing that such statement shall not be allowed to be used except for the limited purpose set out in the provision to the section, at any inquiry or trial in respect of the offence which was under investigation at the time when such statement was made. But, this protection is unnecessary in any proceeding other than an inquiry or trial in respect of the offence under investigation and hence the bar created by the section is a limited bar. It has no application, for example in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution and a statement made before a police officer in the course of investigation can be used as evidence in such proceeding, provided it is otherwise relevant under the Indian Evidence Act. There are a number of decisions of various High Courts which have taken this view and amongst them may be mentioned the decision of Jaganmohan Reddy, J. in Malakaya Surya Rao v. Janakamma MANU/AP/0089/1964 : AIR1964AP198 . The present proceeding before us is a writ petition under Article 32 of the Constitution filed by the petitioners for enforcing their Fundamental Rights under Article 21 and it is neither an "inquiry" nor a "trial" in respect of any offence and hence it is difficult to see how Section 162 can be invoked by the State in the present case. The procedure to be followed in a writ petition under Article 32 of the Constitution is prescribed in Order XXXV of the Supreme Court Rules, 1966, and Sub- rule (9) of Rule 10 lays down that at the hearing of the rule nisi, if the court is of the opinion that an opportunity be given to the party to establish their respective cases by leading further evidence, the court may take such evidence or cause such evidence to be taken in such manner as it may deem fit and proper and obviously the reception of such evidence will be governed by the provisions of the Indian Evidence Act. It is obvious, therefore, that even a statement made before a police officer during investigation can be produced and used in evidence in a writ petition under Article 32 provided it is relevant under the Indian Evidence Act and Section 162 cannot be urged as a bar against its production or use. The reports submitted by Shri L.V. Singh setting forth the result of his investigation cannot, in the circumstances, be shut out from being produced and considered in evidence under Section 162, even it they refer to any statements made before him and his associates during investigation, provided they are otherwise relevant under some provision of the Indian Evidence Act.

6. We now turn to Section 172 which is the other section relied upon by the State. That section reads as follows:

172. Diary of proceedings in investigation- - (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officers, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872) shall apply.

The first question which arises for consideration under this section is whether the reports made by Shri L.V. Singh as a result of the investigation carried out by him and his associates could be said to form part of case diary within the meaning of this section. The argument of Mrs. Mingorani and Dr. Chitale was that these reports did not form part of case diary as contemplated in this section, since the investigation which was carried out by Shri L.V. Singh was pursuant to a direction given to him by the State Government under Section 3 of the Indian Police Act 1861, and it was not an investigation under Chapter XII of the Criminal Procedure Code which alone would attract the applicability of Section 172. Mrs. Hingorani sought to support his proposition by relying upon the decision of this Court in State of Bihar v. J.A.C. Saldhana MANU/SC/0253/1979 : 1980CriLJ98 . Mr. K.G. Bhagat, learned Counsel appearing on behalf of the State however, submitted that even though Shri L.V. Singh earring out the investigation under the direction given by the State Government in exercise of the power conferred under Section 3 of the Indian Police Act, 1861, the investigation carried out by him was one under Chapter XII and Section 172 was therefore applicable in respect of the reports made by him setting out the result of the investigation. He conceded that it was undoubtedly laid down by this Court in State of Bihar v. J.A.C. Saldhana (supra) that the State Government has power to direct investigation or further investigation under Section 3 of the Indian Police Act 1861, but contended that it was equally clear from the decision in that case that "power to direct investigation or further investigation is entirely different from the method and procedure of investigation and the competence of the person who Investigates." He urged that Section 36 of the Criminal Procedure Code provides that police officers superior in rank to an officer in- charge of a police station may exercise the same powers throughout the local area to which they are appointed as may be exercised by such officer within the limits of his station and Shri L.V. Singh being the Deputy Inspector General of Police, was superior in sank to an officer in charge of a police station and was, therefore, competent to investigate the offences arising from the blinding of the undertrial prisoners and the State Government acted within its powers under Section 3 of the Indian Police Act, 1861 in directing Shri L.V. Singh to investigate into these offences. But, "the method and procedure of investigation" was to be the same as that prescribed for investigation by an officer in charge of a police station under Chapter XII and therefore the investigation made by Shri L.V. Singh was an investigation under that Chapter so as to bring in the applicability of Section 172. These rival contentions raise two interesting questions, first, whether an investigation carried out by a superior officer by virtue of a direction given to him by the State Government under Section 3 of the Indian Police Act 1861 is an investigation under Chapter XII so as to attract the applicability of Section 172 to a diary maintained by him in the course of such investigation and secondly, whether the report made by such officer as a result of the investigation carried out by him forms part of case diary within the meaning of Section 172. We do not, however, think it necessary to enter upon a consideration of these two questions and we shall assume for the purpose of our discussion that Mr. K.G. Bhagat, learned Counsel appearing on behalf of the State,

is right in his submission in regard to both these questions and that the reports made by Shri L.V. Singh setting out the result of his investigation form part of case diary so as to invite the applicability of Section 172. But, even if that be so, the question is whether these reports are protected from disclosure under Section 172 and that depends upon a consideration of the terms of this section.

7. The object of Section 172 in providing for the maintenance of a diary of his proceedings by the police officer making in investigation under Chapter XII has been admirably stated by Edge, C.J. in Queen- Empress v. Mannu (1897) 19 All. 360 in the following words:

The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honesty, the capacity, the discretion and the judgment of the police can be thoroughly trusted, it is necessary, for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false, or misleading which was obtained from day to day by the police officer who was investigating the case and what such police officer acted.

The criminal Court holding an inquiry or trial of a case is therefore empowered by Sub- section (2) of Section 172 to send for the police: diary of the case and the criminal court can use such diary, not as evidence in the case, but to aid it in such inquiry or trial. But, by reason of Sub- section (3) of Section 172, merely because the case diary is referred to by the criminal court, neither the accused nor his agent are entitled to call for such diary nor are they entitled to see it. If however the case diary is used by the police officer who has made it to refresh his memory or if the criminal court uses it for the purpose of contradicting such police officer in the inquiry Or trial, the provisions of Section 145, as the case may be, of the Indian Evidence Act would apply and the accused would be entitled to see the particular entry in the case diary which has been referred to for either of these purposes and so much of the diary as in the opinion of the Court is necessary to a full understanding of the particular entry so used. It will thus be seen that the bar against production and use of case diary enacted in Section 172 is intended to operate only in an inquiry or trial for an offence and even this bar is a limited bar, because in an inquiry or trial, the bar does not operate if the case diary is used by the police officer for refreshing his memory or the criminal court uses it for the purpose of contradicting such police officer. This bar can obviously have no application where a case diary is sought to be A produced and used in evidence in a civil proceeding under Article 32 or 226 of the Constitution and particularly when the party calling for the case diary is neither an accused nor his agent in respect of the offence to which the case diary relates. Now plainly and unquestionably the present writ petition which has been filed under Article 32 of 4 the Constitution to enforce the fundamental right guaranteed under Article 21 is neither an 'inquiry' nor a 'trial' for an offence nor is this Court hearing the writ petition a criminal court not are the petitttioners, accused or their agents so far as the offences arising out of their blinding are concerned. Therefore, even if the reports submitted by 5 Shri L.V. Singh as a result of his investigation could be said to form part of 'case diary', it is difficult to see how their production and use in the present writ petition under Article 32 of the Constitution could be said to be barred under Section 172.

8. Realising this difficulty created in his way by the specific language 5 of Section 172, Mr. K.G. Bhagat, learned advocate appearing on behalf of the State, made a valiant attempt to invoke the principle behind Section 172 for the purpose of excluding the reports of investigation submitted by Sh. L.V. Singh. He contended that if, under the terras of Section 172, the accused in an inquiry or trial is not entitled to call for the case diary or to look at it, save for a limited purpose, it is difficult to believe that the Legislature could have ever intended that the complainant or a third party should be entitled to call for or look at the case diary in some other proceeding, for that would jeopardise the secrecy of the investigation and defeat the object and purpose of Section 172 and therefore, applying the principle of that section, we should hold that the case diary is totally protected from disclosure and even the complainant or a third party cannot call for it or look at it in a civil proceeding. This contention is in our opinion wholly unfounded. It is based on what may be called an appeal to the spirit of Section 172 which is totally impermissible under any recognised canon of construction. Either production and use of case diary in a proceeding is barred under the terms of Section 172 or it is not; it is difficult to see how it can be said to be barred on an extended or analogical application of the principle supposed to be underlying that section, if it is not covered by its express terms. It must be remembered that we have adopted the adversary system of justice and in order that truth may emerge from the clash between contesting parties under this system, it is necessary that all facts relevant to the inquiry must be brought before the Court and no relevant fact must be shut- out, for otherwise the Court may get a distorted or incomplete picture of the facts and that might result in miscarriage of justice. To quote the words of the Supreme Court of United States in United States v. Nixon 418 v. 683 : 41 lawyers Edition (2nd series) 1039 "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the frame work of the rules of evidence", it is imperative to the proper functioning of . the judicial process and satisfactory and certain ascertainment of truth that all relevant facts must be made available to the Court. But the law may, in exceptional cases, in order to protect more weighty and compelling competing interests, provide that a particular piece of evidence, though relevarft, shall not be liable to be found, infer alia, in Sections 122, 123, 124, 126 and 129 of the Indian Evidence Act and Sections 162 and 172 of the Criminal Procedure Code. But being exceptions to the legitimate demand for reception of all relevant evidence in the interest of justice, they must be strictly interpreted and not expansively constiued. "for they are in derogation of the search for truth". It would not, therefore, be right to extend the prohibition of Section 172 to cases not falling strictly within the terms of the section, by appealing to what may be regarded as the principle or spirit of the section. That is a feeble reed which cannot sustain the argument of the learned advocate appearing on behalf of the State. It would in fact be inconsistent with the Constitutional commitment of this Court to the rule of law.

9. That takes us to the question whether the reports made by Sh. L.V. Singh as a result of the investigation carried by him and his associates are relevant under any provision of the Indian Evidence Act so as to be liable to be produced and received in evidence. It is necessary, in order to answer this question, to consider what is the nature of the proceeding before us and what are the issues which arise in it. The proceeding is a writ petition under Article 32 for enforcing the

fundamental right of the petitioners enshrined in Article 21, The petitioners complain that after arrest, whilst under police custody, they were blinded by the members of the police force, acting not in their private capacity, but as police officials and their fundamental right to life guaranteed under Article 21 was therefore violated and for this violation, the State is liable to pay compensation to them. The learned Attorney General who at one stage appeared on behalf of the State at the hearing of the writ petition contended that the inquiry upon which the Court was embarking in order to find out whether or not the petitioners were blinded by the police officials whilst in police custody was irrelevant, since, in his submission, even if the petitioners were so blinded, the State was not liable to pay compensation to the petitioners first, because the State was not constitutionally or legally responsible for the acts of the police officers out side the scope of their power or authority and the Windings of the undertrial prisoners effected by the police could not therefore be said to constitute violation of their fundamental right under Article 21 by the State and secondly, even if there was violation of the fundamental right of the petitioners under Article 21 by reason of the Windings effected by the police officials, there was, on a true construction of that Article, no liability on the State to pay compensation to the petitioners. The attempt of the learned Attorney General in advancing this contention was obviously to preempt the inquiry which was being made by this Court, so that the Court may not proceed to probe further in the matter. But we do not think we can accede to this contention of the learned Attorney General. The two questions raised by the learned Attorney General are undoubtedly important but the arguments urged by him in regard to these two questions are not prime facie so strong and appealing as to persuade us to decide them as preliminary objections without first inquiring into the facts. Some serious doubts arise when we consider the argument of the learned Attorney General, if an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the Court for injuncting the State from acting through such officer in violation of his fundamental right under Article 21 ? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article 21, because the officer who is threatening, to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rape of sand, for, on this view, if the officer is acting according to law there would ex concessions be no breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. So also if there is any threatened invasion by the State of the Fundamental Right guaranteed under Article 21, the petitioner who is aggrieved can move the Court under Article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the State which is violative of the Fundamental Right under Article 21, the petitioner can approach the court under Article 32 and ask for a writ striking down the continuance of such action, but where the action taken by the State has already resulted in breach of the Fundamental Right under Article 21 by deprivation of some limb of the petitioner, would the petitioner have no remedy under Article 32 for breach of the Fundamental Right guaranteed to him? Would the court permit itself to become helpless spectator of the violation of the Fundamental Right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the Fundamental Right to him and has also given him the Fundamental Right of moving the court for enforcement of his Fundamental Right, the court cannot give him any relief. These are some of the doubts which arise in our mind even in a prima facie consideration of the contention of the learned Attorney General and we do not, therefore, think it would be right to entertain this contention as a preliminary objection without inquiring into the facts of the case. If we look at the averments

made in the writ petition, it is obvious that the petitioners cannot succeed in claiming relief under Article 32 unless they establish that their Fundamental Right under Article 21 was violated and in order to establish such violation, they must show that they were blinded by the police officials at the time of arrest or whilst in police custody. This is the fundamental fact which must be established before the petitioners can claim relief under Article 32 and logically therefore the first issue to which we must address ourselves is whether this foundational fact is shown to exist by the petitioners. It is only if the petitioners can establish that they were blinded by the members of the police force at the time of arrest or whilst in police custody that the other questions raised by the learned Attorney General would arise for consideration and it would be wholly academic to consider them if the petitioners fail to establish this foundational fact. We are, therefore, of the view, as at present advised, that we should first inquire whether the petitioners were blinded by the police officials at the time of arrest or after arrest, whilst in police custody, and it is in the context of this inquiry that we must consider whether the reports made by Sh. L.V. Singh are relevant under the Indian Evidence Act so as to be receivable in evidence.

10. We may at this stage refer to one other contention raised by Mr. 3 K.G. Bhagat on behalf of the State that if the Court proceeds to hold an inquiry and comes to the conclusion that the petitioners were blinded by the members of the police force at the time of arrest or whilst in police custody, it would be tantamount to adjudicating upon the guilt of the police officers without their being parties (sic) the present writ petition and that would be grossly unfair and hence this inquiry should not be held by the Court until the investigation is completed and the guilt or innocence of the police officer is established. We cannot accept this contention of Mr. K.G. Bhagat. When the Court trying the writ petition proceeds to inquire into the issue whether the petitioners were blinded by police officials at the time of arrest or whilst in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under Article 21 has been violated and the State is liable to pay compensation to them for such violation. The nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot, have any relevance much less any binding effect, in any criminal proceeding which may be taken against a particular police officer. A situation of this kind sometimes arises when a claim for compensation for accident caused by negligent driving of a motor vehicle is made in a civil Court or Tribunal and in such a proceeding it has to be determined by the Court, for the purpose of awarding. compensation to the claimant, whether the driver of the motor vehicle was negligent in driving, even though a criminal case for rash and negligent driving may be pending against the driver. The pendency of a criminal proceeding cannot be urged as a bar against the Court trying a civil proceeding or a writ petition where a similar issue is involved. The two are entirely distinct and separate proceedings and neither is a bar against the other. It may be that in a given case if the investigation is still proceeding, the Court may defer the inquiry before it, until the investigation is completed or if the Court considers it necessary in the interests of Justice, it may postpone its inquiry even after the prosecution following upon the investigation is terminated, but that is the matter entirely for the exercise of the discretion of the Court and there is no bar precluding the Court from proceeding with the inquiry before it merely because the investigation or prosecution is pending.

11. It is clear from the aforesaid discussion that the fact in issue in the inquiry before the Court in the present writ petition is whether the petitioners were blinded by the members of the police force at the time of the arrest or whilst in police custody. Now in order to determine whether the reports made by Sh. L.V. Singh as a result of the investigation carried out by him and his associates are relevant, it is necessary to consider whether they have any bearing on the fact in issue required to be decided by the Court. It is common ground that Sh. L.V. Singh was directed by the State Government under Section 3 of the Indian Police Act, 1861 to investigate into twenty four cases of blinding of under- trial prisoners and First Information Reports were lodged that they were blinded by the police officers whilst in police custody. Sh. L.V. Singh through his associates carried out this investigation and submitted his reports in the discharge of the official duty entrusted to him by the State Government. These reports clearly relate to the issue as to how, in what manner and by whom the twenty- four undertrial prisoners were blinded, for that is the matter which Shri L.V. Singh was directed by the State Government to investigate. If that be so, it is difficult to say how the State can resist the production of these reports and their use as evidence in the present proceeding. These reports are clearly relevant under Section 35 of the Indian Evidence Act which reads as follows:

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register of record is kept, is itself a relevant fact.

These reports are part of official record and they relate to the fact in issue as to how, and by whom the twenty- four under- trial prisoners were blinded and they are admittedly made by Sh. L.V. Singh, a public servant, in the discharge of his official duty and hence they are plainly and indubitably covered by Section 35. The language of Section 35 is so clear that it is not necessary to refer to any decided cases on the interpretation of that section, but we may cite two decisions to illustrate the applicability of this section in the present case. The first is the decision of this Court in Kanwar Lal Gupta v. Amar Nath Chawla MANU/SC/0277/1974 : [1975]2SCR259 . There the question was whether reports made by officers of the CID (Special Branch) relating to public meetings covered by them at the time of the election were relevant under Section 35 and this Court held that they were on the ground that they were "made by public servants, in discharge of their official duty and they were relevant under the first part of Section 35 of the Evidence Act, since they contained statements showing what were the public meetings held by the first respondent." This Court 5 in fact followed an earlier decision of the Court in P.C.P. Reddiar v. S. Perumal MANU/SC/0454/1971 : [1972]2SCR646 . So also in Jagdat v. Sheopal AIR 1927 Oudh 323, Wazirhasan J. held that the result of an inquiry by a Kanungo under Section 202 of the CrPC 1898 embodied in the report is an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties and the report is therefore admissible in evidence under Section 35. We find that a similar view was taken by a Division Bench of the Nagpur High Court in Chandulal v. Pushkar Rai AIR 1952 Nagpur 271 where the learned Judges held that reports made by Revenue Officers, though not regarded as having judicial authority, where they express opinions on the private rights of the parties are relevant under Section 35 as reports made by public officers in the discharge of their official duties, in so far as they supply information of official proceedings and historical facts. The Calcutta High Court also held in Lionell Edweris Limited v. State of West Bengal MANU/WB/0056/1967 :

AIR1967Cal191 , that official correspondence from the Forest Officers to his superior, the conservator of Forests, carried on by the Forest Officer, in the discharge of his official duty would be admissible m evidence under Section 35. There is therefore no doubt in our mind that the reports made by Sh. L.V. Singh setting forth the result of the investigation carried on by him and his associates are clearly relevant under Section 35 since they relate to a fact in issue and are made by a public servant in the discharge of his official duty. It is indeed difficult to see how in a writ petition against the State Government where the complaint is that the police officials of the State Government blinded the petitioners at the time of arrest or whilst m police custody, the State Government can resist production of a report in regard to the truth or otherwise of the complaint, made by a highly placed officer persuant to the direction issued by the Mate Government. We are clearly of the view that the reports made by Shri L.V. Singh as a result of the investigation carried out ', by him and his associates are relevant under Section 35 and they are liable to be produced by the State Government and used in evidence in the present writ petition. Of course, what evidentiary value must attach to the statements contained in these reports is a matter which would have to be decided by the Court after considering these reports. It may ultimately be found that these reports have not much evidentiary value and even if they contain any statements adverse to the Mate Government, it may be possible for the State Government to dispute their correctness or to explain them away, but it cannot be said that these reports are not relevant. These reports must therefore be produced by the State and taken on record of the present writ postition. We may point out that though in our order dated 16th February 1981, we have referred to these reports as having been made by Shri L.V. Singh and his associates between January 10 and January 20, 1981, it seems that there has been some error on our part m mentioning the outer date as January 20, 1981 for we find that some of these reports were submitted by Shri L.V. Singh even after January 20, 1981 and the last of them was submitted on 27th January 1981 . All these reports including the report submitted on 9th December, 1980 must therefore be filed by the State and taken as 5 forming part of the record to be considered by the Court in deciding the question at issue between the parties.

12. What we have said above must apply equally in regard to the correspondence and notings referred to as items three and four in the order dated 16th February 1981 made by us. These notings and 5 correspondence would throw light on the extent of involvement, whether by acts of commission or acts of omission, of the State in the Winding episode and having been made by Shri L.V Singh and M.K. Jha in discharge of their official duties, they are clearly relevant under Section 35 and they must therefore be produced and taken on record in the writ petition, so also the reports submitted by Inspector and Sub- Inspector of CID to Gajendra Narain, DIG, Bhagalpur on 18th July and his letter to Shri K.D. Singh, Superintendent of Police, CID, Patna containing hand- written endorsement of Shri M.K. Jha must for the same reasons be held to be relevant under Section 35 and must be produced by the State and be taken as forming part of the record of the writ petition.

13. Since all these documents are required by the Central Bureau of Investigation for the purpose of carrying out the investigation which has been commenced by them pursuant to the approval given by the State Government under section 6 of the Delhi Special Police Establishment Act, we would direct that five sets of photostat copies of these documents may be prepared by the office, one for Mrs. Hingorani, learned advocate appearing on behalf of the petitioners, one for Mr. K.G.

Bhagat, learned advocate appearing on behalf of the State, one for Dr. Chitale who is appearing amicus curiae at our request and two for the Court, and after taking such photostat copies these documents along with the other documents which have been handed over to the Court by the State shall be returned immediately to Mr. K.G. Bhagat, learned advocate appearing on behalf of the State, for being immediately made available to the Central Bureau of Investigation for carrying out its investigation so that the investigation by the Central Bureau of Investigation may not be impeded or delayed. We hope and trust that the Central Bureau of Investigation will complete its investigation expeditiously without any avoidable delay.

Back to Section 164 of Code of Criminal Procedure, 1973

MANU/SC/0082/1963

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 31 of 1962

Decided On: 16.08.1963

State of Uttar Pradesh Vs. Singhara Singh and Ors.

Hon'ble Judges/Coram:

A.K. Sarkar, J.C. Shah and M. Hidayatullah, JJ.

JUDGMENT

A.K. Sarkar, J.

1. On March 20, 1959 Raja Ram, a shop- keeper, of Afzalgarh in the State of Uttar Pradesh was murdered by gunshot in his shop. Seven persons including the three respondents, Singhara Singh, Bir Singh and Tega Singh were prosecuted for this murder. The learned Additional Sessions Judge of Bijnor before whom the trial was held, convicted the respondent Singhara Singh of the murder under s. 302 of the Indian Penal Code and sentenced him to death. He convicted the respondent Bir Singh and Tega Singh of abetment of the murder under s. 302 read with Sections 120B, 109 and 114 of the said Code and sentenced Bir Singh to death and Tega Singh to imprisonment for life. He acquitted the other accused persons.

2. The respondents appealed from the conviction to the High Court at Allahabad and the State from the acquittal. The High Court had also before it the usual reference for confirmation of the sentences of death. The High Court allowed the appeals of the respondents, dismissed the appeals of the State and rejected the reference. The State has now filed this appeal against the judgment of the High Court by special leave. This Court however granted the leave only so far as the judgment of the High Court concerned the three respondents. We are not, therefore, concerned with the other accused persons and the order acquitting them is no more in question.

3. The only point argued in this appeal was as to the admissibility of certain oral evidence. It is conceded that if that evidence was not admissible, then there is not other evidence on which the respondents can be convicted. In other words, it is not in dispute that if that evidence was not admissible the High Court's decision acquitting the respondents cannot be questioned. It is therefore not necessary to state the facts in details.

4. Now, the evident with which this case is concerned was given by a learned magistrate, Mr. Dixit, of confessions of guilt made to him by the respondents and purported to have been recorded by him under s. 164 of the Code of Criminal Procedure. The terms of that section and certain other section of the Code on the interpretation of which this case depends are as follows :

S. 164 (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, if he is not a police- officer record, any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, 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 no Magistrate shall record and such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, where records any confession, he shall make a memorandum at the foot of such record to the following effect :-

I have explained to (name) that the does not bound make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntary made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

5. (Signed) A. B. Magistrate.

S. 364 (1) Whenever the accused is examined by and Magistrate, or by any Court other than a High Court for a Part A State or a Part B State the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge

shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge was his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 or in the course of a trial held by a Presidency Magistrate.

S. 533 (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91 such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

6. A confession duly recorded under s. 164 would no doubt be a public document under s. 74 of the Evidence Act which would prove itself under s. 80 of that Act. Mr. Dixit, who recorded the confession in this case was a second class magistrate and the prosecution was unable to prove that he had been specially empowered by the State Government to record a statement or confession under s. 164 of the Code. The trial, therefore, proceeded on the basis that he had not been so empowered. That being so, it was rightly held that the confessions had not been recorded under s. 164 and the record could not be put in evidence under Sections 74 and 80 of the Evidence Act to prove them. The prosecution, thereupon called Mr. Dixit to prove these confessions, the record being used only to refresh his memory under s. 159 of the Evidence Act. It is the admissibility of this oral evidence that is in question.

7. The Judicial Committee in Nazir Ahmed v. The King Emperor L.R. 63 IndAp 372 held that when a magistrate of the first class records a confession under s. 164 but does not follow the procedure laid down in that section, oral evidence of the confession in inadmissible. Nazir Ahmed's L.R. 63 IndAp 372. case naturally figured largely in the arguments presented to the Court and the Court below. The learned trial Judge following Ashrafi v. The State I.L.R. [1960] 2All. 488 to which we will have to refer latter, held that Nazir Ahmed's case L.R. 63 IndAp 372.

had no application where, as in the present case, a magistrate not authorised to do so purports to recorded a confession under s. 164 and on that basis admitted the oral evidence. The learned Judges of the High Court observed that the present case was governed by Nazir Ahmed's case (L.R. 63 IndAp 372.) and that Asharfi's case I.L.R. [1960] 2All. 488 had no application because it dealt "with the question of identification parades held by Magistrates. There was no occasion to discuss the question of confession recorded before Magistrates." In this view of the matter the learned Judges of the High Court held the oral evidence inadmissible and acquitted the respondents. It would help to clear the ground to state that it had not been argued in Nazir Ahmed's case L.R. 63 IndAp 372 that s. 533 of the Code had any operation in making any oral evidence admissible and the position is the same in the present case. It would not, therefore, be necessary for us to consider whether that section had any effect in this case in making any evidence admissible.

8. In Nazir Ahmed's case L.R. 63 IndAp 372 the Judicial Committee observed that the principle applied in Taylor v. Taylor [1875] 1 Ch. D. 426 a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that or nor at all and that other methods of performance are necessarily forbidden, applied to judicial officers making records under s. 164 and, therefore, held that magistrate could not give oral evidence of the confession made to him which he had purported to record under s. 164 of the Code. It was said that otherwise all the precautions and safe guards laid down in Sections 164 and 364, both which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than which is laid down with such minute particularity in the section themselves."

9. The rule adopted in Taylor v. Taylor [1875] 1 Ch. D. 426 is well recognised and is founded on sound principle. Its result is that if a statue has conferred a power to do an act and has laid down the method in which power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in s. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible the whole provision of s. 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him.

10. Mr. Aggarwala does not question the validity of the principle but says that Nazi Ahmed's case L.R. 63 IndAp 372 was wrongly decided as the principle was not applicable to its facts. He put his challenge to the correctness of the decision on two grounds, the first of which was that the principle applied in Taylor v. Taylor [1875] 1 Ch. 426 had no application where the statutory

provision conferring the power was not mandatory and that the provisions of s. 164 were not mandatory as would appear from the term of s. 533.

11. This contention seems to us to be without foundation. Quite clearly, the power conferred by s. 164 to record a statement or confession is not one which must be exercised. The Judicial Committee expressly said so in Nazir Ahmed's case L.R. 63 IndAp 372 and we did not understand Mr. Aggarwala to question this part of the judgment. What he meant was that s. 533 of the Code showed that in recording a statement or confession under s. 164, it was not obligatory for the magistrate to follow the procedure mentioned in it. Section 533 says that if the court before which a statement or confession of an accused person purporting to be recorded under s. 164 or s. 364 is tendered, in evidence, "finds that and of the provisions of either of such sections have not been complex with by the magistrate recording the statement, it shall take evidence that such person duly made the statement recorded." Now a statement would not have been "duly made" unless the procedure for making it laid down in s. 164 had been followed. What s. 533 therefore, does is to permit oral evidence to be given to prove that the procedure laid down in s. 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in s. 164 is not intended to be obligatory, s. 533 really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so.

12. The second ground on which Mr. Aggarwala challenged the decision in Nazir Ahmed's case L.R. 63 IndAp 372. was that object of s. 164 of the Code is to permit a record being kept so as to take advantage of Sections 74 and 80 of the Evidence Act and avoid the inconvenience of having to call the magistrate to whom the statement or confession had been made, to prove it. The contention apparently is that the section was only intended to confer a benefit on the prosecution and, therefore, the sole effect of the disregard of its provisions would be to deprive the prosecution of that benefit, for it cannot then rely on Sections 74 and 80 the Evidence Act and has to prove the confession by other evidence including the oral evidence of the magistrate recording it. It was, therefore, said that the principle adopted in Nazir Ahmed's case L.R. 63 IndAp 372 had no application in interpreting s. 164.

13. A similar argument was advanced in Nazir Ahmed's case L.R. 63 IndAp 372 and rejected by the Judicial Committee. We respectfully agree with that view. The section gives power make a record of the confession made by an accused which may be used in evidence against him and at the same time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in evidence. The record, if duly made, may no doubt be admitted in evidence without further proof but if it had not been so made and other evidence was admissible to prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were obviously not created for nothing and it could not have been intended that the safeguards might at will of the prosecution, be bypassed. That is what would happen if oral evidence was admissible to prove a confession

purported to have been recorded under s. 164. Therefore it seems to us that the object of s. 164 was not to give the prosecution the advantage of Sections 74 and 80 of the Evidence Act but to provide for evidence being made available to the prosecution subject to due protection of the interest of the accused.

14. We have to point out that the correctness of the decision of Nazir Ahmed's case L.R.63 IndAp 372 has been accepted by this Court in at least two cases, namely, Rao Shiv Bahadur Chand v. The State of Vindhya Pradesh MANU/SC/0053/1954 : 1954CriLJ910 and Deep Chand v. State of Rajasthan MANU/SC/0118/1961 : [1962]1SCR662 . We have found no reason to take a different view.

15. Mr. Aggarwala then contended that Nazir Ahmed's case L.R. 63 IndAp 372 was distinguishable. He said that all that the Judicial Committee decided in Nazir Ahmed's case was that if a Presidency Magistrate, a Magistrate of the first class or a Magistrate of the second class specially empowered in that behalf records a statement or confession under s. 164 but the procedure laid down in it is not complied with, he cannot give oral evidence to prove the statement or confession. According to Mr. Aggarwala, it does not follow from that decision that a Magistrate of a class not mentioned in the section, for example, a magistrate of the second class not specially, empowered by the State Government cannot give oral evidence of a confession made to him which he had purported to record under s. 164 of the Code.

16. It is true that the Judicial Committee did not have to deal with a case like the present one where a magistrate of the second class not specially empowered had purported to record a confession under s. 164. The principle applied in that decision would however equally prevent such magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by s. 164 on certain magistrates of higher classes. Obviously it was not intended to confer the power on magistrates of lower classes. If, therefore, a proper construction of s. 164 as we have held, is that a magistrate of a higher class prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by s. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that the safeguards were not thought necessary and could be ignored, where the confession had been made to a magistrate of lower class and that such a magistrate was, therefore, free to give oral evidence of confession made to him. We cannot put an interpretation on s. 164 which produces the a anomaly that while its possible for higher class magistrates to practically abrogate the safeguards created in s. 164 for the benefit of an accused person, it is open to lower class magistrate to do so. We, therefore, think that the decision in Nazir Ahmed's case L.R. 63 IndAp 372 also covers the case in had and that on the principles there applied, here too oral evidence given by Mr. Dixit of the confession made to him must be held inadmissible.

17. It remains now to notice in some of the decisions on which Mr. Aggarwala relied in support of his contention. First of all we have to refer to Asharfi's case I.L.R. [1960] 2 All. 488. That was a case which was concerned with the memorandum of an identification parade prepared by a magistrate of the first class. It was observed in that case that Nazir Ahmed's case L.R. 63 IndAp 372. was authority for the proposition that where a magistrate belongs to a class mentioned in s. 164, be must Act in terms of it or not at all, but where the proceedings are held before any to the magistrate the statement is of under the unwritten general law and Nazir Ahmed's case had no application. It was also observed that an identification memorandum was statement recorded under s. 164 when the record was made by a magistrate of a class mentioned in it but where the memorandum was prepared by magistrate of another class it was not a record made under that section and the magistrate making the record can give oral evidence in proof of the statements in the memorandum. We are not very clear as to what exactly was intended to be laid down in this case about s. 164. Furthermore it does not appear to us from the report how the observations referred to above were necessary for the decision of the case, for, as earlier stated, the identification memorandum considered there had been prepared by a magistrate of the first class. It is not necessary for us in this judgment to decide whether or how far a memorandum of identification proceeding is a statement recorded under s. 164 and we do not wish to be understood as lending our support to the view expressed on that question in Asharfi's case I.L.R. [1960] 2 All. 488. We think it enough to state that for the reasons earlier mentioned, we are unable to share the view - if that was the view expressed in Asharfi's case - that where a statement or confession is made in the course of investigation to a magistrate not belonging to one of the classes mentioned in s. 164, he can prove the statement or confession by oral evidence. We may state here that later judgment of the same High Court has expressed some doubt about the correctness of that case : see Ram Sanehi v. State MANU/UP/0087/1963 : AIR1963All308 .

18. The next case to which reference was made by Mr. Aggarwala was Ghulam Hussain v. The King L.R. 77 IndAp 65.. That case dealt with the question whether statement recorded under s. 164 which did not amount to a confession could be used against the maker as an admission by him within Sections 18 to 21 of the Evidence Act and it was held, that it could. The Judicial Committee observed that "the fact that an admission is made to a Magistrate while he is functioning under s. 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act." That case only held that the relevancy of a statement recorded under s. 164 had to be decided by the provisions of the Evidence Act. We have nothing to do with any question as to relevance of evidence. The question before us is whether a confession which is relevant can be proved by oral evidence in view of the provision of s. 164 of the Code. The question dealt with in Ghulam Hussain's case L.R. 77 IndAp 65. was quite different and that case has no bearing on the question before us.

19. It is clear that the observation quoted earlier from Ghulam Hussain's case L.R. 77 IndAp 65. does not, as argued by Mr. Aggarwala, support the contention that where a confession has been purported to be recorded under s. 164 but by a magistrate who is not one of those mentioned it, the Evidence Act can sill be called in aid to admit oral evidence to prove the confession. All that the Judicial Committee did in that case was to hold that an admission in a statement duly recorded under s. 164 was substantive evidence of the facts stated in it under Sections 18 to 21 of the Evidence Act. The Judicial Committee made that observation for this purpose only and to

reject an argument that the cases of Brij Bhushan Singh v. King Emperor L.R. 73 IndAp 1, and Bhuboni Sahu v. The King L.R. 76 IndAp 147. showed that the admission made in the statement recorded under s. 164 could not be used against an accused person as substantive evidence of a fact stated. The Judicial Committee pointed out that "In these cases the Board was considering whether a statement made, by a witness under s. 164 of the Code of Criminal Procedure could be used against the accused substantive evidence of the facts stated, and it was held that such a statement could not be used in that way."

20. Another case cited was Emperor v. Ram Naresh I.L.R. [1939] All. 377.. What had happened there was that two accused persons walled into the court of a magistrate and wanted to make a confession. The magistrate called a petition- writer and the accused persons dictated an application to him and that was taken down by the petition- writer and signed by them That petition was admitted in evidence under s. 21 of the Evidence Act. It was held, and we think rightly, that Nazir Ahmed's case L.R. 63 IndAp 372. did not prevent the petition being admitted in evidence because it only forbade certain oral evidence being given. This case turned on wholly different facts and is of no assistance.

21. We may also refer to, In re Natesan A.I.R. 1960 Mad. 443 where it was observed that the decision in Nazir Ahmed's case L.R. 63 IndAp 372. might require reconsideration in view of the observations of this Court in Willie Slaney v. The State of Madhya Pradesh MANU/SC/0038/1955 : 1956CriLJ291 . The actual decision in In re Natesan does not affect the question before us and with regard to the aforesaid observation made in it we think it enough on the present occasion to say that we are unable to accept it as correct.

22. We think that the High Court in the present case rightly rejected the oral evidence of Mr. Dixit.

23. The result is that the appeal fails is dismissed.

24. Appeal dismissed.

MANU/SC/0335/1992

Back to Section 167 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 310- 311 of 1992

Decided On: 08.05.1992

Central Bureau of Investigation, Special Investigation Cell- I, New Delhi Vs. Anupam J. Kulkarni

Hon'ble Judges/Coram:

A.M. Ahmadi and K. Jayachandra Reddy, JJ.

ORDER

K. Jayachandra Reddy, J.

1. Leave granted.

2. An important question that arises for consideration is whether a person arrested and produced before the nearest Magistrate as required under Section 167(1) CrPC can still be remanded to police custody after the expiry of the initial period of 15 days. We propose to consider the issue elaborately as there is no judgment of this Court on this point. The facts giving rise to this question may briefly be stated. A case relating to abduction of four Bombay based diamond merchants and one Shri Kulkarni was registered at Police Station, Tughlak Road, New Delhi on 16.9.91 and the investigation was entrusted to C.B.I. During investigation it was disclosed that not only the four diamond merchants but also Shri Kulkarni, who is the respondent before us and one driver Babulal were kidnapped between 14th and 15th September, 1991 from two Hotels at Delhi. It emerged during investigation that the said Shri Kulkarni was one of the associates of the accused one Shri R. Chaudhary responsible for the said kidnapping of the diamond merchants. On the basis of some available material Shri Kulkarni was arrested on 4.10.91 and was produced before the Chief Metropolitan Magistrate, Delhi on 5.10.91. On the request of the C.B.I. Shri Kulkarni was remanded to judicial custody till 11.10.91. On 10.10.91 a test identification parade was arranged but Shri Kulkarni refused to cooperate and his refusal was recorded by the concerned Munsif Magistrate. On 11.10.91 an application was moved by the investigating officer seeking police custody of Shri Kulkarni which was allowed. When he was being taken on the way Shri Kulkarni pretended to be indisposed and he was taken to the Hospital the same evening where he remained confined on the ground of illness upto 21.10.91 and then he was referred to Cardiac Out- patient Department of G.B.Pant Hospital. Upto 29.10.91 Shri Kulkarni was again remanded to judicial custody by the Magistrate and thereafter was sent to Jail. In view of the fact that the Police could not take him into police custody all these days the investigating officer again applied to the court of Chief Metropolitan Magistrate for police custody of Shri Kulkarni. The Chief Metropolitan Magistrate relying on a judgment of the Delhi High Court in State (Delhi Admn.)

v. Dharam Pal and Ors. MANU/DE/0059/1981 : 1982 Cri L.J. 1103 refused police remand. Questioning the same a revision was filed before the High Court of Delhi. The learned Single Judge in the first instance considered whether there was material to make out a case of kidnapping or abduction against Shri Kulkarni and observed that even the abducted persons namely the four diamond merchants do not point an accusing finger against Shri Kulkarni and that at any rate Shri Kulkarni himself has been interrogated in jail for almost seven days by the C.B.I. and nothing has been divulged by him, therefore, it is not desirable to confine him in jail and in that view of the matter he granted him bail. The High Court, however, did not decide the question whether or not after the expiry of the initial period of 15 days a person can still be remanded to police custody by the magistrate before whom he was produced. The said order is challenged in these appeals.

3. The learned Additional Solicitor General appearing for the C.B.I. the appellant contended that the Chief Metropolitan Magistrate erred in not granting police custody and that Dharam Pal's case on which he placed reliance has been wrongly decided. The further contention is that the High Court has erred in granting bail to Shri Kulkarni without deciding the question whether he can be remanded to police custody as prayed for by the C.B.I. Shri Ram Jethmalani, learned Counsel for the respondent accused submitted that the language of Section 167 Cr. PC is clear and that the police custody if at all be granted by the Magistrate should be only during the period of first 15 days from the date of production of the accused before the magistrate and not later and that subsequent custody if any should only be judicial custody and the question of granting police custody after the expiry of first 15 days remand does not arise.

4. Section 167 Cr. PC 1973 after some changes reads as under:

167. Procedure when investigation cannot be completed in twenty- four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well founded, the officer- in- charge of the police station or the police officer making the investigation, he if is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence., And, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation 1 - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be so detained in custody so long as he does not furnish bail.

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

(2A) Notwithstanding anything contained in Sub- section (1) or Sub- section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody, as he may think for a term not exceeding seven days in the aggregate, and, on the expiry of the period of the detention so authorised, the accused person

shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub- section, shall be taken into account in computing the period specified in paragraph 2(a) of the proviso to Sub- section (2);

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons- case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under Sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

Before proceeding further it may be necessary to advert to the legislative history of this section. The old Section 167 of 1898 Code provided for the detention of an accused in custody for a term not exceeding 15 days on the whole. It was noted that this was honoured more in the breach than in the observance and that a practice of doubtful legality grew up namely the police used to file an incomplete preliminary charge- sheet and move the court for remand under Section 344 corresponding to the present Section 309 which was not meant for during investigation. Having regard to the fact that there may be genuine cases where investigation might not be completed in 15 days, the Law Commission made certain recommendations to confer power on the Magistrate to extend the period of 15 days detention. These recommendations are noticed in the objects and reasons of the Bill thus:

...At present, Section 167 enables the Magistrate to authorise detention of an accused in custody for a term not exceeding 15 days on the whole. There is a complaint that this provision is honoured more in the breach than in the observance and that the police investigation takes a much longer period in practice. A practice of doubtful legality has grown whereby the police file a "preliminary" or incomplete chargesheet and move the court for remand under Section 344 which is not intended to apply to the stage of investigation. While in some cases the delay in investigation may be due to the fault of the police, it cannot be denied that there may be genuine cases where it may not be practicable to complete the investigation in 15 days. The Commission recommended that the period should be extended to 60 days, but if this is done, 60 days would become the rule and there is no guarantee that the illegal practice referred to above would not continue. It is considered that the most satisfactory solution of the problem would be to confer on the Magistrate the power to extend the period of extension beyond 15 days, whenever he is satisfied that adequate grounds exist for granting such extension....

The Joint Committee, however, with a view to have the desired effect made provision for the release of the accused if investigation is not duly completed in case where accused has been in custody for some period. Sub- sections (5) and (6) relating to offences punishable for imprisonment for two years were inserted and the Magistrate was authorised to stop further investigation and discharge the accused if the investigation could not be completed within six months. By the Cr.PC Amendment Act 1978 proviso (a) to Sub- section (2) of Section 167 has been further amended and the Magistrate is empowered to authorise the detention of accused in custody during investigation for an aggregate period of 90 days in cases relating to major offences and in other cases 60 days. This provision for custody for 90 days intended to remove difficulties which actually arise in completion of the investigation of offences of serious nature. A new Sub-section (2A) also has been inserted empowering the Executive Magistrate to make an order for remand but only for a period not exceeding seven days in the aggregate and in cases where Judicial Magistrate is not available. This provision further lays down that period of detention ordered by such Executive Magistrate should be taken into account in computing the total period specified in Clause (a) of Sub- section (2) of Section 167. Now coming to the object and scope of Section 167 it is well- settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours if not the arrested person should be brought by the police before a magistrate as provided under Section 167. The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate court. Sub- section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest magistrate should also transmit a copy of the entries in the diary relating to the case. The entries in the diary are meant to afford to the magistrate the necessary information upon which he can take the decision whether the accused should be detained in the custody further or not. It may be noted even at this stage the magistrate can release him on bail if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167. It is at this stage Sub- section (2) comes into operation which is very much relevant for our purpose. It lays down that the magistrate to whom the accused person is thus forwarded may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole. If such magistrate has no jurisdiction to try the case or commit it for trial and if he considers further detention unnecessary, he may order the accused to be forwarded

to a magistrate having such jurisdiction. The section is clear in its terms. The magistrate under this section can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole. The custody can be police custody or judicial custody as the magistrate thinks fit. The words "such custody" and "for a term not exceeding fifteen days in the whole" are very significant. It is also well- settled now that the period of fifteen days starts running as soon as the accused is produced before the Magistrate.

5. Now comes the proviso inserted by Act no. 45 of 1978 which is of vital importance in deciding the question before us. This proviso comes into operation where the magistrate thinks fit that further detention beyond the period of fifteen days is necessary and it lays down that the magistrate may authorise the detention of the accused person otherwise than in the custody of the police beyond the period of fifteen days. The words "otherwise than in the custody of the police beyond the period of fifteen days" are again very significant.

6. The learned Additional Solicitor General appearing for the C.B.I. contended that a combined reading of Section 167(2) and the proviso therein would make it clear that if for any reason the police custody cannot be obtained during the period of first fifteen days yet a remand to the police custody even later is not precluded and what all that is required is that such police custody in the whole should not exceed fifteen days. According to him there could be cases where a remand to police custody would become absolutely necessary at a later stage even though such an accused is under judicial custody as per the orders of the magistrate passed under the proviso. The learned Additional Solicitor General gave some instances like holding an identification parade or interrogation on the basis of the new material discovered during the investigation. He also submitted that some of the judgments of the High Courts particularly that of the Delhi High Court relied upon by the Chief Metropolitan Magistrate do not lay down the correct position of law in this regard. In Gian Singh v. State (Delhi Administration) MANU/DE/0052/1982 : 1981 Cri.L.J. 100 a learned Single Judge of the High Court held that once the accused is remanded to judicial custody he cannot be sent back again to police custody in connection with or in continuation of the same investigation even though the first period of fifteen days has not exhausted. Again the same learned Judge Justice M.L. Jain in Trilochan Singh v. The State (Delhi Administration) MANU/DE/0248/1981 : 20(1981)DLT20 took the same view. In State (Delhi Administration) v. Dharam Pal and Ors. MANU/DE/0059/1981 : 1982 Cri.L.J. 1103 a Division Bench of the Delhi High Court overruled the learned Single Judge's judgments in Gian Singh's case and Trilochan Singh's case. The Division Bench held that the words "from time to time" occurring in the Section show that several orders can be passed under Section 167(2) and that the nature of the custody can be altered from judicial custody to police custody and vice- versa during the first period of fifteen days mentioned in Section 167(2) of the Code and that after fifteen days the accused could only be kept in judicial custody or any other custody as ordered by the magistrate but not in the custody of the police. In arriving at this conclusion the Division Bench sought support on an earlier decision in State v. Mehar Chand MANU/DE/0102/1967 : 1969 Delhi Law Times 179. In that case the accused had been arrested for an offence of kidnapping and after the expiry of the first period of fifteen days the accused was in judicial custody under Section 344 Cr. PC (old code). At that stage the police found on investigation that an offence of murder also was prima facie made out against the said accused. Then the question arose whether the said accused who was in

judicial custody should be sent to the police custody on the basis of the discovery that there was aggravated offence. The magistrate refused to permit the accused to be put in police custody. The same was questioned before the High Court. Hardy, J. held that an accused who is in magisterial custody in one case can be allowed to be remanded to police custody in other case and on the same rule he can be remanded to police custody at a subsequent stage of investigation in the same case when the information discloses his complicity in more serious offences and that on principle, there is no difference at all between the two types of cases. The learned Judge further stated as under:

I see no insuperable difficulty in the way of the police arresting the accused for the second time for the offence for which he is now wanted by them. The accused being already in magisterial custody it is open to the learned Magistrate under Section 167(2) to take the accused out of jail or judicial custody and hand him over to the police for the maximum period of 15 days provided in that Section. All that he is required to do is to satisfy himself that a good case is made out for detaining the accused in police custody in connection with investigation of the case. It may be that the offences for which the accused is now wanted by the police relate to the same case but these are altogether different offences and in a way therefore it is quite legitimate to say that it is a different case in which the complicity of the accused has been discovered and police in order to complete their investigation of that case require that the accused should be associated with that investigation in some way.

The Division Bench in Dharam Pal's case referring to these observations of Hardy, J. observed that "We completely agree with Hardy, J. in coming to the conclusion that the Magistrate has to find out whether there is a good case for grant of police custody," A perusal of the later part of the judgment in Dharam Pal's case would show that the Division Bench referred to these observations in support of the view that the nature of the custody can be altered from judicial custody to police custody or vice- versa during the first period of fifteen days mentioned in Section 167(2) of the Code, but however firmly concluded that after fifteen days the accused could only be in judicial custody or any other custody as ordered by the magistrate but not in police custody. Then there is one more decision of the Delhi High Court in State (Delhi Administration) v. Ravinder Kumar Bhatnagar MANU/DE/0052/1982 : 1982 Cri.L.J. 2366 where a Single Judge after relying on the judgment of the Division Bench in Dharam Pal's case held that the language of Section 167(2) is plain and that words "for a term not exceeding fifteen days in the whole" would clearly indicate that those fifteen days begin to run immediately after the accused is produced before the magistrate in accordance with Sub- section (1) and the police custody cannot be granted after the lapse of the "first fifteen days". In State of Kerala v. Sadanandan 1984 K.L.T. 747 a Single Judge of the Kerala High Court held that the initial detention of the accused by the magistrate can be only for fifteen days in the whole and it may be either police custody or judicial custody and during the period the magistrate has jurisdiction to convert judicial custody to police custody and vice- versa and the maximum period under which the accused can be so detained is only fifteen days and that after the expiry of fifteen days the proviso comes into operation which expressly refers to police custody and enjoins that there shall be no police custody and judicial custody alone is possible when power is exercised under the proviso. The learned Single Judge stated that in the case before him the accused has already been in police custody for fifteen days

and therefore he could not be remanded to police custody either under Section 167 or Section 309 Cr.PC

7. The learned Additional Solicitor General submitted that the observations made by Hardy, J. in Mehar Chand's case would indicate that during the investigation of the same case in which the accused is arrested and is already in custody if more offences committed in the same case come to light there should be no bar to turn over the accused to police custody even after the first period of fifteen days and during the period of ninety days or sixty days in respect of the investigation of the cases mentioned in provisos (a)(i) and (ii) respectively. It may be noted firstly that the Mehar Chand's case was decided in respect of a case arising under the old Code. If we examine the background in enacting the new Section 167(2) and the proviso (a) as well as Section 309 of the new Code it becomes clear that the legislature recognised that such custody namely police, judicial or any other custody like detaining the arrested person in Nari Sadans etc. should be in the whole for fifteen days and the further custody under the proviso to Section 167 or under Section 309 should only be judicial. In Chaganti Satyanarayana and Ors. v. State of Andhra Pradesh MANU/SC/0165/1986 : [1986]2SCR1128 this Court examined the scope of Section 167(2) provisos (a)(i) and (ii) and held that the period of fifteen days, ninety days or sixty days prescribed therein are to be computed from the date of remand of the accused and not from the date of his arrest under Section 57 and that remand to police custody cannot be beyond the period of fifteen days and the further remand must be to judicial custody. Though the point that precisely arose before this Court was whether the period of remand prescribed should be computed from the date of remand or from the date of arrest under Section 57, there are certain observations throwing some light on the scope of the nature of custody after the expiry of the first remand of fifteen days and when the proviso comes into operation. It was observed thus:

As Sub- section (2) of Section 167 as well as proviso (1) of Sub- section (2) of Section 309 relate to the powers of remand of a magistrate, though under different situations, the two provisions call for a harmonious reading insofar as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the while' occurring in Sub- section (2) of Section 167 would be tantamount to a period of "15 days at a time" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be, but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed under law either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case.

(emphasis supplied)

These observations make it clear that if an accused is detained in police custody the maximum period during which he can be kept in such custody is only fifteen days either pursuant to a single order or more than one when such orders are for lesser number of days but on the whole such custody cannot be beyond fifteen days and the further remand to facilitate the investigation can only be by detention of the accused in judicial custody.

8. Having regard to the words ' 'in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole" occurring in Sub- section (2) of Section 167 now the question is whether it can be construed that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days of police custody in the first fifteen days are less whether the police can ask subsequently for police custody for full period of fifteen days not availed earlier or for the remaining days during the rest of the periods of ninety days or sixty days covered by the proviso. The decisions mentioned above do not deal with this question precisely except the judgment of the Delhi High Court in Dharam Pal's case. Taking the plain language into consideration particularly the words otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days. To this extent the view taken in Dharam Pal's case is correct.

9. At this juncture we want to make another aspect clear namely the computation of period of remand. The proviso to Section 167(2) clearly lays down that the total period of detention should not exceed ninety days in cases where the investigation relates to serious offences mentioned therein and sixty days in other cases and if by that time cognizance is not taken on the expiry of the said periods the accused shall be released on bail as mentioned therein. In Chaganti Satyanarayana's case it was held that "It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run from the date of order of remand." Therefore the first period of detention should be computed from the date of order of remand. Section 167(2A) which has been introduced for pragmatic reasons states that if an arrested person is produced before an Executive Magistrate for remand the said Magistrate may authorise the detention of the accused not exceeding seven days in aggregate. It further provides that the period of remand by the Executive Magistrate should also be taken into account for computing the period specified in the proviso i.e., aggregate periods of ninety days or sixty days. Since the Executive Magistrate is empowered to order detention only for seven days in such custody as he thinks fit, he should therefore either release the accused or transmit him to the nearest Judicial Magistrate together with the entries in the diary before the expiry of seven days. The Section also lays down that the Judicial Magistrate who is competent to make further orders of detention, for the purpose of computing the period of detention has to take into consideration the period of detention ordered by the Executive Magistrate. Therefore on a combined reading of Sections 167(2) and (2A) it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused can order detention in such custody namely police custody or judicial custody under Section 167(2) for the rest of the first fifteen days after deducting the period of detention ordered by the

Executive Magistrate. The detention thereafter could only be in judicial custody. Likewise the remand under Section 309 Cr.PC can be only to judicial custody in terms mentioned therein. This has been concluded by this Court and the language of the section also is clear. Section 309 comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same. (vide Natabar Parida and Ors. v. State of Orissa MANU/SC/0157/1975 : AIR1975SC1465

10. The learned Additional Solicitor General however submitted that in some of the cases of grave crimes it would be impossible for the police to gather all the materials within first fifteen days and if some valuable information is disclosed at a later stage and if police custody is denied the investigation will be hampered and will result in failure of justice. There may be some force in this submission but the purpose of police custody and the approach of the legislature in placing limitations on this are obvious. The proviso to Section 167 is explicit on this aspect. The detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a magistrate for reasons judicially scrutinised and for such limited purposes as the necessities of the case may require. The scheme of Section 167 is obvious and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers. Article 22(2) of the Constitution of India and Section 57 of Cr. PC give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the court of the magistrate and no such person shall be detained in the custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in police custody. Section 167(3) requires that the magistrate should give reasons for authorising the detention in the custody of the police. It can be thus seen that the whole scheme underlying the section is intended to limit the period of police custody. However, taking into account the difficulties which may arise in completion of the investigation of cases of serious nature the legislature added the proviso providing for further detention of the accused for a period of ninety days but in clear terms it is mentioned in the proviso that such detention could only be in the judicial custody. During this period the police are expected to complete the investigation even in serious cases. Likewise within the period of sixty days they are expected to complete the investigation in respect of other offences. The legislature however disfavoured even the prolonged judicial custody during investigation. That is why the proviso lays down that on the expiry of ninety days or sixty days the accused shall be released on bail if he is prepared to and does furnish bail. If as contended by the learned Additional Solicitor General a further interrogation is necessary after the expiry of the period of first fifteen days there is no bar for interrogating the accused who is in judicial custody during the periods of 90 days or 60 days. We are therefore unable to accept this contention.

11. A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the

expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more sessions offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted than the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused in disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be for formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody. The learned Additional Solicitor General however strongly relied on some of the observations made by Hardy, J. in Mehar Chand's case extracted above in support of his contention namely that an arrested accused who is in judicial custody can be turned over to police custody even after the expiry of first fifteen days at a subsequent stage of the investigation in the same case if the information discloses his complicity in more serious offences. We are unable to agree that the mere fact that some more offences alleged to have been committed by the arrested accused in the same case are discovered in the same case would by itself render it to be a different case. All these offences including the so- called serious offences discovered at a later stage arise out of the same- transaction in connection with which the accused was arrested. Therefore there is a marked difference between the two situations. The occurrences constituting two different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody in the context of Sections 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody. In S. Harsimran Singh v. State of Punjab MANU/PH/0290/1983 a Division Bench of the Punjab and Haryana High Court considered the question whether the limit of police custody exceeding fifteen days as prescribed by Section 167(2) is applicable only to a single case or is attracted to a series of different cases requiring investigation against the same accused and held thus:

We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re- arrested for the purpose of the investigation of an altogether different offence. To put it in other words, there is no insurmountable hurdle in the conversion of judicial custody into police custody by an order of the Magistrate under Section 167(2) of the Code for

investigating another offence. Therefore, a re- arrest or second arrest in a different case is not necessarily beyond the ken of law.

This view of the Division Bench of the Punjab & Haryana High Court appears to be practicable and also conforms to Section 167. We may, however, like to make it explicit that such re- arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be- all and end- all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

12. As the points considered above have an important bearing in discharge of the day- to- day magisterial powers contemplated under Section 167(2), we think it appropriate to sum up briefly our conclusions as under:

13. Whenever any person is arrested under Section 57 Cr. PC he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e., either police or judicial from time time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice- versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate alongwith the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation - can only be in judicial custody. There can not be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by

him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier - case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

14. We may, however, in the end clarify that the position of law stated above applies to Section 167 as it stands in the Code. If there are any State amendments enlarging the periods of detention, different considerations may arise on the basis of the language employed in those amendments.

15. The appeals are accordingly dismissed.

Back to Section 173 of Code of Criminal Procedure, 1973

MANU/SC/0063/1985

IN THE SUPREME COURT OF INDIA

Contempt Petition No. 4998 of 1983 in Writ Petition (Criminal) No. 6607 of 1981

Decided On: 25.04.1985

Bhagwant Singh Vs. Commissioner of Police and Ors.

Hon'ble Judges/Coram:

A.N. Sen, D.P. Madon and P.N. Bhagwati, JJ.

JUDGMENT

1. The short question that arises for consideration in this writ petition is whether in a case where First Information Report is lodged and after completion of investigation initiated on the basis of the First Information Report, the police submits a report that no offence appears to have been committed, the Magistrate can accept the report and drop the proceeding without issuing notice to the first informant or to the injured or in case the incident has resulted in death, to the relatives of the deceased. It is not necessary to state the facts giving rise to this writ petition, because so far as this writ petition is concerned, we have already directed by our order dated 28 November, 1983 that before any final order is passed on the report of the Central Bureau of Investigation by the Chief Metropolitan Magistrate, the petitioner who is the father of the unfortunate Gurinder Kaur should be heard. Gurinder Kaur died as a result of burns received by her and allegedly she was burnt by her husband and his parents on account of failure to satisfy their demand for dowry. The circumstances in which Gurinder Kaur met with her unnatural death were investigated by the Central Bureau of Investigation and a report was filed by the Central Bureau of Investigation in the court of the Chief Metropolitan Magistrate on 11 August, 1982 stating that in their opinion in respect of the unnatural death of Gurinder Kaur no offence appeared to have been committed. The petitioner was however not aware that such a report had been submitted by the Central Bureau of Investigation and he, therefore, brought an application for initiating proceedings for contempt against the Central Bureau of Investigation on the ground that the Central Bureau of Investigation had not completed their investigation and submitted their report within the period stipulated by the Court by its earlier order dated 6 May, 1983. It was in reply to this application for initiation of contempt proceedings that the Central Bureau of Investigation intimated that they had already filed their report in the Court of the Chief Metropolitan Magistrate on 11 August, 1982 and the report was pending consideration by the Chief Metropolitan Magistrate. When this fact was brought to our notice we immediately passed an order dated 28 November, 1983 directing that the petitioner should be heard before any final order was passed on the report. There was no objection on the part of the respondents to the making of this order, but since the question whether incases of this kind, the first informant or any relative of the deceased or any other aggrieved person is entitled to be heard at the time of consideration of the report by the Magistrate and whether the Magistrate is bound to issue notice to any such person, is a question of general importance which is likely to arise frequently in criminal proceedings, we thought that

it would be desirable to finally settle this question so as to afford guidance to the courts of magistrates all over the country and we accordingly proceeded to hear the arguments on both sides in regard to this question.

2. It is necessary to refer to a few provisions of the Code of Criminal procedure, 1973 in order to arrive at a proper determination of this question. Chapter XII of the CrPC, 1973 deals with information to the police and their powers to investigate. Sub- section (1) of Section 154 provides 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 in writing by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced to writing, shall be signed by the person giving it and Sub- section (2) of that section requires that a copy of such information shall be given forthwith, free of cost, to the informant. Section 156 Sub- section (1) vests in the officer- in- charge of a police station the power to investigate any cognizable case without the order of a magistrate and Sub- section (3) of that section authorises the magistrate empowered under Section 190 to order an investigation as mentioned in Sub- section (1) of that section. Section 157 Sub- section (1) lays down that if, from information received or otherwise an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender. But there are of the First Information Report lodged by him. No sooner he lodges the First Information Report, a copy of it has to be supplied to him, free of cost, under Sub- section (2) of Section 154. If, two provisos to this sub- section. Proviso (b) enacts that if it appears to the officer- in- charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case, but in such a case, Sub- section (2) of Section 157 requires that the officer shall forthwith notify to the informant the fact that he will not investigate the case or cause it to be investigated. What the officer in charge of a police station is required to do on completion of the investigation is set out in Section 173. Sub- section (2)(i) of Section 173 provides that as soon as investigation is completed, the officer in charge of a police station shall forward to the magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government setting out various particulars including whether, in the opinion of the officer, as offence appears to have been committed and if so, by whom. Sub- section (2)(ii) of Section 173 states that the officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. Section 190 Sub- section (1) then proceeds to enact that any magistrate of the first class and any magistrate of the second class specially empowered in this behalf under Sub- section (2) may take cognizance of any offence : (a) upon receiving a complaint of facts which constitute such offence or (b) upon a police report of such facts or (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. We are concerned in this case only with Clause (b), because the question we are examining here is whether the magistrate is bound to issue notice to the first informant or to the injured or to any relative of the deceased when he is considering the police report submitted under Section 173 Sub- section (2).

3. It will be seen from the provisions to which we have referred in the preceding paragraph that when an informant lodges the First Information Report with the officer- in- charge of a police station, he does not fade away with the lodging of the First Information Report. He is very much concerned with what action is initiated by the officer in charge of the police station on the basis of the First Information Report lodged by him on sooner he lodges the First Information Report, a copy of it has to be supplied him, free of cost, under Sub- section (2) of Section 154. if notwithstanding the First Information Report, the officer- in- charge of a police station decides not to investigate the case on the view that there is no sufficient ground for entering on an investigation, he is required under Sub- section (2) of Section 157 to notify to the informant the fact that he is not going to investigate the case because it to be investigated. Then again, the officer in charge of a police station is obligated under Sub- section (2)(ii) of Section 173 to communicate the action taken by him to the informant and the report forwarded by him to the magistrate under Sub- section (2)(i) has therefore to be supplied by him to the informant. The question immediately arises as to why action taken by the officer in charge of a police station on the First Information Report is required to be communicated and the report forwarded to the Magistrate under Sub-section (2)(i) of Section 173 required to be supplied to the informant. Obviously, the reason is that the informant who sets the machinery of investigation into motion by filing the First Information Report must know what is the result of the investigation initiated on the basis of the First Information Report, The informant having taken the initiative in lodging the First Information Report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer- in- charge of a police station on the First Information Report should be communicated to him and the report forwarded by such officer to the Magistrate under Sub- section (2)(i) of Section 173 should also be supplied to him.

4. Now, when the report forwarded by the officer- in charge of a police station to the Magistrate under Sub- section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situation may arise, The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things : (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under Sub- section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses : (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under Sub- section (3) of Section 156.

Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or

takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part.

Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognised by the provisions contained in Sub-section (2) of Section 154, Sub- section (2) of Section 157 and Sub- section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under Sub- section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the magistrate to whom a report is forwarded under Sub- section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under Sub- section (2)(i) of Section 173 if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate.

5. The position may however, be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate. We cannot spell out either from the provisions of the Code of Criminal procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report. The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative of or relative the deceased, but not giving of such

notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report.

6. This is our view in regard to the question which has arisen for consideration before us. Since the question is one of general importance, we would direct that copies of this judgment shall be sent to the High Courts in all the States so that the High Courts may in their turn circulate this judgment amongst the Magistrates within their respective jurisdiction.

MANU/RH/0023/1987

IN THE HIGH COURT OF RAJASTHAN (JAIPUR BENCH)

FULL BENCH

Criminal Misc. Petn. No. 309 of 1986 in Criminal Revn. Petn. No. 292 of 1978

Decided On: 05.12.1986

Habu Vs. State of Rajasthan

Back to Section 173 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

V.S. Dave, I.S. Israni and Mohini Kapoor, JJ.

JUDGMENT

V.S. Dave, J.

1. This larger Bench has been constituted by the orders of the Chief Justice, dt. July 3, 1986, to answer a question referred to larger Bench by our brother Hon'ble G. K. Sharma, J. vide his order of reference, dated May 28, 1986 wherein he has framed the following question :

"Whether the judgment given in absence of the appellant or his counsel but the case decided on merits, can be re- called by the Court in its inherent powers under Section 482, Cr.P.C."

2. The petitioner, Habu, had filed a revision petition in this Court in the year 1978 challenging his conviction and sentence. This revision- petition was admitted on Oct. 25, 1978, and was ordered to be heard in due course on May 26, 1979. Thereafter it came up for hearing on Jan. 11, 1985 before Hon'ble Sharma, J. The accused petitioner who was on bail neither appeared in person npr his counsel was present and Hon'ble Sharma, J. after hearing the learned Public Prosecutor dismissed the revision- petition on merits. The petitioner thereafter moved an application on Mar. 14, 1986 under Section 482, CnP.C. wherein it was prayed by him that he had engaged a lawyer Shri Manak Chand Jain who did not inform him of the date of hearing and as such he himself also did not appear and made arguments on his behalf. It was a surprise to him when a warrant of arrest came and he was arrested, then he learnt that his revision petition has been dismissed. He wrote a letter to his counsel but failed to get any reply; hence he engaged another lawyer to find out the position and moved this application after more than a year of the passing of the judgment. This application was heard by Hon'ble Sharma, J. who passed the order of reference. He stated in his judgment, "the case of Dhanna, (MANU/RH/0034/1963 : AIR 1963 Raj 104) decided by Hon'ble Bhargava, J. (C.B.) has been referred by Hon'ble G. M. Lodha, J. and he has tried to distinguish it. This case is identical to the present case and I perfectly agree with the principle laid down by Hon'ble Bhargava, J. but Hon'ble Lodha, J. (G.M.) in Jacob's case 1986 Raj LR 506 had different view, not agreeing with the views of Hon'ble Bhargava, J., in case of Dhanna v. State (MANU/RH/0034/1963 : AIR 1963 Raj 104)".

3. Before the reference came up for hearing we thought it proper to issue a general notice inviting assistance of learned members of the Bar to assist us as intervenors because in our opinion the matter was of general interest and importance. Several learned counsel whose names have been mentioned above intervened and addressed us.

4. Shri Satish Chandra, who was counsel in C. Jacob's case decided by Hon'ble Lodha G. M. J. to which reference has been made by Hon'ble Sharma, J. in his order of reference, raised preliminary objections and submitted that the order of reference itself is bad and there is no necessity to answer the question referred to the Full Bench. His submission is that Hon'ble G. K. Sharma, J. in his order of reference has already agreed with the principle laid down by Hon'ble Bhargava, J. and has further held that "in the present case the revision petition was, no doubt, disposed of with the assistance of the learned Public Prosecutor, but keeping in view that more assistance would have been given by the learned counsel for the petitioner also, I am of the opinion that in view of Shaukin Singh's case the petition under Section 482, Cr.P.C. can be accepted". Thus, when he has already arrived at a conclusion and has agreed with the view taken by Hon'ble Bhargava, J. and also has arrived at a finding in view of the decision of their Lordships of the Supreme Court in Shaukin Singh's case there could not have been any reference as there is a definite expression of opinion. He submits that once a Court arrives at a conclusion that the petition under Section 462, Cr.P.C. can be accepted in view of decision in Shaukin Singh v. State of Uttar Pradesh, MANU/SC/0223/1981 : AIR 1981 SC 1698 no jurisdiction vested in him to refer the matter to a larger Bench. It is further submitted that the reference is wholly uncalled for as he has arrived at further finding that the case of Dhanna v. State of Rajasthan, MANU/RH/0034/1963 : AIR 1963 Raj 104, is more or less similar to the present case.

5. His another objection about maintainability of the reference is that from the language of the question framed by learned Judge is such which does not include the absence of both, i.e., the appellant and his counsel, as the learned Judge has used the word 'or' in the question instead of 'and', therefore, the learned Judge contemplates a position where absence is of the appellant or his counsel which means absence of either of them or presence of only one of them and such a situation having not been the subject- matter of decision in Dhanna's or Jacob's case, the question framed cannot be answered in vacuum. He, therefore, submitted that because of these preliminary objections, point, referred to, need not be answered.

6. We have given our thoughtful consideration to the preliminary objections. In the instant case the accused who filed the revision petition in the year 1978 and was on bail since then. His revision petition was dismissed by the learned single Judge vide his order dated January 11, 1985, and his sentence of six months' rigorous imprisonment and a fine of Rs. 200/- , in default of payment of fine two months' simple imprisonment was maintained. Compliance of this order was issued by the High Court on Jan. 11, 1985. Thereafter the accused was arrested, in pursuance of the warrants issued by the trial Court, for custody of the accused- petitioner to serve out the remaining sentence, as he had also been in custody for about a month during trial and in between the period his appeal was dismissed by appellate Court and his bail was granted by this Court in revision- petition. The accused when learnt that the revision- petition has been dismissed filed an

application for recalling of the judgment on Mar. 11, 1986, on which this reference has been made to Full Bench on May 28, 1986. It has been listed before us after obtaining orders from Hon'ble Chief Justice on July 21, 1986, when the case came before us, we were informed that the accused has served out the sentence passed against him. This is an extremely regrettable situation that a poor rustic villager has not been able to get justice for want of timely proper legal assistance. We are called upon to do this academic exercise, which, of course, is of great importance, in a case, where we are unable to provide real justice to the man who knocked the doors of this Court in expectation of justice. Hon'ble Sharma, J. in his order of reference though opined that he is of the opinion that in view of Shaukin Singh's case (MANU/SC/0223/1981 : AIR 1981 SC 1698) petition under Section 482, Cr.P.C. can be accepted but it appears that no application was moved before him for suspending the sentence of the accused or to release him on interim bail under Section 482, Cr.P.C. itself till the Full Bench answers the reference and he too did not do so suo motu. I am at a loss to understand when his Lordship Hon'ble Sharma, J. took the pains of dictating judgment during summer vacations got it delivered through one of us who was vacation Judge on May 28, 1986, then why it took one month in reaching the file from the Court to section and then was placed before Hon'ble Chief Justice on July 3, 1986, why no efforts were made for getting the case listed earlier, and why it was not brought to the knowledge either of the Chief Justice or before us when we fixed the date and told the Deputy Registrar to list this case on July 21, 1986, that the accused is in jail. We expect from the registry that the record must disclose whether the accused is in jail or not, when it is placed before the Court. It must appear from the title cover. Thus in charge of stamp reporting must ensure that in the cause title as well as on the file cover it must be shown as to what is the position of the accused at the time when the case is presented. Had the Registry in this case taken proper care to see that there is mention that the accused is in jail or had the learned counsel brought the fact to the notice of Hon'ble Sharma, J., possibly the accused would have been benefited of being on interim bail during the pendency. The draft of the entire miscellaneous application only shows one line in para 7, "that when the accused has been arrested, then he could know that his case has been dismissed." Besides this there is not a word in the entire record of the case as to since what date the accused is in jail, in which jail and on what date he had surrendered. We find an affidavit filed by the accused sworn in Jaipur on Mar. 7, 1986 where he has accepted the correctness of the facts mentioned in application, dt. Mar. 11, 1986 which has been presented on Mar. 3, 1986. We are at a loss to understand when an application has been typed and drafted on March 11, 1986 how it could be sworn before the Oath Commissioner on Mar. 7, 1986. We asked the learned counsel for the petitioner, Shri Kasliwal, to explain the anomaly and the circumstances in which the proper facts have not been placed before the Court and which has resulted in making a false record in this case. Mr. Kasliwal thereupon filed an application signed by Shri Pradeep Chaudhary the learned counsel who had brought the case to him from Ajmer. According to this application the accused was arrested on Feb. 17, 1986 and has been released on July 16, 1986 having served out the entire sentence awarded to him by this Court. He has also stated in the application that he got the affidavit verified on Mar. 7, 1986 by Oath Commissioner at Jaipur identifying the accused who was already in Central Jail, Ajmer and as there were typing errors one page was got re- typed on Mar. 11, 1986, and signature of Oath Commissioner taken. He has submitted that these mistakes have been committed by him as he is a new entrant to the Bar and was not knowing the procedure. He has expressed his regrets and has prayed that looking to his inexperience and future in the profession he may be excused. It is unfortunate that due to the negligence and the illegal procedure followed by the learned counsel the accused has served out the sentence and the facts could not be properly placed on the record. The manner in which the affidavit has been filed and has been got sworn in is unknown

to the fair practice and the law concerning swearing in of the affidavits. Neither the Oath Commissioner nor the learned counsel has acted in accordance with law and in fact it amounts to making a false record. However, looking to the extreme youth of the learned counsel and that the Oath Commissioner is also in the evening of his life, we refrain from ordering the prosecution or reference of the matter to the Bar Council suo motu but sound a note of warning and express our strong displeasure on their conduct.

7. Coming to the preliminary objection it is worthwhile to reproduce Rule 59 of the High Court Rules which reads as under:

"Rule 59. Reference of a case to a larger Bench- - The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question or questions of law formulated by a Bench hearing a case. In the latter even the decision of such Bench on the questions so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question or questions and dispose of the case after deciding the remaining questions, if any, arising therein."

8. On a plain reading of the aforesaid rule it is obvious that this bench is called upon to determine only the question formulated by Hon'ble S. Sharma, J. We do not find any other rule in the High Court rules which gives power to Hon'ble the Chief Justice to constitute a Bench of two or more Judges for deciding a case or any question referred to. The argument of the learned counsel is that reference could not be made to this Bench as the learned Judge himself has agreed with one of the views taken by this Court and once he was in agreement the reference was incompetent. We are unable to accept this contention because despite the fact that learned Judge accepted the view in Shaukin's case (MANU/SC/0223/1981 : AIR 1981 SC 1698) yet he had a right to refer the matter to Hon'ble the Chief Justice for referring it to Full Bench, It is for the Full Bench to consider thereafter whether the question framed has to be answered in affirmative or negative or not to answer at all. It is true that the scope of the Full Bench is only to the extent the rule provides, as has been held by the Full Bench of this Court in State of Rajasthan v. Shamlal, MANU/RH/0068/1960 : AIR 1960 Raj 256, where this Court held :

"It appears to me, therefore, that Rule 59 cannot be exhaustive of the powers which the Chief Justice must process in regulating the functioning of the Court to constitute appropriate Benches for the decision of such questions which may, from time to time, necessarily arise."

Since Hon'ble Sarjoo Prasad, J. who was then Chief Justice was himself presiding over the Bench he further held as under

"Since I have the honour of presiding myself over this Special Bench constituted for the purpose, I think that there can be no valid objection to my enlarging the scope of the enquiry in the present case, and formulating the auxiliary question in the manner that I have done, so that this Special Bench of three Judges may conveniently address itself to this important question of law bearing on the interpretation of Article 295 of the Constitution, and the decision given by this Court may be binding as an authority in future."

9. The word 'case' in Rule 59 again came up for consideration before the Division Bench of this Court in Umrao Singh Dhabariya v. Yashwant Singh Nagar, MANU/RH/0032/1970 : AIR 1970 Raj 134. This Court held as under :

"Rule 59 of the High Court Rules for Rajasthan contemplates a reference to a larger Bench to decide a case or any question or questions of law formulated by a Bench. The word 'case' may be used in a narrow sense to imply the whole case or in a wider sense to connote a part of the case or to any state of facts requiring judicial determination. If the wider view is adopted, the decision on issue by the single Judge before the reference to a larger Bench remains a case finally decided and required no reopening and the larger Bench need only decide the controversy remaining alive at the time of the reference. If, on the other hand, a narrower view is adopted, then evidently the Bench has to apply its mind to all the controversies, arising in the case including those earlier decided.

The Court felt inclined to adopt the narrow view of the word 'case' in the rule and to hold that a larger Bench should decide the case as a whole including the controversy already decided by the single Judges."

Reading' the rule coupled with the aforementioned two cases we are of the opinion that nothing prevents us from answering the question referred to us by the learned single Judge despite the facts that he has already agreed with one of the views.

10. The another objection is that there is no controversy between Shaukin Singh's case (MANU/SC/0223/1981 : AIR 1981 SC 1698) and Dhanna's case (MANU/RH/0034/1963 : AIR 1963 Raj 104) and, therefore, the reference is incompetent. We will consider this argument while considering the merits of the reference as the question whether there is any controversy or there is difference of opinion can only be answered after we go through both the cases and in light of the arguments advanced before us by various learned counsel. Regarding another objection about the maintainability of the reference for using the word 'or' suffice it to say that in the facts and circumstances in which the reference has been made neither the appellant nor his counsel was present and obviously the word 'and' can be read instead of the word 'or' as the question which has been referred to us relates to those cases where a case has been decided on merits in the absence of the party and/or counsel representing the party. There is no substance in this argument and we overrule the preliminary objections and proceed to examine the points referred to us, namely:

"Whether the judgment given in the absence of the appellant or his counsel, but the case decided on merits, can be re- called by the Court in its inherent powers under Section 482, Cr.P.C."

11. The aforesaid question has been raised in view of the previsions contained in Section 362 Cr.P.C. which corresponds to Section 369 of the old Cr.P.C. Section 362, Cr.P.C. reads as under:-

"Section 362, Cr.P.C. Court not to alter judgment.- - Save as otherwise provided by this Code or by any other law for the time being in force, 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."

12. A plain reading of the aforesaid section puts a complete bar for altering or reviewing of judgment or a final order on merits and the only power given to the Court is that it can correct a

clerical or arithmetical error. But the question posed before us is whether in these circumstances where the judgment or the final order has been passed without affording an opportunity of being heard to the accused- appellant.

13. Shri S. C. Agarwal submitted that in an application under Section 482, Cr.P.C. this Court has ample powers to re- call its judgment as recalling is not a bar under Section 362, Cr.P.C. He submits that the provisions of Section 482, Cr.P.C. are wide enough to meet any eventuality and if the Court is satisfied that injustice has been done to a person it can always recall its judgment in order to secure the ends of justice. It is submitted that the ban imposed under Section 362, Cr.P.C. is about reviewing or altering the judgment, i.e., interfering with the findings which had been given in the judgment but when it is re- called it means complete abrogation as if there is no judgment at all and, therefore, this Court has to make a distinction between review, alter and re-call. He submits that it is mandatory to give an opportunity of hearing to an accused person in the Court and he should not be condemned unheard. He referred to proviso (b) to Sub- section (1) of Section 384, Cr.P.C. and submitted that no appeal can be dismissed except after giving the appellant a reasonable opportunity of being heard and this means that the presence of the appellant or his counsel is a condition precedent. He submits that if Section 362, Cr.P.C. is given a narrow connotation, then it will make the provisions of Section 384, Cr.P.C. redundant. He referred to a decision reported in T. Somu Naidu, MANU/TN/0350/1923 : AIR 1924 Mad 640 where the Court re- called the earlier judgment and directed the case to be heard afresh. This case came up on a reference made by learned single Judge and a similar question was raised as in the instant case. Their Lordships after considering the various authorities held as under:

"that in exceptional circumstances the judgment has to be re- called since it is either void ab initio or is otherwise null and void. It was held that sound judicial view is that reasonable opportunity for the accused to be heard is essential condition precedent to the exercise of jurisdiction under Section 439, Cr.P.C. when the Court is considering the question of enhancing the punishment inflicted on him. The Court further held that where the condition laid down by law as precedent and requisite to the bearing of a case are not observed the case has to be re- heard and it does not amount to review or revising the order."

14. Reference was then made to Muhammad Sadiq v. The Crown AIR 1925 Lah 355 where the scope of Section 561(A) of the then Cr.P.C. which corresponds to Section 482, Cr.P.C. was considered. It was held that "where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order refusing the appeal must be held to have been passed without jurisdiction and the Court has inherent power to make an order that the appeal should be re- heard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same." In this case their Lordships considered the various cases before coming to the conclusion that the Court has a power to rehearing the case. Reference was then made to Emperor v. Shivadatt (: (MANU/OU/0012/1928 : AIR 1928 Oudh 402 : 1928) 111 Ind Cas 573) wherein it has held as under :

"Where owing to counsel's carelessness in not appearing in the Court at the time when a case is called on for hearing, his client's case goes unrepresented and an ex parte order is passed, the High Court has jurisdiction under Section 561A of the Cr.P.C. to entertain an application to re-

hear the matter, if, in its discretion, it considers, it necessary to do so in order to secure the ends of justice."

15. Reference was then made to Sangam Lal v. Rent Control and Eviction Officer, Allahabad, MANU/UP/0078/1966 : AIR 1966 All 221 a Full Bench decision wherein interpretation to the High Court Rules was given and it was held as under :

"There is power of review both in cases where judgment has been delivered but not signed and cases in which judgment has been delivered, signed and sealed. In the former case, the power to alter or amend or even to change completely is unlimited provided notice is given to the parties and they are heard before the proposed change is made, while in the latter case the power is limited and review is permitted only on very narrow grounds. Hence a judgment which has been orally dictated in open Court can be completely changed before it is signed and sealed provided notice is given to all parties concerned and they are heard before the change is made".

In our opinion this judgment has no bearing on the facts of this case as the point involved therein was absolutely different. The Court was only considering whether a judgment which has been delivered in open Court but not signed can be changed. Hence as mentioned above this case is neither applicable on facts nor on law. Reference was then made to Swarth Mahto v. Dharmdeo Narain Singh, MANU/SC/0272/1972 : AIR 1972 SC 1300 which is a case of improper publication of the cause- list where neither the name of the respondent nor his advocates were properly mentioned. In this case in Patna High Court when an appeal against acquittal came up for hearing after 2 1/2 years after issuance of notice neither the name of the accused- respondent nor his advocate appeared in the cause- list and the State appeal was allowed ex parte. Their Lordships of the Supreme Court held that "when the names of the accused- respondent and his advocate did not appear in the causelist resulting in conviction of the accused without hearing his counsel it could not be said that the accused was given reasonable opportunity of hearing and the application filed by him for re- hearing of appeal afresh by the High Court was allowed by their Lordships of the Supreme Court".

16. Reliance was then placed on Superintendent and Remembrancer of Legal Affairs, West Bengal v. Mohan Singh, MANU/SC/0223/1974 : (1975) 3 SCC 706 : (AIR 1975 SC 1002) wherein their Lordships held as under :

"S. 561- A preserves the inherent power of the High Court to make such orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must therefore exercise its inherent powers having regard to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked."

17. Reference was made to Galos Hirad v. The King AIR 1944 PC 93. In the aforesaid case their Lordships of the Privy Council were considering the scope of Poor Persons Defence Ordinance and were further considering whether an appeal decided in the absence of a lawyer should be re-heard or not. Their Lordships held as under :

"The importance of persons accused of a serious crime having the advantage of counsel to assist them before the Courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel; see Holdworth History of English Law, Vol. 9, p. 226, et. seq. This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused so it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Govt. who was unable, without any default on his part to reach the Court in time to conduct the appeal. The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard, The present appeal must therefore be allowed. Steps must be taken to restore the appeal for hearing either with Mr. Manilal or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly".

18. Reference then was made to Ganesharam v. State of Raj. MANU/RH/0081/1968 where at the time of disposal of the main case provisions of the Probation of Offenders Act were not brought to the notice of the Court and the same were brought to the notice by way of an application under Section 561- A Cr.P.C. His Lordship Hon'bte Tyagi held as under :

"S. 561- A Cr.P.C. envisages three circumstances in which the Court can exercise that power, namely, when it is necessary (1) for securing the ends of justice, (2) for preventing abuse of the process of Court, and (3) to give effect to any order under this Code.

It is now well settled that this section doesn't confer any power on the High Court. It only saves such inherent power which the Court possessed before the Cr.P.C. was enacted. If such a power is so included it can be exercised for the purposes mentioned in the Section and it would be a matter for determination by the Court in each individual case whether the circumstance obtaining in that case makes out that purpose and makes inherent on the Court to exercise such a power to achieve the objects mentioned in the section".

19. Reference was made to Kailash Nath Lahiri v. Shamilal Khushaldas and Bros. Pvt. Ltd. 1977 Cri LJ 1520) (Goa) wherein it was held as under :

"High Court has inherent power to set aside order dismissing a revision for default of appearance. What Section 362 forbids is the alteration or review of the "final order disposing of a case", but it does not prohibit the total obliteration of such order. The alteration or review pre- supposes the continuation of the initial order and the effectuation of some changes in it, whereas the setting aside of the order means the complete abrogation of it. There is therefore, no specific bar contained in Section 362 or in any other section of the Code against the setting aside of an order of dismissal for default. It follows that the inherent powers of High Court are not taken away as far as the setting aside of the orders of dismissal ex parte are concerned".

In totality Mr. Agarwal's contention is that this Court has ample power to re- call its judgment/order in case it is satisfied that one of the three essentials of Section 482, Cr.P.C. so warrants.

20. Mr. Ravi Kasliwal referred to Deepak Thanwardas Balwani v. State of Maharashtra (1984) 1 Crimes 736 : (1985 Cri LJ 23) wherein it was held as under :

"In its inherent powers as provided under Section 482, Cr.P.C., 1973, the High Court can review or revise its judgment if such a judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault. For the mistake of the Court, a party cannot suffer".

He also referred to Raj Narain v. The State, (MANU/UP/0075/1959 : AIR 1959 All 315) which is again a Full Bench decision and where the High Court's power to revoke, review, re- call or alter its own earlier decision in a criminal revision and rehear the same came up for consideration. The question referred to the Full Bench was whether this Court has power to revoke, review, re- call or alter its earlier decision in a criminal revision and re- hear the same and if so in what circumstances. Their Lordships answered the question as under :

"1. that this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and re- hear the same.

2. that this can be done only in cases falling under one or the other of the three conditions mentioned in Section 561- A, namely :

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure,

(ii) for the purpose of preventing abuse of the process of any Court,

(iii) for otherwise securing the ends of justice.

Reference answered accordingly".

In Makkapati Nageswara Sastri v. S. S. Satyanarayan, MANU/SC/0156/1980 : AIR 1981 SC 1156 their Lordships held that the view taken by the High Court that in a revision party was not entitled to be heard as of right and though the counsel did not appear due to non- appearance of his name in the cause- list yet decided the revision ex parte. Their Lordships held that the view

taken by the High Court is manifestly contrary to audi alteram partem rule of natural justice which was applicable to the proceedings before the High Court.

21. Mr. A. K. Bhandari submitted that there is a great difference between the word 'review' or 're-call'. He submitted that what is a bar under Section 362, Cr.P.C. is a review or alteration but not the re- call. He referred to Chambers Dictionary and submitted that review means a re-consideration, a critical examination, to look back etc. while re- call means to call back, to revoke etc. which means that in one there is an examination of the judgment and then on viewing the same from a different angle it has to be reviewed. While in another it is not only abrading it but to revoke it as a whole as if everything is obliterated from the record. In one earlier judgment remains on record with correction of the errors while in another it completely goes out. Therefore, what is contemplated in Section 482, Cr.P.C. is re- calling the judgment and not reviewing the same. In other words it is submitted that Section 362, Cr.P.C. bars the review or alteration but not the re- calling. He submits, that in Swarth Mahto v. Dharmdeo, (MANU/SC/0272/1972 : AIR 1972 SC 1300) their Lordships were conscious of the phraseology and have used the word 're-hearing' and not 'reviewing'. It is further submitted that in all other Courts except High Court the presence of an accused on each date of hearing is a condition precedent, while in the High Court it is not so except that according to Section 385, Cr.P.C. when the appellate Court does not dismiss the appeal summarily it has to cause notice of the time and place at which such appeal will be heard to be given to the appellant or his pleader and by the High Court Rules the notice of time and place is given through cause- list. He, therefore, submits that if either the name is wrongly printed or omitted to be printed or the description of the case is erroneous or for any other reason there is defect in the list, it is non- compliance of Section 385, Cr.P.C. and in case the appeal is heard in non- compliance of Section 385, Cr.P.C. then it is not hearing at all and it violates the principles of natural justice as well.

22. Mr. Subhash Zindal relied on the observations made by their Lordships of the Supreme Court in State of Orissa v. Ram Chandra Agrawal, MANU/SC/0179/1978 : AIR 1979 SC 87 where it was observed :

"That this Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise the order made by this Court."

In our opinion this case has a limited bearing and will be considered at an appropriate place on a different point i.e. whether the provisions of Section 561- A, Cr.P.C. can be invoked for exercise of powers which are specifically prohibited by the Court.

23. Mr. Bapna submitted that Section 482, Cr.P.C. does not confer any new jurisdiction on the High Court. It is inherent on the Court and whenever this Court feels that injustice has been done it has to invoke that jurisdiction which is inherent in every Court. He places' reliance on Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiraial, MANU/SC/0056/1961 : AIR 1962 SC 527 wherein their Lordships of the Supreme Court in reference to Section 151, C.P.C. held that the

inherent power has not been conferred upon the Court. It is a power inherent in the Court by virtue of its duty to do justice between the parties before it. It is then submitted that Section 482, Cr.P.C. only makes this power inherent. Further it is always the duty of the Court to do justice between the parties and in doing so nothing can come as an impediment. It is submitted that when there is an anxiety to do justice Section 362, Cr.P.C. would not operate as a bar because that only prohibits altering or reviewing judgments, neither the correction has to be done nor the judgment has to be dressed. Section 362, Cr.P.C. will only be a bar when there will be some fault finding in the judgment. Learned counsel then relied on Sankatha Singh v. State of Uttar Pradesh, MANU/SC/0142/1962 : AIR 1962 SC 1208. On the strength of this case it is submitted that a Court cannot pass a judgment in the absence of the accused or his counsel and though the order is not without jurisdiction yet the hearing should be given. In this judgment, however, the Court has held that Sessions Judge could not pass the order rehearing of the appeal in exercise of such power that Section 362 read with Section 424, Cr.P.C. specifically prohibits the alter or reviewing of its order by a Court. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. Reliance was then placed on Bindeshwari Prasad Singh v. Kali Singh, MANU/SC/0100/1976 : AIR 1977 SC 2432. In this case their Lordships of the Supreme Court have made a distinction between the jurisdiction vested in the subordinate Courts and in the High Court. It has been held that "there is no provision in Code of Criminal Procedure empowering a Magistrate to review or recall a judicial order passed by him. Inherent powers under Section 561- A are only given to High Court and unlike Section 151, C.P.C. subordinate Criminal Courts have no inherent powers". Thus, this case in fact impliedly explains what has been held in Sankatha Singh v. State of U.P. and clearly lays down that the High Court has the inherent powers while the lower Courts do not possess it. It is submitted that deciding the case in the absence of the party or his lawyer would amount to denial of justice as the view point of the accused is not before the Court and there is likely to be a prejudice to his case.

24. Mr. Ganpat Singh Singhvi submitted that there is yet another angle of looking at the entire case and if need be this Court should go in the constitutional validity of the provisions of the Code of Criminal Procedure, particularly Section 362, Cr.P.C. which is basically against the rights of the citizens. He submits that if that strict interpretation is taken that Section 362, Cr.P.C., puts a complete bar for rehearing the cases even in case where the principles of natural justice are violated, then this provision would be ultra vires of Article 21 of the Constitution. It is submitted that even in matters of property rights the settled law is that none can be deprived of the property in violation of principles of natural justice. He submits that up to 1978 this view was generally acceptable only in the property matters and an individual's liberty was not put at the same pedestal but that was the capitalistic way of looking at things. Now after 1978 the Courts have given new dimensions to Article 21 of the Constitution and right from Hussainara, Khatoon's case (MANU/SC/0119/1979 : AIR 1979 SC 1360) till date their Lordships of the Supreme Court by series of decisions have opened new vistas and it is in the same sequence that this Court must take a view that Section 482, Cr.P.C. is wide enough to give effect to the spirit of principles of natural justice. It is submitted that there is no inherent prohibition and even if there is one in Section 362, Cr.P.C. the same must be held to be violative to the principles of natural justice and Article 41 of the Constitution. It is submitted that this Court should not take a view that right of hearing of an appeal is completely taken away. In support of his aforesaid contentions he placed reliance on the following observations in Central Inland Water Transport Corporation Ltd. v.

Brojo Nath Ganguly (and another Civil Appeal), MANU/SC/0439/1986 : (1986) 3 SCC 156 : (AIR 1986 SC 1571) wherein it has been held as under :

"The law exists to serve the needs of the society which is governed by it. If the law is to play its plotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith said : "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable Fool", The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time for the legislative process is to slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the Courts because the Courts can by the process of judicial interpretation adapt the law to suit the needs of the society".

He then referred to Nawabkhan Abbaskhan v. State of Gujarat AIR 1971 SC 1471 wherein it has been held as under :

"Decisions are legion where the conditions for the exercise of power have been contravened and the order treated as void. And when there is excess or error of jurisdiction the end product is a semblance, not an actual order, although where the error is within jurisdiction it is good, particularly when a finality clause exists. The order becomes 'infallible in error' a peculiar legal phenomenon like the hybrid beast of voidable voidness for which, according to a learned author, Lord Denning is largely responsible. The legal chaos on this branch of jurisprudence should be avoided by evolving simpler concepts which work in practice in Indian conditions. Legislation, rather than judicial law- making will meet the needs more adequately. The only safe course, until simple and sure light is shed from a legislative source, is to treat as void and ineffectual to bind parties from the beginning any order made without hearing the party affected if the injury is to a constitutionally guaranteed right. In other cases, the order in violation of natural justice is void in the limited sense of being liable to be avoided by Court with retroactive force.

In the present case, a fundamental right of the petitioner has been encroached upon by the police commissioner without due hearing. So the Court quashed it not killed it then but performed the formal obsequies of the order which had died at birth. The legal result is that the accused was never guilty of flouting an order which never legally existed."

Reliance has been placed on the following observations of their Lordships in Suk Das v. Union Territory of Arunachal Pradesh, MANU/SC/0140/1986 : AIR 1986 SC 991. It is submitted that this judgment is a landmark and extends the horizons of Article 21 of the Constitution of India

and has an important bearing in deciding this reference. Then reference has been made to A. K. Roy v. Union of India, MANU/SC/0051/1981 : AIR 1982 SC 710 wherein it has been held as under :

"If the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner.

The embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person, whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend."

Reliance has also been placed on the Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni, MANU/SC/0184/1982 : AIR 1983 SC 109, wherein it has been held as under :

"In this connection, we would like to refer to a weighty observation on this point where despite constitutional inhibition this Court conceded such a right. In A. K. Roy v. Union of India, MANU/SC/0051/1981 : (1982) 1 SCC 271 at P. 335 (para 93) : (AIR 1982 SC 710 at p. 747 para 93), the learned Chief Justice while rejecting the contention that a detenu should be entitled to appear through a legal adviser before the Advisory Board observed that Article 22(3)(b) makes it clear that a legal practitioner should not be permitted to appear before an Advisory Board for any party. While noting this constitutional mandate, the learned Chief Justice proceeded to examine, what would be the effect if the department is represented before the Advisory Board by a legally trained person. It was held that in such situation despite the inhibition of Article 22(3)(b) the fair procedure as contemplated by Article 21 requires that a detenu be permitted to appear by a legal practitioner."

On the strength of the aforesaid two authorities it is submitted that their Lordships of the Supreme Court have accepted the right of being heard by a legal expert even in those cases where there was prohibition by law. Reliance has also been placed on Mariabhilli Ramanna v. Andhavarapu Dharmayya 1986 Cri LJ 738 (Andh Pra) and stated that power of re- call is different than the power of review. It has been held in this case that "it is fairly settled that the Court has no power to review its order unless there is a provision specifically empowering the Court to exercise the power of review. The inherent power conferred on the High Court under Section 482, Cr. P.C. cannot be called in aid in a situation where the Magistrate seeks to review the matter. The power of review lacks sanction of any of the provisions of Criminal P.C. Therefore, I am unable to agree with the decision of the Patna High Court."

25. Mr. Ajeet Bhandari placed reliance on Rafiq v. Munshilal, MANU/SC/0076/1981 : AIR 1981 SC 1400 wherein it has been held as under :

"Where an appeal filed by the appellant was disposed of in absence of his counsel, so also his application for recall of order of dismissal was rejected by the High Court, the Supreme Court in appeal set aside both the orders of dismissal on ground that a party who as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such a innocent party who has done everything in his power and expected of him, should not suffer for the inaction, deliberate omission or misdemeanour of his counsel".

It is submitted that" though this was the civil case but the principle laid down therein shall also be applicable in criminal cases.

26. Mr. A. K. Gupta submits that Section 304, Cr. P.C. and Article 39A of the Constitution where right to defend the accused at the State expenditure has been accepted then not to order rehearing of cases decided in the absence of the counsel - must be seriously deprecated. He submits that according to Section 304, Cr. P.C. in a Sessions trial as well as in the appeals legal aid has to be provided at the State expenditure and a notification is also contemplated. While in Article 39A of the Constitution, the framers have categorically enacted that the State shall secure for providing free legal aid by suitable legislation or schemes or in any other way. Seeking support from these it is submitted that whenever case is decided in the absence of legal aid to an accused then keeping in spirit all the aforesaid provisions that judgment should be re- called in the inherent powers of the Court in case it is found that same is prejudicial to the interest of the accused.

27. Mr. Tibrewal submitted that harmonious construction has to be given to the provisions of Section 362, Cr. P.C. and Section 482, Cr. P.C. He submits that under Section 362, Cr. P.C. review or alteration is prohibited but Court has also to bear in mind that power of review is always a creation of a statute and since it has not been created in Code of Criminal Procedure, rather, there is a specific bar, no review is permissible but the question is whether order of review is an order of recall, it has to be considered that whether Section 362, Cr. P.C. can be considered to be a complete bar even if there is gross injustice done to an accused whether the Court will only remain a silent spectator. He submits that in appropriate cases despite bar under Section 362, Cr. P.C. Court is obliged to grant relief to secure ends of justice. Learned counsel has placed reliance on a Full Bench decision of this Court reported in Noor Taki Mammu v. State of Rajasthan 1986 Raj LR 195 : (1986 Cri U 1488) wherein it has been held that in exceptional cases despite the bar contained in Section 397, Cr. P.C. interference can be made with interlocutory orders under Section 482, Cr. P.C. as it gives unfettered powers to this Court for securing the ends of justice. In the aforesaid case the Court was considering the question of releasing an approver on bail who was not on bail at the time of granting pardon. After considering the various authorities the Court held as under :

"A perusal of the aforesaid cases coupled with that of many other cases, like that of Sunil Batra v. Delhi Administration : 1980 Cri LJ 1099 : (MANU/SC/0184/1978 : AIR 1980 SC 1579), and yet another case of Hussainara Khatoon reported in MANU/SC/0119/1979 : AIR 1979 SC 1360, we have no hesitation in holding that detention of a person even by due process of law has to be reasonable, fair and just and if it is not so, it will amount to violation of Article 21 of the Constitution of India. Reasonable expeditious trial is warranted by the provisions of Cr. P.C. and in case this is not done and an approver is detained for a period which is longer than what can be considered to be reasonable in the circumstances of each case, the Court has always power to declare his detention either illegal or enlarge him to bail while exercising its inherent powers. Section 482, Cr. P.C. gives wide power to this Court in three circumstances. Firstly, where the jurisdiction is invoked to give effect to an order of the Court. Secondly if there is an abuse of the process of the Court and thirdly in 'order to. secure the ends of justice. There may be occasions where a case of approver may fall within latter two categories. For example in a case where there are large number of witnesses a long period is taken in trial where irregularities and illegalities have been committed by the Court and a re- trial is ordered and while doing so the accused persons are released on bail, the release of the approver will be occasioned for securing the ends of justice. Similarly, there may be cases that there may be an abuse of the process of the Court and the accused might be trying to delay the proceedings by absconding one after another, the approver may approach this Court for seeking indulgence. But this too will depend upon the facts and circumstances of each case. Broadly, the parameters may be given but no hard and fast rule can be laid down. For instance, an approver, who has already been examined and has supported the prosecution version and has also not violated the terms of pardon coupled with the fact that no early end of the trial is visible, then he may be released by invoking the powers under Section 482, Cr. P.C. Section 482, Cr. P.C. gives only power to the High Court. Sessions Judge cannot invoke the provisions of the same. High Court therefore in suitable cases can examine the expediency of the release of an approver. We are not inclined to accept the contention of the learned Public Prosecutor that since there is a specific bar under Section 306(4)(b), Cr. P.C. Section 482, Cr. P.C. should not be made applicable. Their Lordships of the Supreme Court have said it in times without number that there is nothing in the Code to fetter the powers of the High Court under Section 482, Cr. P.C. Even if there is a bar in different provisions for the three purposes mentioned in Section 482, Cr. P.C., and one glaring example quoted is that though Section 397 gives a bar for interference with interlocutory order yet Section 482, Cr. P.C. has been made applicable in exceptional cases. Secondly revision by the same petitioner is barred yet this Court in exceptional cases invokes the provisions of Section 482, Cr. P.C. Therefore, Section 482, Cr. P.C. give sample power to this Court. However, in exceptional cases, to enlarge the approver on bail, we answer the question that according to Section 306(4)(b), Cr. P.C. the approver should be detained in custody till the termination of trial, if he is not already on bail, at the same time in exceptional and reasonable cases this Court has power under Section 482, Cr. P.C. to enlarge him on bail or in case there are circumstances to suggest that his detention had been so much prolonged, which would otherwise outlive the period of sentence, if convicted his detention can be declared to be illegal, as violative of Article 21 of the Constitution."

Relying on Ranchod Mathur Wasawa v. State of Gujarat, MANU/SC/0442/1973 : (1974) 3 SCC 581: (AIR 1974 SC 1143) it is submitted that adequate opportunity and facility should be provided to the counsel for an accused to prepare the case. He relied on the following passage of the judgment :

"Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases -- not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available, so that the Advocate chosen may serve the cause of justice with all the ability at his command. In all these cases there should be a sensitive approach made by the Court to see that the accused feels confident that his counsel chosen by the Court has had adequate time and material to defend him properly".

Reliance was placed on a Full Bench decision of Travancore Cochin reported in State v. Kunjan Pillai Alyappan Pillai AIR 1952 Trav Co 210, where power to review was considered. Their Lordships though held that Section 561A does not confer any power on the High Courts even under Section 561A to review or alter the judgment, yet observed that in the circumstances of that particular case since there was no abuse of the process of the Court or any grave injustice was done to the party, they were dismissing the petition. They however, did not express any specific view about the correctness of the law laid down in different cases wherein power of re- call had been accepted. The Full Bench of Allahabad High Court in Mahesh v. State consisting of five Judges considered the scope of inherent powers of the High Court and held as under :

"The inherent power cannot affect the substantive rights. It can be invoked only to law down the procedure in cases not covered by the provisions of the Code. The inherent power is to be exercised in exceptional cases, and even then carefully and with caution, when there is no other remedy which can be effectively availed of. The High Court will also be justified to exercise its inherent power in those exceptional cases which could not be in the mind of the legislature at the time of enacting the Code even though for usual cases a provision was made therein. Whenever the inherent power is exercised, it shall be for one of the three purposes mentioned in Section 561A, Cr. P.C. that is, to prevent the abuse of the process of the Court or to secure the ends of justice".

A Full Bench consisting of four Judges of Jammu and Kashmir High Court in Prem Singh v. State MANU/JK/0040/1981, held as under :

"If there is no decision because it is a nullity, the bar under Section 369 cannot operate. Cases are conceivable where the order passed in appeal or revision is a nullity not because of any procedural non- compliance by the Court of appeal or revision, which goes to the roof of the matter, but because the order passed by the trial Court itself is found to be a nullity. That may be so where the trial Court has violation of principles of natural justice and the appellate or the revisional Court had no jurisdiction of its own to make an order but its jurisdiction is only to confirm or set aside the order of the trial Court. In such cases, the order passed in appeal or revision would be a nullity because in law the order of the trial Court will be deemed to be non-existent and it would necessarily follow that there was no order which the appellate Court or the revisional Court would confirm or set aside. Consequently, it shall be open to the appellate Court or the revisional Court, as the case may be, to proceed to rehear the case as if the order already passed by it did not exist, Section 369, Cr. P.C. would not stand in its way".

Reliance has also been placed on Deepak Thanwardas Balwani v. State of Maharashtra 1985 Cri LJ 23 (Bom) wherein it has been held as under :

"In its inherent powers as provided in Section 482, the High Court can review or revise its judgment if such a judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault. For the mistake of the Court, a party cannot suffer".

28. Mr. Dalip Singh laid emphasis on the right recognised for providing in engaging a lawyer and hearing them. He relied on the observations of their Lordships of the Supreme Court in State of Madhya Pradesh v. Shobharam, MANU/SC/0271/1966 : AIR 1966 SC 1910 wherein it has been held as under :

"But the right to be defended by a legal practitioner is not conferred only on a person arrested. The right to be defended by a legal practitioner extends also to a case of defence in a trial which may result in the loss of personal liberty. On the other hand, where a person is subjected to a trial under a law which does not provide for an order resulting in the loss of his personal liberty, he is not entitled to the constitutional right to defend himself at the trial by a legal practitioner. The reason is that Articles 21 & 22 of the Constitution are concerned only with giving protection to personal liberty. That is strongly indicated by the language used in these Articles and by the context in which they occur in the Constitution. It would follow that the requirement laid down in Art, 22(1) is not a constitutional necessity in any enactment which does not affect life or personal liberty."

29- 30. Mr. Jagdeep Dhankhar also laid emphasis on Articles 21 & 39A of the Constitution of India and further submitted that scope of Section 482, Cr. P.C. is very wide enough and Section 362, Cr. P.C. cannot be said to be a bar in all cases under Code of Criminal Procedure. He submits that this Court while interpreting an order under Section 68 IPC wherein an accused has not paid the fine during the period given to him has negatived the argument of the Government Advocate that Section 362, Cr. P.C. would come into operation and this Court cannot now review the order. In this light he has referred to Sheduram v. State of Rajasthan 1985 Cri LR 703 (Raj). Reliance was also placed on an order of the Supreme Court reported in Chakreshwarnath Jain v. State of Uttar Pradesh : (MANU/SC/0128/1981 : AIR 1981 SC 2009 (2) : 1981 (Supp) SCC 11, where a revision petition was ex parte decided by the Allahabad High Court. Their Lordships set aside the order and sent the case back to Allahabad High Court for a decision afresh. Reliance was also placed on a decision of the Supreme Court in Superintendent and Remembrancer of Legal Affairs W.B. v. Mohan Singh (MANU/SC/0223/1974 : AIR 1975 SC 1002 : 1975 Cri LJ 812) wherein it has been held as under :

"Inherent power of High Court to quash criminal proceedings in lower Court - - Proceedings long drawn out - - No prima facie case made out against accused - - Proceedings may be quashed by High Court to prevent abuse of process of Court and to secure ends of justice - - Fact that a similar application for quashing the proceedings on a former occasion was rejected by the High Court on the ground that questions involved were purely questions of fact which were for the Court of fact to decide, is no bar to the quashing of the proceedings at the later stage - - Such quashing will not amount to revision or review of the High Court's earlier order - - Order under Section 561- A should be passed in view of the circumstances existing at the time when the order is passed."

31. Mr. M.I. Khan Additional Advocate General submitted that this question is of much wider importance and should be referred to a still larger Bench. He submits that one of us has already taken view in Noortaki's case {MANU/RH/0015/1987 : 1986 Cri LJ 1488) (Raj) (supra), that even when there is specific prohibition under same provision in exceptional cases inherent powers of the Court can be invoked, he submits that Noortaki's case requires reconsideration and it has to be considered whether scope of Article 21 of the Constitution can be extended to that extent. He submits that according to Article 21 of the Constitution there are only two riders that no person should be deprived of his life or personal liberty and that if it is to be curtailed it can only be in accordance with the procedure established by law. He submits that it is essential to consider Article 21 of the Constitution and it is submitted that even on consideration of it it cannot be said that the provisions of Section 362, Cr. P.C. can be circumvented by taking resort to Section 482, Cr. P.C. It is submitted that Section 362, Cr. P.C. starts with the word save as 'otherwise provided by this Code, therefore, unless there is some provision specifically giving effect to the bar contained in Section 362, Cr. P.C this Court cannot widen the horizans by taking resort to Section 482, Cr. P.C. He relies on Smt. Sooraj Devi v. Pyare Lal, 1981 Cri LJ 296 : (MANU/SC/0228/1981 : AIR 1981 SC 736) and specifically refers to the following observations of their Lordship of the Supreme Court:

"The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the Court cannot be exercised for doing that which is specifically prohibited by the Code. Sankatha Singh v. State of U.P., MANU/SC/0142/1962 : AIR 1962 SC 1208. It is true that the prohibition in Section 362 against the Court altering or reviewing its judgment is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail".

He submits that their Lordships in the aforesaid case have categorically held that inherent powers cannot be invoked when there is a complete bar. He has also placed reliance on Nandlal Chunilal Bodiwala v. Emperor, MANU/MH/0072/1945 : AIR 1946 Bom 276 and submitted that the Full Bench of Bombay High Court considered the meaning of the word 'judgment' as occurred in then Section 369, Cr. P.C. and the scope of reviewing and altering the said judgment. Section 438, Cr. P.C. was made for hearing the effect of the petition still it would not affect its validity and the binding nature on the petitioner. He also relied on S. Kuppuswami Rao v. The King AIR 1949 FCI to substantiate that the term 'judgment' indicates the judicial decision given on the merits of the dispute before the Court and in criminal case the expression 'judgment' or 'final order' cannot cover a preliminary or interlocutory order made on a preliminary objection. On the strength of this case it is submitted that if the judgment is final order then there is a bar for reviewing or altering the same. Mr. Khan also submitted that when a reference has been made to this Bench it should only answer the question referred to and the scope is limited. He refers to Eknath Shankarrao Mukkawar v. State of Maharashtra MANU/SC/0087/1977 and submits that the reference made is competent.

32. Mr. Mohammad Rafiq submitted that power to re- call must be derived only from some specific provisions in the Code and there being none the Code cannot enlarge the scope which otherwise has been restricted by the negative provisions of Section 362 Cr. P.C. He submitted that the inherent power regarding review or alteration of the judgment in Section 482 Cr. P.C. has been deleted by virtue of Section 362 Cr. P.C. He has further submitted that a judgment is a termination of a proceeding and once the proceeding is terminated that Court is functus officio and to give effect to this principle of functus officio the legislature has incorporated Section 362 Cr. P.C. It is submitted that the express provision of Section 367 Cr. P.C. would override even inherent powers as the same is prohibitory. He also emphasized on the words 'save as otherwise provided by this Code or by any other law' and submits that these words make it clear that the only authority vested with power is Supreme Court. He submits that Supreme Court possesses three types of , jurisdiction, namely, appellate jurisdiction, power to correct the errors of subordinate Courts and to lay down the law under Article 141 of the Constitution of India. It is submitted that the Supreme Court has held that there are no inherent powers vested in a court when there is specific bar against it and that being the law binding on this Court the Court cannot now enlarge the jurisdiction by giving wider interpretation to Section 482 Cr. P.C. He relies on Manohar Nathurao Samarth v. Marotrao, MANU/SC/0350/1979 : (1979) 4 SCC 93 : (AIR 1979 SC 1084) and submits that the emphasis while interpreting a law should be on the function, utility, aim and purpose which the provision has to fulfil He has relied on para 14 of this judgment which reads as under :

"Even assuming ' that literality in construction has tenability in given circumstances, the doctrinal development in the nature of judicial interpretation takes us to other methods like the teleological , the textual, the contextual and the functional. The strictly literal may not often be logical if the context indicates a contrary legislative intent. Courts are not victims of verbalism but are agents of the functional success of legislation, given flexibility of meaning, if the law will thereby hit the target intended by the law- maker. Here the emphasis lies on the function, utility, aim and purpose which the provision has to fulfil. A policy oriented, understanding of a legal provision which does not do violence to the text or the context gains preference as against a narrow reading of the words used. Indeed, this approach is a version of the plain meaning rule, and has judicial sanction. In Huttonv. Phillips (1948 45 Del 156) the Supreme Court or Delaware said :

(Interpreation) involves for more than picking out dictionary definitions of words or expressions used. Consideration of the context saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or farfetched, or unusual, or unlikely."

He also referred to Addl. District Magistrate, Jabalpur v. Shivakant Shukla, MANU/SC/0062/1976 : AIR 1976 SC 1207 and submitted that while interpreting the provisions and considering the observations of a High Judicial Authority like the Supreme Court greatest possible care must be taken to relate the observations of a Judge to the precise issues before him and to confine such observations, even though expressed in broad terms, in the general compass of the question before him, unless he makes it clear that he intended his remarks : to have a wider

ambit. His Lordship Hon'ble Mr. Justice Bhagwati in the aforesaid case has observed that it is not possible for Judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression can only lead to the opposite result of uncertainty and even obscurity as regards the case in hand. He also placed strong reliance on Soorajdevi's case (MANU/SC/0228/1981 : AIR 1981 SC 736) (supra) relied upon by Mr. Khan. He also placed reliance on B. R. V. Satyanarayana v. The State MANU/AP/0227/1976 (Andh Pra) and submitted that the High Court cannot review its own order. He relied on the following observations :

"It is an universal principle of law that when a matter has been finally disposed of by a Court, such Court is functus officio in respect of that matter. In the absence of a direct statutory provision, the Court which became functus officio cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. It is this cardinal principle that has been incorporated in Section 362 of the Code. Admittedly, there is no provision in any other law permitting the High Court to alter or review a final order passed by it in a criminal revision case. Inherent powers under Section 482 cannot be exercised to do what the Code specifically prohibits the Court from doing. When Section 362 expressly prohibits the Court from altering or reviewing its final order after the same is signed, it would not be open to High Court to review or alter the order by admitting a fresh revision application. Case law reviewed.

Where the order of dismissal of a revision petition was a regular order passed on merits after hearing the petitioner's counsel, it cannot be said that the order is without jurisdiction or that it was passed without affording an opportunity to petitioner. Even a summary dismissal at the admission stage of a revision case after due hearing of the petitioner or his counsel is as much a dismissal after full hearing and the order having been pronounced and signed by the Judge, the same cannot be altered or reviewed in view of the express prohibition contained in Section 362 Cr. P.C."

He also relied on Naresh v. State of Uttar Pradesh, MANU/SC/0192/1981 where the High Court had altered the quantum of sentence. Their Lordships of the Supreme Court held that the High Court was wholly wrong in altering the judgment passed by them disposing the criminal appeals. He also relied on Chandrabali v. State MANU/UP/0275/1979 (All) wherein also it was held that Section 482 Cr. P.C. is not applicable in which it has been held as under :

"We may also point out that in the Full Bench case of Raj Narain (MANU/UP/0075/1959 : AIR 1959 All 315) (supra) it was observed in the majority judgment that Section 561- A, did not authorise this Court to rehear a case where the applicant or appellant was not heard due to some fault of his or his counsel Thus the applicant cannot get any assistance even from the majority judgment in Raj Narain's case (supra) which on this point has not been overruled by their Lordships of the Supreme Court. Thus the applicant in the case on hand will not be entitled to claim rehearing even if we were to hold that the applicant could invoke inherent jurisdiction of this Court reserved under Section 482 Cr. P.C.".

He then relied on Har Bilas v. Ram Niwas Bansal MANU/UP/0177/1983 (All). The Court held that Section 362 Cr. P.C. is a bar. But in this case we may observe that the name of the counsel was printed in the cause- list and there was no adjournment slip also nor any mention was made and it was an application under Section 482 Cr. P.C. which was decided and in those circumstances their Lordships held that S. 362 will operate as a bar. A reference has then been made to Ajit Singh v. State of Punjab (1983) 2 Crimes 60 : AIR 1982 NOC 219 (Punj & Har) (FB) wherein it has been held as under :

"It seems to be more than manifest that both with regard to the appellate and the revisional jurisdiction of the High Court there is no power to review or revise its earlier judgment, except to correct clerical errors. In face of the all pervading dictum there is no option but to hold that Lal Singh's case MANU/PH/0007/1970) (supra) can no longer hold the field and is hereby overruled. Consequently the answer to the first question has to be rendered in the affirmative and it is held that the High Court has no power to review or alter its earlier judgment within the criminal jurisdiction accept to correct clerical errors."

The learned counsel also submitted that the word 'alter' appearing in Section 362 Cr. P.C. is wider in scope than the word 're- call'. He referred to Law Lex icon by Venkataramayya 1978 Edition page 128 and submitted that 'recall' included the word 'review'. He finally submitted that legislature always intended a finality to a judgment and it should not be permitted to be tested by taking resort to Section 482 Cr. P.C. He submitted that the cancellation of earlier judgments is not permissible. He has also placed reliance on Collector of Customs v. Digvijay Singhji Spinning & Weaving Mills Ltd., Jamnagar, MANU/SC/0365/1961 : AIR 1961 SC 1549. In Shivanarayan Kabra v. State of Madras, MANU/SC/0091/1966 : AIR 1967 SC 986 it has been observed as under :

"It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute."

In The Commr. of Sales Tax U.P. v. Mangal Sen Shyamlal, MANU/SC/0448/1975 : AIR 1975 SC 1106 it has been held as under :

"A statute is supposed to be an authentic repository of the legislative will and the function of a Court is to interpret it "according to the intent of them that made it". From that function the Court is not to resile. It has to abide by the maxim ut res magis valeat quam pereat, lest the intention of the legislature may go in vain or be left to evaporate into thin air. Where that intent is clearly expressed in the language of the Act, there is little difficulty in giving effect to it. But where such intent is covert and couched in language which is imperfect, imprecise and deficient or is ambiguous or enigmatic and external aids to interpretation are few, scant and indeterminate, the Court may, despite application of all its experience, ingenuity and ratiocination, find itself in a position no better than that of a person solving a cross word puzzle with a few given hints and hunches. In such a situation a mere reference to the High Court of a question of opinion may not afford an adequate solution. Only legislative amendment may furnish an efficacious and speedy remedy."

He also referred Rule 64 of the Rajasthan High Court Rules and said that for the purpose of review there are specific rules which have to be observed.

33. Mr. S. P. Tyagi submitted that once the judgment is given and signed it has become final for the Court which has delivered and there is no provision of law which empowers the Court to alter or change the same by way of review, recall, reconsideration or rehearing. In other words he submits that the Court is functus officio and whatever may be the circumstances there being a jurisdictional power provided by Section 362 Cr. P.C. no jurisdiction express or implied is vested in the Court. He relies on two decisions of their Lordships of the Supreme Court, one reported in Sankatha Singh v. State of Uttar Pradesh, (MANU/SC/0142/1962 : AIR 1962 SC 1208) (supra) and another in State of Orissa v. Ramchander Agarwala, (MANU/SC/0179/1978 : AIR 1979 SC 87) (supra).

34. Mr. Mathur, Government Advocate, adopted the arguments of the Addl. Advocate General and Mr. Mohd. Rafiq and further submitted that Section 393 Cr. P.C. read with Sections 377, 378 and 384(4) makes it abundantly clear that there is a finality attached to the judgments and orders and Section 362 Cr. P.C. provides a bar which cannot be lifted by Section 482 Cr. P.C.

35. Mr. S. C. Agrawal in his rejoinder submitted that Advocates presence has always been felt necessary and the Courts have been zealous in looking to the fact that the case of the accused has not in any manner been prejudiced. He has placed reliance on Raj Kapoor v. State (Delhi Administration), MANU/SC/0210/1979 : AIR 1980 SC 258 where their Lordships of the Supreme Court have held that the High Court must exercise the inherent powers very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initialed illegally, vexatiously or as without jurisdiction. Learned counsel has also relied upon a judgment delivered by this Court in Baluram v. State, S. B. Cr. Misc. Appl. No. 154/82 wherein an application under Section 482 Cr. P.C. was dismissed.

36. We shall first quote and discuss the cases considered by Hon'ble Sharma, J.

37. We have given our earnest and thoughtful consideration to the rival contentions and have carefully gone through the cases cited above.

38. There are two views available on the point. According to one view Section 362 Cr. P.C. has been held to be mandatory and puts complete bar and it has been therefore, held that Section 482 Cr. P.C. can also not be invoked for the purposes of reviewing or altering the judgment. The other view is that re- calling is different than reviewing and altering and if the Court is of the opinion that gross injustice has been done, then Section 482 Cr. P.C. should be invoked to re- call the judgment and re- hear the case. !n fact the earlier view has impliedly been done away with by their Lordships of the Supreme Court in Sankatha Singh's case (MANU/SC/0142/1962 : AIR 1962

SC 1208) (supra). Their Lordships have held that the appellate Court had no power to review or restore an appeal which has been disposed of under Sections 424 and 369 Cr. P.C. (old). Similar was the view taken in State of Orissa v. Ram Chandra, (MANU/SC/0179/1978 : AIR 1979 SC 87) (supra). Sankatha Singh's case has been referred to in Sooraj Devi's case (MANU/SC/0228/1981 : AIR 1981 SC 736) (supra) wherein also their Lordships have held that inherent powers cannot be invoked when there is a complete bar. Scope of Section 482 Cr. P.C. was then considered by their Lordships in Manohar Nathu Sao Samarth v. Marot Rao, (MANU/SC/0350/1979 : AIR 1979 SC 1084) (supra). Thus on one side as mentioned above the principles which have been laid down by their Lordships of the Supreme Court can be summarised as under :- -

1. That the powers to deal with the case must flow from the statute,

2. That the powers given under Section 362 Cr. P.C. (S. 369 Cr. P.C. old) given to the Court for reviewing or altering is limited only for correcting an arithmetical or clerical error and specifically prohibits Courts from touching the judgment by taking away the powers altering or reviewing the judgment or the final order and as such principle of functus officio has been accepted.

3. That the prohibition contained in Section 362 Cr. P.C. (Section 369 Cr. P.C. Old) is not only restricted to the trial Court but also extends to appellate Court or the revisional Court.

4. That the inherent powers of the Court cannot be invoked where there is an express prohibition and in other words Section 482 Cr. P.C. cannot be invoked.

39. As against this the analogical deduction which comes out from another set of cases is- -

(i) Right of the accused to be heard is his valuable right which cannot be taken away by any provision of law,

(ii) If the accused has not been given an opportunity of being heard or is not provided with the counsel when not duly represented it will be violative of principles of natural justice as well as Article 21 of the Constitution,

(iii) That to provide defence counsel in case the accused is not in a position to engage is fundamental duty of the State and has throughout been recognized and now incorporated in Section 304 Cr. P.C. and in Article 39 A of the Constitution,

(iv) That bar of review or alter is different than the power of re- call,

(v) That inherent powers given under Section 482 Cr. P.C. (Section 561- A Cr. P.C. Old) are wide enough to cover any type of cases if three conditions mentioned therein so warrant, namely- -

(a) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(b) for the purposes of preventing the abuse of the process of any Court; and

(c) for securing the ends of justice.

(vi) The principle of audi alteram partem shall be violated if right of hearing is taken away,

(vii) That when the judgment is re- called it is a complete obliteration/abrogation of the earlier judgment and the Appeal or the ' Revision, as the case may be, has to be heard and decided afresh,

(viii) That a Court subordinate to High Court cannot exercise the inherent powers and the Code restricts it to the High Court alone.

(ix) That no fixed parameters can be fixed and hard and fast rule also cannot be laid down and Court in appropriate cases where it is specified that one of the three conditions of Section 482 Cr. P.C. are attracted should interfere.

40. Hon'ble Mr. Justice Lodha while deciding C. Jacobs case has taken note of all these factors before he directed re- hearing of the appeals. He has in extent discussed the judgment of the Supreme Court particularly in Sankatha Singh (MANU/SC/0142/1962 : AIR 1962 SC 1208) and Swarth Mathew's cases (MANU/SC/0272/1972 : AIR 1972 SC 1300) (supra) and had then arrived at a conclusion. He has also dealt with Dhanna's case (MANU/RH/0034/1963 : AIR 1963 Raj 104) (supra) and in fact we do not find any anomaly in decisions in Dhanna's and C. Jacobs 1986 Raj LR 506 cases which would have otherwise called for this reference. Hon'ble Mr. Justice Bhargava C. B. in Dhanna's case has discussed various authorities which have been cited before us also and then has categorically held "the inherent powers under Section 561- A should be exercised very sparingly and only when the facts of the case justify the tests laid down in the section itself. They do not authorise the Court to re- direct a case where the appellants or his counsel was not heard on account of their own fault. I am, therefore, not satisfied that the absence of the learned counsel

at the time the appeal was called for hearing was due to insufficient cause and the ends of justice require that a re- hearing should be granted to him".

41. Thus in this case the power of rehearing has been accepted by Hon'ble Bhargava, J., of course in cases where sufficient cause had been shown for the absence of the appellant or his counsel He, however, was clearly of the opinion that Section 561- A Cr.P.C. is not meant for abusing the process of the Court, i.e., to say that a lawyer or the appellant deliberately, in order to avoid the Bench, absents himself, then it would not give him a right of being re- heard. The facts in that case were such where it had not been shown that the lawyer was busy elsewhere or that his name might not have been shown in the cause- list and, on merits, therefore, he refused to exercise jurisdiction under Section 561 A Cr. P.C. Hon'ble Lodha, J. distinguished the case on fact and not on the point of law. He on the other law (hand?) accepted the principle laid down by Hon'ble Bhargava, J. Therefore, in our opinion case of Dhanna (MANU/RH/0034/1963 : AIR 1963 Raj 104} (supra) was not sought to be distinguished in the case of C. Jacob 1986 Raj LR 506) by Hon'ble Lodha, J. and there is no need to refer this case before larger Bench particularly when similar principles had been laid down by their Lordships of the Supreme Court in Shaukin Singh's case (MANU/SC/0223/1981 : AIR 1981 SC 1698) (supra) relied upon by Hon'ble Sharma, J.

42. Sankatha Singh's case also, in our opinion, does not put a complete bar as their Lordships in that case were considering the scope of the trial Court and it has been explained in Swarth Methue's case (MANU/SC/0272/1972 : AIR 1972 SC 1300) in which case their Lordships set aside the conviction and ordered the rehearing of the appeal. A perusal of the history of the cases shows that in all democratic societies right of hearing has been given utmost importance, rather laws have been enacted from time to time for providing legal aid to the persons who are unable to afford the lawyers. Holds Werth's history on English Law Vol. 9 page 226 deals with history of struggle which took place in England before a litigant's representation in the Court took a final shape in bringing out Poor Persons' Defence Ordinance which came up for scrutiny before their Lordships of the Privy Council in Gelosh Hurads AIR 1944 PC 93 (cited above). Very valuable observation has been made therein that if there is a refusal to hear the counsel for the accused an appeal cannot stand. Their Lordships had gone to the extent of holding that even when an adjournment had been sought and refused the accused has to be re- heard because right of hearing cannot be taken away. Their Lordships of the Supreme Court have also advanced this very principle where it was held in couple of cases that if a lawyer does not appear it behoves the Court to appoint an amicus curiae. The same view has been taken in other cases also which have been referred to by the learned counsel above and we are firmly of the opinion that right of hearing cannot be taken away and the sound judicial view would be that reasonable opportunity of being heard must be provided to the accused. Thus, once an appeal or revision is admitted for hearing it should not normally be decided ex parte and if it has been decided ex parte and valid reasons have been shown that there had been failure of justice, inherent powers of this Court should be exercised. This of course, has not to be meant for giving long rope to those persons who either intend to delay the course of justice or to avoid the case from being heard by a particular Bench. Mr. M. I. Khan has cited a passage from Crime in Britain Today by Clive Borrell and Brian Cashinella. He referred to Chapter Eleven Courts, Law and Prisons, particularly the following paragraphs :

"Let there be no doubt, that a minority of criminal lawyers do very well from the proceeds of crime. A reputation for success, achieved by persistent lack of scruple in the defence of the most disreputable, soon attracts other clients who see little hope of acquittal in any other way. Experienced and respected Metropolitan detectives can identify lawyers in criminal practice who are more harmful to society than the clients they represent. A conviction said to result from perjury or wrong- doing by police rightly causes a public outcry. Acquittal, no matter how blatantly perverse, never does, even if brought about by highly paid forensic trickery."

"There is very little reliable information about how and why juries arrive at their verdicts because no one is allowed to listen to the discussions in the jury room. Lawyers obviously believe that public confidence in the jury would be undermined if this were allowed to happen. I find this curious. If exposing the truth about the jury would destroy the public's belief in its value, then surely it is high time that belief was destroyed I cannot think of any other social institution which is protected from rational inquiry because investigation might show that it wasn't doing its job. My own view is that the prosecution of those acquittals relating to those whom experienced police officers believe to be guilty is too high to be acceptable. I would not deny that sometimes commonsense and humanity produce an acquittal which could not be justified in law but this kind of case is much rarer than you might suppose. Much more frequent are the cases in which the defects and uncertainties in the system are ruthlessly exploited by the knowledgeable criminal and his advisers."

42A. Generally speaking we do not have any dispute with what has been said by the author but these observations have hardly any bearing on the question referred to in the case.

43. We have also gone through the observations in the following Article wherein it has been laid down by Shri Ram Jethmalani in an article titled as 'A lawyer Excommunicated' published in LEX ET JURIS wrote- -

"So important is the right of an accused to have the services of a lawyer that the Constitution-makers were not satisfied with the rights created by the successive Codes of Criminal Procedure. The Constitution- makers introduced it in the Fundamental Rights chapter so that no tyrannical regime could curtail or destroy it. Article 22 declares that no accused shall be denied the right to consult and to be defended by a legal practitioner of his choice."

".....The newly added Article 39A mandates that the legal system shall provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

In another issue of the same magazine Soli Sorabjee an eminent lawyer wrote an Article 'Our Expanding Liberties wherein he wrote asunder :- -

"At present it is Article 21 which is the fountainhead of the freedom and liberties of the people of India. Yet, it is only ten years ago that the Supreme Court in its disastrous judgment in ADM

Jabalpur MANU/SC/0062/1976 : AIR 1976 SC 1207 held that on account of the suspension of Article 21 during the operation of the proclamation of Emergency the writ of habeas corpus was not available even in the case of an order of detention proven to be mala fide. Fortunately, after the Constitution (Forty- fourth) Amendment Act, which has made Article 21 non- suspendable even during an emergency, no Court can now deny to any person, at anytime, the full amplitude of Article 21 including its enforcement by a writ of habeas corpus or other appropriate writ.

There are indignant critics who charge that by an over- expansive interpretation of Article 21, the Supreme Court is acting as a super- legislature and is dabbling in matters outside its legitimate sphere. These critics forget that it is the proverbial tardiness of legislatures and the inertia, almost boardering on callousness, of the executive branch which provides a proper occasion for judicial activism. The judiciary can neither prevaricate nor procrastinate. It must respond if fundamental rights are to be living realities for the downtrodden and the oppressed. The Court is not legislating. It is adopting certain operational principles and attitudes within the framework of the Constitution.

May be the Court has "gone too far" in interpreting Article 21. If it has erred, it is an error which had made the blessings of liberty available in a real and meaningful way to numerous unfortunate and exploited segments of humanity. Indeed, the Court's recent role in this field indicates its commitment to 'Taking Rights Seriously' or, as Prof. Upendra Baxi has aptly said, "The Court is taking suffering seriously."

Ultimately, that is the real yardstick by which one can answer the question whether the Supreme Court of India is the sentinel on the qui vive for the bulk of its citizens."

A great emphasis has been laid on Article 21 of the Constitution of India which has been given new dimensions. Therefore, while considering the scope of right of hearing we are of the opinion that due consideration has to be given to Section 304 Cr. P.C. Articles 21 and 39A of the Constitution. Section 482 Cr. P.C. will have to be considered in the light of the aforesaid provisions. We have already mentioned above that in all civilized and democratic societies right of hearing has been considered to be one of the most fundamental of the fundamental rights flowing from principles of natural justice and principles enshrined in well known maxim audi alteram partem. Hon'ble Mr. Justice C. B. Bhargava white considering Dhanna's case (MANU/RH/0034/1963 : AIR 1963 Raj 104) did not consider the aforesaid aspect but st.ill after considering the various cases particularly Keshav Lal v. Gaveria, MANU/RH/0022/1952 : AIR 1952 Raj 50, Sri Ram v. Emperor AIR 1945 All 106, Chandrika v. Rex, MANU/UP/0075/1948 : AIR 1949 All 176, Ram Ballabh v. State MANU/BH/0113/1962, Mohan Singh v. Emperor, MANU/BH/0051/1943 : AIR 1944 Pat 209 and Bhagwandas v. The State AIR 1954 M B 10 and also considering his own judgment in Criminal Revision Petition No. 138/62 coupled with Rules 79 and 80 of the Rajasthan High Court Rules, did come to the conclusion that re- hearing of a revision or an appeal can be ordered if the conditions laid down in Section 561- A Cr. P. C. (S. 482 Cr. P.C now) are fulfilled but gave a caution that this power should be sparingly used and the

test laid down in the section must be satisfied. Hon'ble Mr. Justice Lodha in C. Jacob's case 1986 Raj LR 506 has not only given due weight to the observations made by Hon'ble Bhargava, J. but has gone further and laid more emphasis on this right of re- hearing. He has only distinguished the same on facts. Hon'ble Justice Bhargava, J. had, on the merits of the case found that it was not clear from the application that the learned counsel was actually arguing any case before another Bench when the appeal was called for hearing. He further held that if the learned counsel had other cases listed on that day before other Benches he could have mentioned this case as provided by Rule 80 of the Rajasthan High Court Rules and, therefore, on merits he did not hear the appeal and it was because of these facts that Hon'ble Justice Lodha, J. in his judgment distinguished the said case and in our considered opinion Hon'ble Mr. Justice Sharma was not right when he held that Hon'ble Lodha, J. in C. Jacob's case had taken a different view not agreeing with the views of Hon'ble Bhargava, J. in case of Dhanna(MANU/RH/0034/1963 : AIR 1963 Raj 104). In fact Hon'ble Mr. Justice Lodha, J. has widened the scope of Section 482 Cr. P.C. and Hon'ble Mr. Justice Sharma himself in his order of reference has accepted that proposition. Considering the various aspects of the matter in our opinion there was no necessity of making a reference to this Court and we do not find that there was any difference of opinion between two Benches of this Court. On the contrary we find that even in the order of reference Hon'ble Mr. Justice Sharma has advanced the same logic and has opined that in view of Shaukin Singh's case (MANU/SC/0223/1981 : AIR 1981 SC 1698) a petition under Section 482 Cr. P.C. can be accepted.

44. Keeping the well known principles of interpretation of statute in our mind we deem it proper to observe that while considering the scope of Section 482 Cr. P.C. we must remember that inherent powers which are always inherent in a court are if (not) specifically provided by the legislature, all pervasive and comprehensive enough to arm the Court for advancing the cause of justice and to prevent the abuse of the process of the Court. It is a well known dictum that justice has not only to be done but it should also appear to have been done and, therefore, whenever a litigant comes before the Court it is essential that he must go having full faith in his mind that the Court has done justice with his case. It is true that all cannot go satisfied with the decision of the Court but at least all must have the satisfaction that they have been heard by the Court. The litigant who comes from different corners of the State cannot be expected to be around the Court when his case is called for hearing unless he has a competent and vigilant lawyer who informs him of approximate date of hearing of a case or the litigant himself is vigilant enough to keep in touch with his case, but most of the people who are illiterate and come to the Court have to bank on the information they receive, the treatment they gel and the advice which is tendered to them by their counsel. It can also not be expected that each and very litigant will have the lawyers of the same competence which the others can afford, but at the same time it is always expected from the learned counsel that they would do their best in the best interest of their client. Equally is the responsibility of the Registry in being cautious about notifying the cases properly when they come up for hearing. What we mean to say is that a litigant is always helpless and is at the mercy of the others, whoever makes a mistake ultimate sufferer is he. If the case is not properly shown in the daily cause- list, i.e. either the number is wrong or the title is not properly given or the name of the counsel representing not shown the case will go unattended and if the lawyer misses the case despite the fact that it is properly shown or is busy elsewhere and is unable to attend the Court again sufferer is the litigant, it is for the Courts to see that the record is properly looked into with the assistance of the counsel before the case is finally decided. At the same time Court must ensure that the absence of the counsel is neither deliberate nor meant to avoid the Bench,

nor the litigant or his counsel has tried to over reach the Courts. The Courts in such case must not hesitate in proceeding against such persons.

45. Their Lordships of the Supreme Court in a case of Bhagwant Singh v. Commr. of Police, MANU/SC/0063/1985 : AIR 1985 SC 1285 even while giving interpretation to Section 173(2)(ii) Cr. P.C. have laid great emphasis on the right of hearing and held as under :

"in a case where the Magistrate to whom a report is forwarded under Sub- section (2) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

What we intend to emphasize is that right of hearing is very important right of which no litigant should be deprived. Thus on the consideration of all the cases cited and on the two cases quoted by learned single Judge, we answer the reference as under :

(i) That the power of re- call is different than the power of altering or reviewing the judgment.

(ii) That powers under Section 482 Cr. P.C. can be and should be exercised by this Court for re-calling the judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down under Section 482 Cr. P.C.

MANU/SC/0054/1982

Back to Section 197 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 15 of 1979

Decided On: 09.11.1982

B.S. Sambhu Vs. T.S. Krishnaswamy

Hon'ble Judges/Coram:

A. Vardarajan and V.D. Tulzapurkar, JJ.

JUDGMENT

1. The question raised in this appeal is whether sanction under Section 197 Cr. P.C. is required for prosecuting the appellant who at the material time was working as Additional Munsiff and Judicial Magistrate First Class Madhugiri?

2. It appears that the respondent, an Advocate, was representing a party (defendant) in Suit No. 522 of 1973 which was being heard by the appellant. An application for transfer of the suit from his court to some other court was moved by the defendant before the District Court being Misc. Case No. 30 of 1975. The District Judge called for remarks from the appellant regarding certain allegations that were made in the transfer application. The appellant submitted his remarks in the form of DO. letter No. 16/75 dated 5th December, 1975 wherein he made the following statement:

In this connection I may also bring to your Honour's kind notice that the conduct and character of Sri T.S. Krishnaswamy are not good and that he misbehaves in the open Court making all nonsense allegations. Further, it is brought to my notice that Shri T.S. Krishnaswamy is a big gambler in this Town and is a rowdy also and on account of that he exhibits all sorts of rowdism in the open court. The District Judge is requested to safeguard him from the hands of such mischievous elements.

3. It appears that this letter was read out by the learned District Judge in open court. The respondent filed a criminal complaint against the appellant alleging that the aforesaid contents of the D.O. Letter amounted to his defamation under Section 499 I.P.C. A question was raised whether the Court could take cognizance of the offence without the sanction contemplated in Section 197 Cr.P.C. The learned Magistrate negatived the contention of the appellant that the sanction was necessary. In an application under Section 482 the High Court upheld in the Magistrate's view.

4. It was contended before us as was done before the High Court that the D.O. letter sent by the appellant to the District Judge was in discharge of his duties because the District Judge had called for the remarks and hence whatsoever had been written by the appellant was done while acting or purporting to act in discharge of his official duty and as such the ingredients of Section 197 Cr. P.C. were satisfied. It is not possible to accept this contention for in our view there is no reasonable nexus between the act complained of and the discharge of duty by the appellant. Calling the respondent as 'Rowdy', 'a big gambler' and 'a mischievous element' cannot even remotely be said to be connected with the discharge of official duty which was to offer his remarks regarding the allegations made in the transfer petition. In Matajog Dubey v. H.C. Bharil 1957 (2) SCR 925 this Court has laid down the test in these terms:

There must be a reasonable connection between the, act and the discharge of official duty; the act must bear such "relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

Applying this test to the facts of the present case it is impossible to come to the conclusion that the act complained of has any connection with the discharge of official duty by the appellant.

5. We might refer to the decision of this Court in Pukhraj MANU/SC/0145/1973 : 1973CriLJ1795 case where the facts were similar to the facts in the instant case. 1 Pukhraj filed the complaint against the respondent No. 2, his superior officer, in the postal department, under secs. 323 and 502 of I.P.C. alleging that when he went with his certain complaint to the second respondent, the second respondent kicked him at his abdomen and abused him by saying "Sale gunde, bamash...." The second respondent raised the contention that the court could not take cognizance of the offence without sanction of the Government under Section 197 of the Cr.P.C. That contention was negatived and this Court posed the Question whether the acts complained of were done by the second respondent in purported exercise of his duties and applying the test laid down in Matajog Dubey's case held that the acts complained of, namely, kicking the complainant and abusing him could not be said to have been done in the course of the performance of the duty by the second respondent.

6. For the reasons indicated above we are satisfied that the High Court was right in coming to the conclusion that Section 197 was not attracted. There is, therefore, no substance in the appeal and the same is dismissed.

MANU/HP/0027/1979

IN THE HIGH COURT OF HIMACHAL PRADESH

Decided On: 11.07.1979

Darshan Kumar Vs. Sushil Kumar Malhotra and Ors.

Back to Section 197 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

T.R. Handa, J.

ORDER

T.R. Handa, J.

1. The petitioner herein filed a criminal complaint under Sections 143, 148, 149, 379, 380, 382, 452, 453, 454, and 461 I. P. C. against all the 63 respondents in the court of Sub Divisional Magistrate, Chamba which complaint was later on with the enforcement of the Code of Criminal Procedure, 1973 transferred to the Court of Chief Judicial Magistrate, Chamba. Respondents Nos. 1, 3 and 4 are admittedly public servants not removable from office save by or with permission of the State Government. The learned Chief Judicial Magistrate after recording the preliminary evidence of the petitioner, vide his order dated 10- 6- 1976 summoned only 21 out of 63 respondents under Sections 143, 379, 380 and 461 read with Section 149, Indian Penal Code. As regards respondents 'Nos. 1, 3 and 4 the learned Chief Judicial Magistrate observed that he could not take cognizance against these respondents without the sanction of the State Government as contemplated by Section 197 of the Code of Criminal Procedure as the act complained of against them was committed by them while acting or purporting to act in the discharge of their official duties. He accordingly refused to summon these three respondents.

2. The petitioner has now approached this Court in revision and has challenged the order of the Chief Judicial Magistrate dated 10- 6- 1976 in so far only as it lays down that he could not take cognizance of the offences against respondents Nos. 1, 3 and 4 without the prior sanction of the State Government under Section 197, Cr. P.C.

3. Thus the sole question that falls for consideration in this revision is with regard to the application of the provisions of Section 197, Cr P. C. on the facts of the present case. The very nature of the case, therefore, demands that the facts should be set out at some length.

4. The petitioner is the Director In- charge of Messrs. Stee- Men Limited. This company entered into a contract with the President of India through the then Executive Engineer, Chamba Division, H.P. P. W. D. Chamba for the construction of a 300 ft. span stiffened suspension bridge across

Ravi at Chamba vide agreement No. 10 of 1969- 1970, As both the parties relied upon Clauses 16 to 18 of this agreement, it is considered expedient to quote these Clauses in extenso and the same are reproduced as under:

Clause 16 : - The works comprised in this tender are to be commenced after 15 days on receipt of written orders from the Divisional Officer to commence work. The time allowed 'for carrying out the work as entered in the tender shall be strictly observed by the contractor on the part of the Contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one per cent, or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work shown in the tender for every day that work remains uncommenced, or unfinished after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one- eighth of the whole of the work before one- fourth of the whole of the time allowed under the contract has elapsed, three- eighths of the work before one-half of such time has elapsed, and three- fourths of the whole of the work before three- fourths of such time has elapsed. However, for special jobs if a time schedule has been submitted by the contractor and the same had been accepted by the Engineer- in- Charge, the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as Superintending Engineer (whose decision in "writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender.

Clause 17 : - - In any case in which under any clause or clauses of this contract the contractor(s) shall have rendered himself/themselves liable to pay compensation amounting to the whole of his/their security deposit (whether paid in one sum or deducted by instalment) or committed a breach or a persistent breach of any of the terms contained in Clause 16, the Divisional Officer on behalf of the President of India, shall have power to adopt any of the following courses, as he may deem best suited to the interests of Government,

(a) To rescind the contract of which rescission notice in writing to the contractor(s) under the hand of the Divisional Officer shall be conclusive evidence, and in which case the security deposit of the contractor(s) shall stand forfeited, and be absolutely at the disposal of the Government.

(b) To employ labour paid by the P. W. D. and to supply materials to carry out the work or any part of the work, debiting the contractor(s) with the cost of the labour and the price (certificate of the Divisional Officer shall be final and conclusive) against the contractor (s) and crediting him

them with the value of the work done, the certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the con tractor (s) of the material of the amount of which costs and price.

(c) After giving notice, to the contractor to measure up the work of the contractor and to take such part of the work as shall remain unexecuted out of his/their hands and to give it to another/other contractors to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor (s) if the whole work had been executed by him/them (of the amount of which excess the certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by original contractor(s) and may be deducted from any money due to them by Government. Under the contractor or otherwise or from his/their security deposit or the proceeds of the sale thereof or a sufficient part thereof.

In the event of any of the above courses being adopted by the Divisional Officer the contractor (s) shall have no claim to compensation for any loss sustained by him/them by reasons of his/their having purchased or procured any materials or entered into any engagements or made any advances on account of or with a view to the execution of the work or the performances of the contractor. And in case the contract shall be rescinded under the provision aforesaid the contractor (s) shall not be entitled to recover or be paid any sum for any work therefore actually performed under this contract unless and until the Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof and he/they shall only be entitled to be paid the value so certified.

Clause 18: - In any case in which any of the powers conferred upon the Divisional Officer, by Clause 17 hereof, shall have become exercisable and the same shall not be exercised the non-exercise thereof shall not constitute a waiver of any of the conditions hereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the contractor(s) for which by any clause or clauses hereof he is/they are declared liable to pay compensation amounting to the whole of his/their security deposit and the liability of the contractor (s) for - past and future compensation shall remain unaffected. In the event of the Divisional Officer putting in force either of the power (s) or/and (c) vested in him and the preceding clause he may if so desired take possession of all or any tools, plant materials and stores in or upon the works or the site thereof or belonging to the contractor procured by him/them are intended to be used for the extension of the work or any part thereof paying or allowing for the same in account at the contract rates or in case of these not being applicable at current market rates to be certified by the Divisional Officer whose certificate thereof shall be final otherwise the Divisional Officer may by notice in writing to the contractor (s) or his/their clerk or the works foreman or other authorised agent require him/them remove such tools, plant, materials or stores from the premises (within a time to be specified in such notice) in the event of the contractor (s) failing to comply with any such requisition the Divisional Officer may remove them at the contractor's expenses or sell them by auction or private sale on account of the contractor (s) and at his/their risk in all respect and the certificate of the Divisional Officer as to the expense of any such sale shall be final and conclusive against the contractors.

5. In pursuance of this agreement the site for the construction of the aforesaid bridge was handed over to the company by the then Executive Engineer, Chamba for execution of the "work. The company after taking possession of the site brought the requisite machinery etc. for the construction of the said bridge except some items like cement, steel, C. I. ropes etc. which were to be supplied by the Department in accordance with the terms of the agreement. On 5- 7- 1971 however, the then Executive Engineer, Chamba Division, rescinded the contract referred to above on the ground of 'slow progress of the work'. The company thereupon approached the Government as a result whereof the order of rescission passed by the Executive Engineer was revoked. An intimation to that effect was conveyed to the company by the Executive Engineer on 5- 11- 4971. The dispute that arose between the company and the Department at the time of the original rescission of the contract were referred to the arbitrator. After the rescission order was withdrawn, the company restarted the construction work and made considerable progress. The then Executive Engineer, Chamba, Shri S. P. Punani, however, vide his order dated 5- 6- 1972 levied a penalty of Rs. 63,000/~ on the company on the ground of slow progress. Two days later on 7- 6- 1972 the said Executive Engineer again issued an order rescinding the contract on the pretext of 'slow progress'. The company thereupon approached the arbitrator with its grievances as the proceedings were still pending before the arbitrator.

6. On 13- 6- 1972 the then Executive Engineer, Chamba for the first time made an attempt to take forcible possession of the site of the bridge along- with the property lying thereon from the company with the assistance of his own men. That attempt of the Executive Engineer was successfully resisted by the petitioner who on coming to know of the designs of the Executive Engineer had arranged for police protection in advance. Thereafter on 13- 9- 1972 respondent No. 1 who had then taken over as Executive Engineer, Chamba sent a telegram to the petitioner . stating therein that under Clause 18 of the agreement, respondent No. 1 would be implementing the order of rescission dated 7- 6- 1972 on 15- 9- 1972 at 10.30 a.m. Respondent No. 1 further directed vide the aforesaid telegram to the petitioner to depute some representatives as respondent No. 1 intended to take final measurements and also the control of the property. In pursuance to that telegram respondent No. 1 accompanied by respondents 3 and 5 and some other 50 Beldars duly armed with Gentis, Belchas and Jhabbals actually came to the spot at 10.30 a.m. on 15- 9- 1972 to take forcible possession from the company. The petitioner, however, did not permit them to enter upon the site unless they showed him some order of a competent court. The petitioner had also arranged for police force and the A. S. I. present on the spot also told respondent No. 1 that he could help respondent No. 1 in taking over possession only after respondent No. 1 produced orders from some competent Court to that effect. As respondent No. 1 insisted to take possession, the A. S. I. informed the District authorities of his difficulties on which the Sub- Divisional Magistrate, Chamba reached the spot by about 12.30 p. m. where he held a conference with respondent No. I and the Managing Director of the company. After holding some talks the Sub Divisional Magistrate left at about 1.30 p. m. without passing any order. Respondent No. 1, after the departure of the Sub Divisional Magistrate again tried to take forcible possession of the site and the material which the petitioner was again successful in resisting with the help of the police. Respondent. No. 1 along with his men had to go back without success. Respondent Nos. 3 and 5, however, on that day made a written complaint to the A. S. I,

respondent No. 6 who on that complaint wrongfully arrested the petitioner under Section 353, I. P. C.

7. On the following day, that is, 1.6- 9- 1972 respondent No. 1 accompanied by the other respondents again visited the spot at about 1 p.m. to take forcible possession. It was a local holiday on that day and for that reason the company was also having an off day and no work was in progress on the site. Only three Chowkidars of the company were present to guard the site on that day. The respondents after wrongfully arresting those three Chowkidars on duty, entered upon the site where they broke open the locks of the office, store room, almirahs and Chowkidars' quarters and dishonestly removed movable property of the company from its possession and without its consent. Besides other movables, cash amount of Rs. 14,365- 00 which was lying in the office of the company was also removed by the respondents. Thus according to the petitioner, the respondents after forming themselves into an unlawful assembly with intent to take forcible possession from the company had committed the offences as stated in the complaint.

8. The learned Chief Judicial Magistrate examined four witnesses including Darshan Kumar petitioner, who were produced before him in the course of preliminary enquiry. Out of them P. W. 1 is Shri Darshan Kumar, Director Incharge of the company and P. W. 4 is Shri Gopi Krishan - the Managing Director of the Company. Neither of them was present on the spot at the time of the alleged occurrence and as such ,they are not in a position to, depose as to what actually happened on the spot. The other two witnesses, namely, P. W. 2 Hanif- Ula and P. W. 3 Kesar Singh are stated to be the eye witnesses who witnessed the occurrence. According to versions of these two P. Ws, which are almost identical, respondents 1, 3 and 4 along- with their Beldars and a police party reached the site of the work in the afternoon of 16- 9- 1972 where only three Chowkidara were present at that time. As the Chowkidars refused to allow entry to the respondents, the police party accompanying the respondents arrested all the three Chowkidars. Thereafter the respondents entered upon the site where they fixed their own locks and started construction work. Neither of these witnesses stated if the respondents broke open the locks on the spot or if they removed any article from the site.

9. The petitioner, Shri Darshan Kumar Vig, appearing as P. W. 1 and the Managing Director of the Company Shri Gopi Krishan Khanna appearing as P. W. 4 deposed about the events which are alleged to have taken place prior to the date of actual occurrence, that is 16- 9- 1972. They reiterated the allegations made in the complaint which have already been referred to in details in the earlier part of this judgment.

10. Now to clear the ground for consideration of the application of the provisions of Section 197 Cr. P. C. to the facts of the instant case, it may be stated that from the preliminary evidence produced by the petitioner, the following facts were established before the learned Chief Judicial Magistrate when he passed the impugned order:

(i) That respondents 1, 3 and 4 who were officers of the Public Works Department of the Himachal Pradesh Government were then posted in Chamba Division and they were public servants not removable from office save by or with the permission of the State Government.

(ii) That the company entered into an agreement with the President of India through the Executive Engineer, Chamba which post at the relevant time was held by respondent No. 1, for the construction of a bridge over the river Ravi at Chamba.

(iii) That the work of construction of such bridge was of very urgent nature and for that reason time had been made the essence of the contract between the Government and the Company.

(iv) That respondent No. 1 was the officer responsible to ensure that the progress of the work was effected in accordance with the time schedule.

(v) In case of breach in the time schedule for construction of the bridge, respondent No. 1 had been empowered under the contract aforesaid to:

(a) rescind the contract;

(b) employ Departmental labour and to supply Departmental material at the expense of the company in order to maintain the progress of the work.

(c) After giving notice to the company to measure up the work of the company and to take up the unexecuted part of the work in his own hand for completion either through some other contractor or through Departmental labour.

(vi) That in exercise of such powers, the then Executive Engineer, Chamba for the first time on 5-7- 1971 rescinded the contract on the ground of slow progress of work which rescission was however, later on withdrawn on 5- 11- 1971.

(vii) Again for the some reason, the then Executive Engineer, Chamba, the predecessor- in-interest of respondent No. 1 imposed a penalty of 63.000/- on the company on the ground of slow progress on 5- 6- 1972 and two days later the same , officer rescinded the contract again on the ground of slow progress of work.

(viii) That on 13- 6- 1972 the then Executive Engineer in pursuance of his order rescinding the contract made an attempt to take over the control of the work from the company but that attempt was resisted by the company and hence the Executive Engineer could 'not take control over the work.

(ix) That on 13- 9- 1972 respondent No. 1 sent telegraphic intimation to the company expressing his intention to take over control of the work as per Clause 18 of the agreement in implementation of the order of rescission dated 7- 6- 1972 passed by his predecessor. In his telegram respondent No. 1 notified 15- 9- 1972 as the date and 10.30 a.m. as the hour for taking such action and further advised the company to depute some of his representatives so that final measurements could also be taken along with the control of the property in terms of Clause 18 of the contract.

(x) That as notified earlier vide the telegram referred to above, the respondent No. 1 along with his men visited the site to take measurements and control of the construction work but the company resisted and respondent No. 1 therefore had to return without accomplishing his object.

(xi) That on the following day, that is, 16- 9- 1972 respondent No. 1 again with his men and after securing the police help visited the site in order to take» possession and this time only three chowkidars of the company were found present who refused to surrender. The police accompanying the party of respondent No. 1, accordingly put all the three Chowkidars under arrest whereafter there was nobody to offer resistance on the site. Respondent No. 1 and his men then entered upon the site, affixed their own locks and started construction work to complete the incomplete portion.

(xii) That no, machinery, material, cash or any other article was removed by any of the respondents from the site as is apparent from the evidence of the two eye witnesses examined by the petitioner.

11. The provisions of Section 197 (1), Cr, P. C. which have been attracted by the Chief Judicial Magistrate in his impugned order read as under:

Section 197 (1) : - When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government.

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with affairs of a State, of the State Government.

12. The effect, meaning, scope and interpretation of this provision has been the subject matter of several decisions announced by both the Privy Council as also the Supreme Court from time to time. The Privy Council as early as in 1948 in case H. H. B. Gill v. The King reported as MANU/PR/0013/1948 while explaining the circumstances under which the protection afforded by this section to a public servant is available observed that the test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. The matter again came up for consideration before the Supreme Court in the case of Matajog Dobey v. H. C. Bhari reported as MANU/SC/0071/1955 : [1955]28ITR941(SC) wherein it was observed that in order to attract the protection of this section it must be shown that 'the offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty...There must be a reasonable connection between the act and the official duty...What the Court must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.' Again in the case Prabhakar V. Sinari v. Shanker Anant Verlekar reported as MANU/SC/0306/1968 : 1969CriLJ1057 the Supreme Court while explaining the scope of Section 197(1) and the circumstances under which this provision can be attracted observed as under:

What has to be found out is whether the act complained of and the official duty in the performance of which such act is alleged to have been committed are so interrelated that one could postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of the needs and requirements of the situation. Of course it is not every offence committed by a public servant which required sanction for prosecution under Section 197 (1), Cr, P. C. nor even every act done by him while he was actually engaged in the performance of his official duties. But if the act complained of was directly concerned with his official duly so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary and that would be so, irrespective of whether it was in fact, a proper discharge of his duty or not.

In the case of Bhagwan Prasad Srivastava v. N.P. Mishra reported as MANU/SC/0093/1970 : 1970CriLJ1401 . Hon'ble Justice Dua who delivered the main judgment observed that 'S. 197 is neither to be too narrowly construed nor too widely....' There must be a reasonable connection between the act and the discharge of official duty. The act must fall within the scope and range of the official duties of the public servant concerned.

13. Thus the crux of the matter is that in order to determine whether in a particular case a public servant is entitled to the protection of Section 197, Cr. P. C. all that has to be considered is whether the act complained of against the public servant which is alleged to constitute the offence, was committed by him while discharging his official duty and that such act had a reasonable connection with his official duty. It is not material whether in discharging such official duty, the public servant acted somewhat in excess of his limits.

14. The pertinent question that next arises is as to what considerations should prevail and what tests need be applied for determining as to whether there was a reasonable connection between the act complained of and the official duty of the concerned public servant. Whereas it is not possible to lay down any hard and fast rules of universal application for the determination of this question, one safe and sure test in this regard would in my view be, to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duties. A negative answer to this question may not clinch the issue but if the answer to this question is in the affirmative, it may be said without the least hesitation and without any further probe that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant.

15. If we apply the above test in the instant case, there would be no difficulty in upholding the view taken by the learned Chief Judicial Magistrate that he could not take cognizance against respondents Nos. 1, 3 and 4 without the prior sanction of the State Government under Section 197, Cr. P. C. As already stated, respondent No. 1 is the Executive Engineer who is entrusted with the work of construction of the Bridge at River Ravi at Chamba for the construction of which the contract had been given to the Company. It is apparent from Clause 16 of the agreement referred to above that this construction work was of urgent nature and accordingly time had been made the essence of the contract between the Government and the Company. It was to ensure that there was no delay in the construction of this work that certain powers had been vested by virtue of Clauses 16 to 18 of the agreement in the Executive Engineer who had been fixed with the responsibility of getting the bridge completed in time. It was towards the discharge of this duty of getting the construction work completed in time that the predecessors of respondent No. 1 had on two earlier occasions rescinded the contract and one of them had actually made an effort on 13th June, 1972 to take control of the work. Respondent No. 1 towards the discharge of the same duty and in exercise of the power vested in him under Clause 18 of the agreement issued telegraphic notice to the Company conveying his intention to take measurements as also the control of the work for its expeditious completion. Respondent No. 1 then actually proceeded to the spot on 15th September, 1972 in pursuance of his telegraphic notice but like a disciplined public servant he came back when resistance was offered to him on behalf of the Company. On the next day after taking police help, he again went to the spot and entered upon the site when no resistance was offered and immediately thereafter started the construction work for which purpose he had gone to take possession of the site. I have no doubt in my mind that all that was done by respondent No. 1 with the aid of his staff was done in the discharge of his duties. In case respondent No. 1 had not acted in such a manner and let the things lie as they were, he would certainly have been answerable to his superiors for the delay in the construction of the bridge which could be attributed to inaction on his part. The circumstances as brought on the record

fully establish that it was the duty of respondent No. 1 to see that the progress of the construction work was in accordance with the time schedule and that in case of delay he could take immediate action and take over control of the work for completing the same through some other contractor or, through departmental aid. Respondent No. 1 in doing the act complained of did nothing beyond what he was required to do as a matter of his official duty. The case of respondents Nos. 3 and 4 is not different.

16. I thus find that the act complained of against respondents No. 1, 3 and 4 was committed by them in the discharge of their official duties and it was reasonably connected with their official duty so as to require prior sanction of the State Government for prosecuting them in respect of the offence, if any, made out from the commission of such acts.

17. In the result, I find no force in this Revision Petition which is hereby dismissed.

MANU/SC/0741/2010

Back to Section 227 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. ... of 2010 (Arising out of SLP (Crl.) No. 6374 of 2010)

Decided On: 20.09.2010

Sajjan Kumar Vs. Central Bureau of Investigation

Hon'ble Judges/Coram:

P. Sathasivam and Anil R. Dave, JJ.

JUDGMENT

P. Sathasivam, J.

1. Application for intervention is allowed.

2. Leave granted.

3. This appeal is directed against the order of the High Court of Delhi at New Delhi dated 19.07.2010 whereby the learned single Judge confirmed the order dated 15.05.2010 passed by the District Judge- VII/NE- cum- Additional Sessions Judge, Karkardooma Courts, Delhi in S.C. No. 26/10, RC SII 2005 S0024. By the said order, the Additional Sessions Judge has ordered the framing of charges against the appellant for offences punishable under Section 120B read with Sections 153A, 295, 302, 395, 427, 436, 339 and 505 of the Indian Penal Code (hereinafter referred to as "IPC") and for the offence under Section 109 read with Sections 147, 148, 149, 153A, 295, 302, 395, 427, 435, 339 and 505 IPC, besides framing of a separate charge for offence punishable under Section 153A IPC and rejected the application for discharge filed by the appellant.

4. Brief Facts:

(a) The present case arises out of 1984 anti- Sikh Riot cases in which thousands of Sikhs were killed. Delhi Police has made this case a part of FIR No. 416 of 1984 registered at Police Station Delhi Cantt. In this FIR, 24 complaints were investigated pertaining to more than 60 deaths in the area. As many as 5 charge- sheets were filed by Delhi Police relating to 5 deaths which resulted in acquittals. One supplementary charge- sheet about robbery, rioting etc. was also filed which also ended in acquittal. The investigation pertaining to the death of family members of Smt.

Jagdish Kaur PW- 1, was reopened by the anti- Riot Cell of Delhi Police in the year 2002 and after investigation, a Closure Report was filed in the Court on 15/22.12.2005.

(b) After filing of the Closure Report in the present case, on 31.07.2008, a Status Report was filed by the Delhi Police before the Metropolitan Magistrate, Patiala House Court, New Delhi. Pursuant to the recommendation of Justice Nanavati Commission, the Government of India entrusted the investigation to the Central Bureau of Investigation (hereinafter referred to as "CBI") on 24.10.2005. On receipt of the said communication, the respondent- CBI registered a formal FIR on 22.11.2005. The Closure Report was filed by Delhi Police on 15.12.2005/22.12.2005, when a case had already been registered by the CBI on 22.11.2005 and the documents had already been transferred to the respondent- CBI.

(c) After fresh investigation, CBI filed charge- sheet bearing No. 1/2010 in the present case on 13.01.2010. After committal, charges were framed on 15.05.2010. At the same time, the appellant has also filed a petition for discharge raising various grounds in support of his claim. Since he was not successful before the Special Court, he filed a revision before the High Court and by the impugned order dated 19.07.2010, after finding no merit in the case of the appellant, the High Court dismissed his criminal revision and directed the Trial Court for early completion of the trial since the same is pending from 1984.

5. Heard Mr. U.U. Lalit, learned senior counsel for the appellant, Mr. H.P. Rawal, learned Additional Solicitor General for the respondent- CBI and Mr. Dushyant Dave, learned senior counsel for the intervenor.

6. Submissions:

(a) After taking us through the charge- sheet dated 13.01.2010, statements of PW- 1, PW- 2 and PW- 10, order dated 15.05.2010 framing charges by the District Judge, Karkardooma Courts, Delhi and the impugned order of the High Court dated 19.07.2010, Mr. Lalit, learned senior counsel for the appellant submitted that i) the statement of Jagdish Kaur is highly doubtful and later she made an improvement, hence the same cannot be relied upon to frame charge against the appellant; ii) reliance on the evidence of Jagsher Singh PW- 2, who gave a statement after a gap of 25 years cannot be accepted; iii) the statement of Nirprit Kaur PW- 10 is also not acceptable since the same was also made after a gap of 25 years of the occurrence; iv) other witnesses who were examined in support of the prosecution specifically admitted that they did not see the appellant at the time of alleged commission of offence; v) inasmuch as the charge has been framed after 25 years of occurrence, proceeding against the appellant, at this juncture, is violative of his constitutional right under Article 21; vi) after filing of the closure report by the Delhi Police, by following the procedure, the present action of the CBI conducting further re- investigation and filing charge- sheet based on fresh and improved materials is impermissible in law; vii) follow-up action based on the recommendation of Justice Nanavati Commission is also impermissible at this juncture; viii) many remarks/observations made by the High Court are uncalled for and based on conjectures and surmises and also without there being any material on record. If those

observations are not deleted from the order of the High Court, it would amount to directing the trial Judge to convict the appellant without proper proof and evidence.

(b) On the other hand, Mr. H.P. Rawal, learned Additional Solicitor General appearing for the CBI submitted that in view of categorical statement by the victims before Justice Nanavati Commission and its recommendation which was deliberated in the Parliament, the Government of India took a decision to entrust further/re- investigation in respect of 1984 anti- Sikh riots through CBI. According to him, the present action by the CBI and framing of charges against the appellant and others is in consonance with Sections 227 and 228 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C."). He also submitted that at the stage of framing of the charges, the material on record has not to be examined meticulously; a prima facie finding of sufficient material showing grave suspicion is enough to frame a charge. He pointed out that there is nothing illegal with the order framing charge which was rightly affirmed by the High Court. He further submitted that the High Court has not exceeded in making observations and, in any event, it would not affect the merits of the case.

(c) Mr. Dushyant Dave, learned senior counsel for the intervenor, while reiterating the stand taken by the learned Additional Solicitor General supported the order of the District Judge framing charges as well as the order of the High Court dismissing the criminal revision filed by the appellant. He pointed out that it is not a case for interference under Article 136 of the Constitution of India. No prejudice would be caused to the appellant and he has to face the trial. He further contended that the delay cannot be a ground for interference.

Relevant Provisions:

7. Before considering the claim of the parties, it is useful to refer Sections 227 and 228 of the Cr.P.C. which are reproduced below:

227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate,

or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

It is clear that the Judge concerned has to consider all the records of the case, the documents placed, hear the submission of the accused and the prosecution and if there is "not sufficient ground" (Emphasis supplied) for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in Section 227, if the Judge is of the opinion that "there is ground for presuming" (Emphasis supplied) that the accused has committed an offence, he is free to direct the accused to appear and try the offence in accordance with the procedure after framing charge in writing against the accused. Statements of PW- 1, PW- 2, PW- 8 and PW- 10

8. Mr. Lalit, learned senior counsel for the appellant pointed out that the prosecution, for framing the impugned charges, heavily relied on the statements of Jagdish Kaur, Jagsher Singh and Nirprit Kaur. He also took us through their statements made at various stages which are available in the paper- book. It is true that Jagdish Kaur PW- 1, in her statement under Section 161 Cr.P.C. dated 20.01.1985, did not mention the name of the appellant. Even in the affidavit dated 07.09.1985, filed before Justice Ranganath Misra Commission she has not whispered a word about the role of the appellant. According to him, for the first time i.e. in the year 2000, after a gap of 15 years an affidavit was filed before Justice Nanavati Commission, wherein she referred the name of the appellant and his role along with certain local Congress workers. According to Mr. Lalit, except the above statement in the form of an affidavit before Justice Nanavati Commission, she had not attributed anything against the appellant in the categorical statements made on 20.01.1985 as well as on 07.09.1985 before Justice Ranganath Misra Commission.

9. He also pointed out that even after submission of Justice Nanavati Commission's report and entrusting the investigation to CBI, she made a statement before the CBI officers at the initial stage by mentioning "that the mob was being led by Congress leaders". Only in later part of her statement, she mentioned that "she learnt that Sajjan Kumar, the Member of Parliament was conducting meeting in the area". She confirmed the statement in the form of an affidavit dated 07.09.1985 filed before Justice Ranganath Misra Commission as well as her deposition with regard to the appellant before Justice Nanavati Commission on 08.01.2002. No doubt, in the last part of her statement, it was stated that in the year 1984- 85, the atmosphere was totally against the Sikh

community and under pressure she did not mention the name of Sajjan Kumar. She also informed that she could not mention his name for the safety of her children.

10. The other witness Jagsher Singh, first cousin of Jagdish Kaur, in his statement recorded by the CBI on 07.11.2007 i.e. after a gap of 23 years, mentioned the name of the appellant and his threat to Sikhs as well as to Hindus who had given shelter to Sikhs. According to Mr. Lalit, this witness mentioned the name of the appellant for the first time before the CBI nearly after 23 years of the incident which, according to him, cannot be relied upon.

11. The other witness relied on by the prosecution in support of framing of charges is Nirprit Kaur PW- 10. It is pointed out that she also made certain statements to the CBI after a gap of 23 years and she did not mention the name of the appellant except stating that one Balwan Khokhar who is alleged to be a nephew of Sajjan Kumar, came to her house for discussing employment for her nephew as driver.

12. The other statement relied on by the prosecution in support of framing of charges against the appellant is that of Om Prakash PW- 8. He narrated that during the relevant time he had given shelter to a number of women and children of Sikh community including Jagdish Kaur PW- 1. Mr. Lalit pointed out that in his statement, he did not even utter a word about the appellant but at the end of his statement on being asked, stated that he knew Shri Sajjan Kumar, Member of Parliament. However, he further stated that he did not see him in that mob or even in their area during the said period. In the last sentence, he expressed that he had heard from the people in general that Sajjan Kumar was also involved in the 1984 riots.

13. By pointing out the earlier statement of Jagdish Kaur PW- 1, recorded by the CBI, her affidavit before Justice Nanavati Commission and the statement of Jagsher Singh PW- 2, Nirpreet Kaur PW- 10 and Om Prakash PW- 8 before the CBI, Mr. Lalit submitted that there was no assertion by anyone about the specific role of the appellant except the bald statement and that too after 23 years. In such circumstances, according to him, the materials relied on by the prosecution are not sufficient to frame charges. According to him, mere suspicion is not sufficient for which he relied on the judgments of this Court in Union of India v. Prafulla Kumar Samal and Anr. MANU/SC/0414/1978 : (1979) 3 SCC 4

and Dilawar Balu Kurane v. State of Maharashtra MANU/SC/0005/2002 : (2002) 2 SCC 135.

14. In Prafulla Kumar Samal (supra), the scope of Section 227 of the Cr.P.C. was considered. After adverting to various decisions, this Court has enumerated the following principles:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

15. In Dilawar Balu Kurane (supra), the principles enunciated in Prafulla Kumar Samal (supra) have been reiterated and it was held:

12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see Union of India v. Prafulla Kumar Samal).

14. We have perused the records and we agree with the above views expressed by the High Court. We find that in the alleged trap no police agency was involved; the FIR was lodged after seven days; no incriminating articles were found in the possession of the accused and statements of witnesses were recorded by the police after ten months of the occurrence. We are, therefore, of the opinion that not to speak of grave suspicion against the accused, in fact the prosecution has not been able to throw any suspicion. We, therefore, hold that no prima facie case was made against the appellant.

16. It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce prove the guilt of the accused even if fully accepted before it is challenged in cross- examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. A Magistrate enquiring into a case under Section 209 of the Cr.P.C. is not to act as a mere Post Office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 of Cr.P.C., the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

17. Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

18. With the above principles, if we discuss the statements of PW- 1, PW- 2, PW- 10 as well as of PW- 8, it cannot be presumed that there is no case at all to proceed. However, we are conscious of the fact that the very same witnesses did not whisper a word about the involvement of the appellant at the earliest point of time. It is the grievance of the appellant that the High Court did not take into account that the complainant Jagdish Kaur PW- 1 had not named him in her first statement filed by way of an affidavit dated 07.09.1985 before Justice Ranganath Misra Commission nor did she named him in her subsequent statements made before the Delhi Police (Riots Cell) and in her deposition dated 08.01.2002 before Justice Nanavati Commission except certain hearsay statement. It is the stand of Jagdish Kaur PW- 1, the prime prosecution witness, that apart from her statement dated 03.11.1984, she has not made any statement to Delhi Police at any stage. However, it is also the claim of the C.B.I. that the alleged statements of Jagdish Kaur PW- 1, dated 20.01.1985 and 31.12.1992 are doubtful. Likewise, Nirprit Kaur PW- 10, in her statement under Section 161 Cr.P.C., has denied having made any statement before the Delhi

Police. At the stage of framing of charge under Section 228 of the Cr.P.C. or while considering the discharge petition filed under Section 227, it is not for the Magistrate or a Judge concerned to analyse all the materials including pros and cons, reliability or acceptability etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and free to take a decision one way or the other. Investigation by the C.B.I.

19. Learned Additional Solicitor General has brought to our notice the letter dated 24.10.2005 from Mr. K.P. Singh, Special Secretary (H) to Mr. U.S. Mishra, Director, Central Bureau of Investigation, North Block, New Delhi. A perusal of the said letter shows that in reply to the discussion held in the Lok Sabha on 10.08.2005 and the Rajya Sabha on 11.08.2005 on the report of Justice Nanavati Commission of Inquiry into 1984 anti- Sikh riots, the Prime Minister and the Home Minister had given an assurance that wherever the Commission has named any specific individuals as needing further examination or re- opening of case the Government will take all possible steps to do so within the ambit of law. The letter further shows that based on the assurance on the floor of the Parliament, the Government examined the report of Justice Nanavati Commission, its recommendations regarding investigation/re- investigation of the cases against (a) Shri Dharam Das Shastri, (b) Shri Jagdish Tytler, and (c) Shri Sajjan Kumar. The letter further shows that the Government had decided that the work of conducting further investigation/re-investigation against the abovementioned persons as per the recommendations of Justice Nanavati Commission should be entrusted to the CBI. Pursuant to the said decision, Home Department forwarded the relevant records connected with the cases against the abovementioned persons. It also shows those additional records/information required in connection with investigation are to be obtained from the Delhi Police. The materials placed by the CBI show that Justice Nanavati Commission submitted its report on 09.02.2005, its recommendations were discussed by the Lok Sabha on 10.08.2005 and the Rajya Sabha on 11.08.2005, Government of India asked CBI to inquire those recommendations on 24.10.2005 and the F.I.R. No. 416 of 1984 dated 04.11.1984 of Police Station, Delhi Cantt was re- registered by the CBI as case RC- 24(S)/2005- SCU.I/CBI/SCR.I/New Delhi. Pursuant to the same, on 22.11.2005, investigation was taken up and it revealed that the accused persons committed offences punishable under Section 109 read with Sections 147, 148, 149, 153A, 295, 302, 396, 427, 436, 449, 505 and 201 IPC and accordingly filed the charge- sheet. It is relevant to note that no one including the appellant has not challenged appointment of CBI to inquire into the recommendations made by Justice Nanavati Commission. Status Report by Delhi Police

20. Mr. Lalit heavily relied on the status report of the Delhi Police and consequential order of the Magistrate. By pointing out the same, he contended that the CBI is not justified in re- opening the case merely on the basis of observations made by Justice Nanavati Commission. The following conclusion in the status report dated 31.07.2008 filed by the Delhi Police was pressed into service.

From the investigation and verification made so far it was revealed that:

(a) There is no eye- witness to support the version of the complaint of Smt. Jagdish Kaur.

(b) The complaints and affidavits made by Smt. Jagdish Kaur are having huge contradictions.

(i) In her first statement recorded by local police during the investigation, she did not name any person specifically and also stated that she could not identify any one among the mob.

(ii) She even did not name Shri Sajjan Kumar in her statement recorded by the I.O. of the Spl. Riot Cell after a gap of seven years.

(iii) She suspected the involvement of one Congress Leader Balwan Khokhar in these riots but she had not seen him personally. She was told by one Om Prakash who was colleague of her husband, about the killing of her husband and son.

(iv) In the statement recorded on 22.01.1993 under Section 161 Cr.P.C. during the course of further investigation, the witness Om Prakash stated that he had seen nothing about the riots. Jagdish Kaur stayed at his house from 01.11.1984 to 03.11.1984 but she did not mention the name of any person who was indulged in the killing of her husband and son.

It is seen from the report that taking note of lot of contradictions in the statement of Jagdish Kaur PW- 1 before the Commissions and before different investigating officers and after getting legal opinion from the Public Prosecutor, closure report was prepared and filed before the Metropolitan Magistrate, Patiala House Courts, New Delhi on 31.07.2008. It is further seen that before accepting the closure report, the Magistrate issued summons to the complainant i.e., Smt. Jagdish Kaur number of times and the same were duly served upon her by the officers of the Special Riot Cell but she did not appear before the Court. In view of the same, the Magistrate, on going through the report and after hearing the submissions and after noting that the matter under consideration is being further investigated by the CBI and the investigation is still pending and after finding that no definite opinion can be given in respect of the closure report, without passing any order closed the matter giving liberty to the prosecution to move appropriate motion as and when required.

21. Mr. Lalit, learned senior counsel, by placing copy of the final report under Section 173 Cr.P.C. by Delhi Police as well as endorsement therein including the date on which the said report was filed before the Court, submitted that the action taken by Delhi Police cannot be faulted with. In other words, according to him, till the entrustment of further investigation by the CBI, Delhi Police was free to proceed further and there is no error in the action taken by the Delhi Police. In view of the order dated 31.07.2008 of the Magistrate, declining to give definite opinion on the

closure report since the same was under further investigation by CBI, we are of the view that no further probe/enquiry on this aspect is required. Delay

22. Learned senior counsel appearing for the appellant further submitted that because of the long delay, the continuation of the prosecution and framing of charges merely on the basis of certain statements made after a gap of 23 years cannot be accepted and according to him, it would go against the protection provided under Article 21 of the Constitution. Mr. Lalit heavily relied on para 20 of the decision of this Court in Vakil Prasad Singh v. State of Bihar MANU/SC/0089/2009 : (2009) 3 SCC 355 which reads as under:

20. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (A.R. Antulay case, SCC pp. 270- 73, para 86)

(i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily;

(ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial;

(iii) in every case, where the speedy trial is alleged to have been infringed, the first question to be put and answered is - - who is responsible for the delay?;

(iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on- - what is called, the systemic delays;

(v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case;

(vi) ultimately, the court has to balance and weigh several relevant factors- - `balancing test' or `balancing process'- - and determine in each case whether the right to speedy trial has been denied;

(vii) ordinarily speaking, where the court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial;

(viii) it is neither advisable nor feasible to prescribe any outer time- limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint;

(ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis.

After adverting to various decisions including Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr. this Court further held:

24. It is, therefore, well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case.

25. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time- frame for conclusion of trial.

Considering the factual position therein, namely, alleged demand of a sum of Rs. 1,000/- as illegal gratification for release of payment for the civil work executed by a contractor, a charge was laid against Assistant Engineer in the Bihar State Electricity Board and taking note of considerable length of delay and insufficient materials, based on the above principles, ultimately the Court

after finding that further continuance of criminal proceedings pending against the appellant therein is unwarranted and quashed the same. Though the principles enunciated in the said decision have to be adhered to, considering the factual position being an extraordinary one, the ultimate decision quashing the criminal proceedings cannot be applied straightaway.

23. In P. Vijayan v. State of Kerala and Anr. MANU/SC/0058/2010 : (2010) 2 SCC 398, this Court while considering scope of Section 227 of Crl.P.C. upheld the order dismissing the petition filed for discharge and permitted the prosecution to proceed further even after 28 years. In that case, from 1970 till 1998, there was no allegation that the encounter was a fake and only in the year 1998 reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers were involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organisations before the High Court of Kerala with a prayer that the investigation may be transferred to the Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999 in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. He also stated that the appellant was present when the incident occurred. By order dated 27.01.1999, learned Single Judge of the High Court of Kerala passed an order directing CBI to register an FIR on the facts disclosed in the counter affidavit filed by Constable Ramachandran Nair. Accordingly, CBI registered an FIR on 3- 3- 1999 in which Constable Ramachandran Nair was named as Accused 1, Mr. Lakshmana was named as Accused 2 and Mr. P. Vijayan, the appellant, was named as Accused 3 for an offence under Section 302 IPC read with Section 34 IPC. After investigation, CBI filed a charge- sheet before the Special Judge (CBI), Ernakulam on 11.12.2002 wherein all the abovementioned persons were named as A- 1 to A- 3 respectively for an offence under Sections 302 and 34 IPC. The appellant - P. Vijayan filed a petition under Section 227 of the Code on 17.05.2007 for discharge on various grounds including on the ground of delay. The trial Judge, by order dated 08.06.2007, dismissed the said petition and passed an order for framing charge for offences under Sections 302 and 34 IPC. Aggrieved by the aforesaid order, the appellant - Vijayan filed Criminal Revision Petition No. 2455 of 2007 before the High Court of Kerala. By an order dated 04.07.2007, learned Single Judge of the High Court dismissed his criminal revision petition. The said order was challenged by Mr. P. Vijayan before this Court. Taking note of all the ingredients in Section 227 of the Criminal Procedure Code and the materials placed by the prosecution and the reasons assigned by the trial Judge for dismissing the discharge petition filed under Section 227, this Court confirmed the order of the trial Judge as well as the order of the High Court. Though, there was a considerable lapse of time from the alleged occurrence and the further investigation by CBI inasmuch as adequate material was shown, the Court permitted the prosecution to proceed further.

24. Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though Mr. Lalit heavily relied on paragraph 20 of the decision of this Court in Vakil Prasad Singh's case (supra), the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e., 21, 23, 24, 27 and 29 pointed out that the principles enunciated in A.R. Antulay's case (supra) are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

25. Mr. Dave, learned senior counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in Japani Sahoo v. Chandra Sekhar Mohanty MANU/SC/3080/2007 : (2007) 7 SCC 394. In para- 14, C.K. Thakker, J. speaking for the Bench has observed:

It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay.

In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay. As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial.

Observations by the High Court

26. Coming to the last submission about the various observations made by the High Court, Mr. Lalit pointed out that the observations/reference/conclusion in paragraphs 64, 65, 69, 70, 72, 73 and 50 are not warranted. According to him, to arrive such conclusion the prosecution has not placed relevant material. Even otherwise, according to him, if the same are allowed to stand, the trial Judge has no other option but to convict the appellant which would be against all canons of justice. He further submitted that even if it is clarified that those observations are to be confined for the disposal of the appeal filed against framing of charges and dismissal of discharge petition and need not be relied on at the time of the trial, undoubtedly, it would affect the mind of the trial Judge to take independent conclusion for which he relied on a judgment of this Court in Common Cause, A Registered Society v. Union of India and Ors. MANU/SC/0437/1999 : (1999) 6 SCC 667. He pressed into service paragraph 177 which reads as under:

177. Mr. Gopal Subramaniam contended that the Court has itself taken care to say that CBI in the matter of investigation, would not be influenced by any observation made in the judgment and that it would independently hold the investigation into the offence of criminal breach of trust or any other offence. To this, there is a vehement reply from Mr. Parasaran and we think he is right. It is contended by him that this Court having recorded a finding that the petitioner on being appointed as a Minister in the Central Cabinet, held a trust on behalf of the people and further that he cannot be permitted to commit breach of the trust reposed in him by the people and still further that the petitioner had deliberately acted in a wholly arbitrary and unjust manner and that the allotments made by him were wholly mala fide and for extraneous consideration, the direction to CBI not to be influenced by any observations made by this Court in the judgment, is in the nature of palliative. CBI has been directed to register a case against the petitioner in respect of the allegations dealt with and findings reached by this Court in the judgment under review.

Once the findings are directed to be treated as part of the first information report, the further direction that CBI shall not be influenced by any observations made by this Court or the findings recorded by it, is a mere lullaby.

On the other hand, learned Additional Solicitor General highlighted that these observations by the High Court are based on the materials placed and, in any event, it would not affect the interest of the appellant in the ultimate trial. In view of the apprehension raised by the learned senior counsel for the appellant, we also verified the relevant paragraphs. In the light of the fact that it is for the trial Judge to evaluate all the materials including the evidentiary value of the witnesses of the prosecution such as Jagdish Kaur PW- 1, Jagsher Singh PW- 2, Nirpit Kaur PW- 10 and Om Prakash PW- 8, alleged contradictory statements, delay and the conduct of the Delhi Police in filing Status Report and on the basis of further investigation by the CBI, we clarify that all those observations of the High Court would not affect the ultimate analysis and final verdict of the trial Judge.

Conclusion:

27. In the light of the above discussion, we are of the view that it cannot be concluded that framing of charges against the appellant by the trial Judge is either bad in law or abuse of process of law or without any material. However, we clarify that de hors to those comments, observations and explanations emanating from the judgment of the learned single Judge, which we referred in para 26, the trial Judge is free to analyse, appreciate, evaluate and arrive at a proper conclusion based on the materials being placed by prosecution as well as the defence. Inasmuch as the trial relates to the incident of the year 1984, we direct the trial Judge to take sincere efforts for completion of the case as early as possible for which the prosecution and accused must render all assistance. Interim order granted on 13.08.2010 is vacated. With the above observation and direction, the appeal is disposed of.

MANU/SC/0167/1976

Back to Section 235 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 392 of 1975

Decided On: 17.08.1976

Santa Singh Vs. The State of Punjab

Hon'ble Judges/Coram:

P.N. Bhagwati and S. Murtaza Fazal Ali, JJ.

JUDGMENT

P.N. Bhagwati, J.

1. This appeal, by special leave, raises an interesting question of law relating to the construction of Section 235(2) of the CrPC, 1973. The appellant was tried before the Sessions Judge, Ludhiana for committing a double murder, one of his mother and the other of her second husband. He was represented by a lawyer during the trial and after the evidence was concluded and the arguments were heard, the learned Sessions Judge adjourned the case to 13th February, 1975 for pronouncing the judgment. It appears that on 13th February, 1975, the judgment was not ready and hence the case was adjourned to 20th February, 1975 and again to 26th February, 1975. The Roznamcha of the proceedings shows that on 26th February, 1975 the appellant was present without his lawyer and the learned Sessions Judge pronounced the judgment convicting the appellant of the offence under Section 302 of the Indian Penal Code and sentenced him to death. It was common ground that after pronouncing the judgment convicting the appellant, the learned Sessions Judge did not give the appellant an opportunity to be heard in regard to the sentence to be imposed on him and by one single judgment, convicted the appellant and also sentenced him to death. The appellant preferred an appeal to the High Court and the case was also referred to the High Court for confirmation of the death sentence. The High Court agreed with the view taken by the learned Sessions Judge and confirmed the conviction as also the sentence of death. The appellant thereupon preferred the present appeal with special leave obtained from this Court.

2. The appeal is limited to the question of sentence and the principal argument advanced on behalf of the appellant is that in not giving an opportunity to the appellant to be heard in regard to the sentence to be imposed on him after the judgment was pronounced convicting him, the learned Sessions Judge committed a breach of Section 235(2) of the CrPC, 1973 and that vitiated the sentence of death imposed on the appellant. This argument is a substantial one and it rests on the true interpretation of Section 235(2). This is a new provision and it occurs in Section 235 of the CrPC, 1973 which reads as follows :