235 (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.

3. This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the court can proceed to pass the sentence.

4. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice as important as the adjudication of guilt and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.

In most of the countries of the world, the problem of sentencing the criminal offender is receiving increasing attention and that is largely because of the rapidly changing attitude towards crime and criminal. There is in many of the countries, intensive study of the sociology of crime and that has shifted the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and, simultaneously, of the range of sentencing procedures. Today, more than ever before, sentencing is becoming a delicate task, requiring an inter- disciplinary approach and calling for skills and talents vary much different from those ordinarily expected of lawyers. This was pointed out in clear and emphatic words by Mr. Justice Frankfurter :

I myself think that the bench we lawyers who become judges- - are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I did not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training gives you any special competence. I, myself,

hope that one of these days, and before long, we will divide the functions, of criminal justice. I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery the rule of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to possess.

5. The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence the circumstances extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence,

and therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can bear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.

Hence the new provision in Section 235(2).

6. But, on the interpretation of Section 235(2) another question arises and that is, what is the meaning and content of the words "hear the accused". Does it mean merely that the accused has to be given an opportunity to make his submissions or he can also produce material bearing on sentence which has so far not come before the court ? Can he lead further evidence relating to the question of sentence or is the hearing to be confined only to oral submissions ? That depends on the interpretation to be placed on the word 'hear'. Now, the word 'hear' has no fixed rigid connotation. It can bear either of the two rival meanings depending on the context in which it occurs. It is a well settled rule of interpretation, hallowed by time and sanctified by authority, that the meaning of an ordinary word is to be found not so much in strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained. It was Mr. Justice Holmes who pointed out in his inimitable style that "a word is not a crystal, transparent and unchanged : it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". Here, in this provision, the word 'hear' has been used to give an opportunity to the accused to place before the court various circumstances bearing on the sentence to be passed against him. Modern penology, as pointed out by this Court in Ediga Annamma v. State of Andhra Pradesh MANU/SC/0128/1974 : 1974CriLJ683 "regards crime and criminal as equally material when the right sentence has to be picked out". It turns the focus not only on the crime, but also on the criminal and seeks to personalize the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that "facts of a social and personal nature, sometimes altogether irrelevant, if not injurious, at the stage of fixing the

guilt may have to be brought to the notice of the court when the actual sentence is determined". We have set out a large number of factors which go into the alchemy which ultimately produces an appropriate sentence and full and adequate material relating to these factors would have to be brought before the court in order to enable the court to pass an appropriate sentence. This material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court. This was also the opinion expressed by the Law Commission in its Forty Eighth Report where it was stated that "the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process." The Law Commission strongly recommended that if a request is made in that behalf by either the prosecution or the accused, an opportunity for leading "evidence on the question" of sentence "should be given". We are, therefore, of the view that 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. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.

7. Now there can be no doubt that in the present case the requirement of Section 235(2) was not complied with, inasmuch as no opportunity was given to the appellant, after recording his conviction, to produce material and make submissions in regard to the sentence to be imposed on him. Since the appellant was convicted under Section 302 of the Indian Penal Code, only two options were available to the Sessions Court in the matter of sentencing the appellant either to sentence him to death or to impose on him sentence of imprisonment for life. It the Sessions Court had, instead of sentencing him to death, imposed on him sentence of life imprisonment, the appellant could have made no grievance of the breach of the provision of Section 235(2) because, even after hearing the appellant, the Sessions Court would not have passed a sentence more favourable to the appellant than the sentence of life imprisonment. In such a case, even if any complaint of violation of the requirement of Section 235(2) were made, it would not have been entertained by the appellate court as it would have been meaningless and futile. But, in the present case, the Sessions Court chose to inflict death sentence on the appellant and the possibility cannot be ruled out that if the accused had been given opportunity to produce material and make submissions on the question of sentence, as contemplated by Section 235(2), he might have been able to persuade the Sessions Court to impose the lesser penalty of life imprisonment. The breach of the mandatory requirement of Section 235(2) cannot, in the circumstances, be ignored as inconsequential and it must be held to vitiate the sentence of death imposed by the Sessions Court.

8. It was, however, contended on behalf of the State that non- compliance with the mandatory requirement of Section 235(2) was a mere irregularity curable under Section 465 of the CrPC, 1973 as no failure of justice was occasioned by it and the trial could not on that account be held to be bad. The State leaned heavily on the fact that the appellant did not insist on his right to be heard under Section 235(2) before the Sessions Court, nor did he make any complaint before the High Court that the Sessions Court had committed a breach of Section 235(2) and this omission on the part of the appellant, contended the State, showed that he had nothing to say in regard to the question of sentence and consequently, no prejudice was suffered by him as a result of non-compliance with Section 235(2). This contention is, in my opinion, without force and must be rejected. It must be remembered that Section 235(2) is a new provision introduced for the first time in the CrPC, and 1973 and it is quite possible that many lawyers and judges might be unaware of it. Before the Sessions Court, the appellant was not represented by a lawyer at the time when the judgment was pronounced and obviously he could not be aware of this new stage in the trial provided by Section 235(2). Even the Sessions Judge was not aware of it, for it is reasonable to assume that if he had been aware, he would have informed the appellant about his right to be heard in regard to the sentence and given him an opportunity to be heard. It is unfortunate that in our country there is no system of continuing education for judges so that judges can remain fully informed about the latest developments in the law and acquire familiarity with modern methods and techniques of judicial decision- making. The world is changing fast and in our own country, vast social and economic changes are taking place. There is a revolution of rising expectation amongst millions of human beings who have so far been consigned to a life of abject poverty, hunger and destitution. Law has, for the first time, adopted a positive approach and come out openly in the service of the weaker sections of the community. It has ceased to be merely an instrument providing a framework of freedom in which men may work out their destinies. It has acquired a new dimension, a dynamic activism and it is now directed towards achieving socio- economic justice which encompasses not merely a few privileged classes but the large masses of our people who have so far been denied freedom and equality social as well as economic and who have nothing to hope for and to live for. 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.

9. So far as Section 465 of the CrPC, 1973 is concerned, I do not think it can avail the State in the present case. In the first place, non- compliance with the requirement of Section 235(2) cannot be

described as mere irregularity in the course of the trial curable under Section 465. It is much more serious. It amounts to by- passing an important stage of the trial and omitting it altogether, so that the trial cannot be aid to be that contemplated in the Code. It is a different kind of trial conducted in a manner different from that prescribed by the Code. This deviation constitutes disobedience to an express provision of the Code as to the mode of trial, and as pointed out by the Judicial Committee of the Privy Council in Subramania Jyer v. King Emperor (1901) 28 I.A. 257 such a deviation cannot be regarded as a mere irregularity. It goes to the root of the matters and the resulting illegality is of such a character that it vitiates the sentence. Vide Pulukurti Kotayya v. King Emperor (1947) 74 I.A. 65 and Magga and Anr. v. State of Rajasthan. MANU/SC/0029/1953 : 1953CriLJ892 Secondly, when no opportunity has been given to the appellant to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit. Section 465 cannot, in the circumstances, have any application in a case like the present.

10. I accordingly allow the appeal and whilst not interfering with the conviction of the appellant under Section 302 of the Indian Penal Code, set aside the sentence of death and remand the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the appellant to be heard in regard to the question of sentence in accordance with the provision of Section 235(2) ;as interpreted by me.

Fazal Ali, J

11. I entirely agree with the judgment proposed by my learned brother Bhagwati, J. and I am at one with the views expressed by him in his judgment, but I would like to add a few lines of my own to highlight some important aspects of the question involved in this appeal.

12. In this appeal by special leave which is confined only to the question of sentence an interesting question of law arises as to the interpretation of the provisions of Section 235(2) of the CrPC, 1973 hereinafter after referred to as 'the 1973 Code'. In the light of the arguments advanced before us by the parties the question may be framed thus :

Does the non- compliance with the provisions of Section 235(2) of the 1973 Code vitiate the sentence passed by the Court?

13. In order to answer this question it may be necessary to trace the historical background and the social setting under which Section 235(2) was inserted for the first time in the 1973 Code. It would appear that the 1973 Code was based on a good deal of research done by several authorities including the Law Commission which made several recommendations for revolutionary changes in the provisions of the previous Code so as to make the 1973 Code hi consonance with the growing needs of the society and in order to solve the social problems of the people. Apart from introducing a number of changes in the procedure, new rights and powers were conferred on the

Courts or sometimes even on the accused. For instance, a provision for anticipatory bail was introduced to enable the accused to be saved from unnecessary harassment. In its 48th Report the Law Commission while recommending the insertion of a provision which would enable the accused to make a representation against the sentence to be imposed after the judgment of conviction had been passed, observed as follows :

It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background of the offender.

We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to co- operate in the process.

14. In the aims and objects of 1973 Code which have been given clause by clause a reference to this particular provision has been made thus .-

If the judgment is one of conviction, the accused will be given an opportunity to make his representation, if any, on the punishment proposed to be awarded and such representation shall be taken into consideration before imposing the sentence. This last provision has been made because it may happen that the accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is the bread- winner of the family of which the Court may not be made aware during the trial.

15. Para 6(d) of the statement of objects and reasons of the 1973 Code runs thus:

6. Some of the more important changes intended to provide relief to the poorer sections of the community are :-

(d) the accused will be given an opportunity to make representation against the punishment before it is imposed.

16. The statement of objects and reasons further indicates that the recommendations of the Law Commission were examined carefully keeping in view, among others, the principle that "an accused person should get a fair trial in accordance with the accepted principles of natural justice". In these circumstances, therefore, I feel that the provisions of Section 235(2) are very salutary and contain one of the cardinal features of natural justice, namely, that the accused must be given an opportunity to make a representation against the sentence proposed to be imposed on him.

17. Section 235 of the 1973 Code runs thus:

235(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.

18. A perusal of this Section clearly reveals that the object of the 1973 Code was to split up the sessions trial or the warrant trial, where also a similar provision exists, into two integral parts- - (i) the stage which culminates in the passing of the judgment of conviction or acquittal; and (ii) the stage which on conviction results in imposition of sentence on the accused. Both these parts are absolutely fundamental and non- compliance with any of the provisions would undoubtedly vitiate the final order passed by the Court. The two provisions do not amount merely to a ritual formula or an exercise in futility but have a very sound and definite purpose to achieve. Section 235(2) of the 1973 Code enjoins on the Court that after passing a judgment of conviction the Court should stay its hands and hear the accused on the question of sentence before passing the sentence in accordance with the law. This obviously postulates that the accused must be given an opportunity of making his representation only regarding the question of sentence and for this purpose he may be allowed to place such materials as he may think fit but which may have bearing only on the question of sentence. The statute, in my view, seeks to achieve a socio-economic purpose and is aimed at attaining the ideal principle of proper sentencing in a rational and progressive society. The modern concept of punishment and penology has undergone a vital transformation and the criminal is now not looked upon as a grave menace to the society which should be got rid of but is a diseased person suffering from mental malady or psychological frustration due to subconscious reactions and is, therefore, to be cured and corrected rather than to be killed or destroyed. There may be a number of circumstances of which the Court may not be aware and which may be taken into consideration by the Court while awarding the sentence, particularly a sentence of death, as in the instant case. It will be difficult to lay down any hard and fast rule, but the statement of objects and reasons of the 1973 Code itself gives a clear illustration. It refers to an instance where the accused is the sole bread- earner of the family. In such a case if the sentence of death is passed and executed it amounts not only to a physical effacement of the criminal but also a complete socio- economic destruction of the family which he leaves behind. Similarly there may be cases, where, after the offence and during the trial, the accused may have developed some virulent disease or some mental infirmity, which may be an important factor to be taken into consideration while passing the sentence of death. It was for these reasons that Section 235(2) of the 1973 Code was enshrined in the Code for the purpose of making the Court aware of these circumstances so that even if the highest penalty of death is passed on the accused he does not have a grievance that he was not heard on his personal, social and domestic circumstances before the sentence was given.

19. My learned brother has very rightly pointed out that our independence has led to the framing of numerous laws on various social concepts and a proper machinery must be evolved to educate

not only the people regarding the laws which have been made for their benefit but also the Courts, most of whom are not aware of some of the recent and the new provisions. It is, therefore, the prime need of the hour to set up Training Institutes to impart the new judicial recruits or even to serving judges with the changing trends of judicial thoughts and the new ideas which the new judicial approach has imbibed over the years as a result of the influence of new circumstances that have come into existence.

20. The next question that arises for consideration is whether non- compliance with Section 235(2) is merely an irregularity which can be cured by Section 465 or it is an illegality which vitiates the sentence. Having regard to the object and the setting in which the new provision of Section 235(2) was inserted in the 1973 Code there can be no doubt that it is one of the most fundamental part of the criminal procedure and non- compliance thereof will ex facie vitiate the order. Even if it be regarded as an irregularity the prejudice caused to the accused would be inherent and implicit because of the infraction of the rules of natural justice which have been incorporated in this statutory provision, because the accused has been completely deprived of an opportunity to represent to the Court regarding the proposed sentence and which manifestly results in a serious failure of justice. There is abundant authority for this proposition to which reference has been made by my learned brother.

21. 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.

22. 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.

23. I, therefore, agree with the order of my learned Bhagwati, J., that the appeal should be allowed on the question of the sentence and the matter should be sent back to the Trial Court for giving an opportunity to the accused to make a representation regarding the sentence proposed.

MANU/BH/0090/1958

IN THE HIGH COURT OF PATNA

Criminal Ref. No. 1 of 1955

Decided On: 16.10.1957

Rasik Tatma Vs. Bhagwat Tanti

Back to Section 247 of Code of Criminal Procedure, 1973

Back to Section 256 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

Jamuar and K. Dayal, JJ.

JUDGMENT

Authored By : K. Dayal, Jamuar

K. Dayal, J.

1. This is a reference under Section 438 of the Code of Criminal Procedure by the District Magistrate, Saharsa.

2. The material facts are these: One Bhagwat Tanti filed a complaint in the court of the Subdivisional Magistrate, Madhipura, against Rasik Tatma and three others, alleging that they had forcibly uprooted wheat crop from his lands. The: Subdivisional Magistrate summoned accused Rasik. and, thereafter, transferred the case to the file of the Honorary Magistrate, First Class, Madhipura. This trying Magistrate allowed bail to the accused and summoned prosecution witnesses for the next date. On the next date, that is, the 16th March 1954, trying Magistrate found the complainant absent on call and, therefore, he acquitted the accused under section 247 of the Code of Criminal Procedure. Subsequently the complainant appeared before the trying Magistrate and filed a petition for reviving the case. On the 2nd April 1954, the learned trying Magistrate passed an order reviving the case. Accused Rasik then moved the District Magistrate for referring the matter to the High Court for setting aside the order of the learned trying Magistrate dated 2nd April, 1954 reviving the case. Upon this application, the learned District Magistiate has referred this case to this Court for quashing the proceeding against petitioner Rasik Tatma.

3. The only important question for decision in this case is as to whether the case could have been revived or restored after the accused had been acquitted under Section 247 of the Code of Criminal Procedure.

4. In Ram Mahto v. Emperor 2 Pat LT 170: AIR 1921 Pat 311 (A), Kiran Sarkarv. Emperor : (MANU/BH/0133/1923 : AIR 1924 Pat 140) (B) : 5 Pat L T 15, and Jaikaran Jha v. Dukhan Paswan, Cri, Revn. No. 637 of 1953, D/- 8- 4- 1954 (Pat) (C) (unreported), this Court has held that an order under section 247 of the Code of Criminal Procedure is a final order of acquittal which operates as a bar under Section 403 of the Code of Criminal Procedure(sic) the trial of the accused for the same offence. The principles of these cases are directly applicable to the facts of the present case. Similar is the view of the Calcutta High Court, see for instance. Kanai Hizra v. Golap Hizra MANU/WB/0065/1953 : AIR 1953 Cal 197 (D). Mr. A.K. Roy, appearing against the reference, referred us to a solitary case of the Madras High Court namely B. Kotevva v. K. Venkayya AIR 1918 Mad 212 (E) where a different view has been expressed. But it appears that, previous to 1918 and after 1918, the Madras High Court had taken the view as has been taken by the Calcutta and the Patna High Courts, see for instance, In re G. Peddaya ILR 34 Mad 253 (F), In re Sinnu Gounden ILR 36 Mad 1028: AIR 1914 Mad 628 (G), and (Devarakonda) Lakshminara- simham v. Nalluri Bapanna, MANU/TN/0058/1926 : AIR 1927 Mad 473 (H). Thus, on the authorities brought to our notice the consensus of opinion appears to be that an order of acquittal under Section 247 of the Code of Criminal Procedure operates as a bar under Section 403 of the Code to the trial of the accused for the same offence.

5. Besides, it has been laid down in a number of cases that, in a criminal case, the Magistrate, after once having signed and completed his order, has no jurisdiction to review or revise the same, see for instance, Gajo Chaudhary v. Debi Chaudhary MANU/BH/0381/1923 : AIR 1923 Pat 532 (I).

6. It is, thus, manifestly clear that the learned trying Magistrate had no jurisdiction to revive the complaint case.

7. In the result, the reference is accepted and the order of the learned trying Magistrate dated 2nd April 1954 is set aside and the fresh proceeding drawn up against Rasik Tatma is quashed.

Jamuar, J.

8. I agree.

MANU/GJ/0186/2005

Back to Section 265H of Code of Criminal Procedure, 1973

IN THE HIGH COURT OF GUJARAT

Criminal Appeal Nos. 477, 843, 891, 892, 896, 897 and 898 of 2002 and 265 of 2003

Decided On: 22.02.2005

State of Gujarat Vs. Natwar Harchandji Thakor

Hon'ble Judges/Coram:

J.N. Bhattand Dhirubhai Naranbhai Patel, JJ.

JUDGMENT

J.N. Bhatt, J.

Prelude (Focal Point)

Let us at the very outset, evidently record, remember, and recollect that ;

"A civilisation is judged by the way it treats its criminals."

1. In this group of criminal appeals, specially assigned to the Larger Bench by the Hon'ble Chief Justice, the central theme, the core issue and the main point, in focus, has been, as to whether the trial Court, on being satisfied or in presence of special and adequate reasons peculiar to the accused, to be mentioned in writing, in the judgment of the Court, in finding accused guilty, "for a first offence" either by evidence or "by raising the plea of guilty"; is competent to impose for such "first offence";

(i) a sentence of imprisonment for a term of less than three months and fine of less than Five Hundred Rupees for the offence punishable under the proviso to Sub- clause (i) of Sub- section (1) of Section 66 of the "Bombay Prohibition Act, 1949". (B. P. Act")?

And

(ii) a sentence of imprisonment for a term of less than seven days and fine of less than Rupees Twenty Five for the first offence punishable, in terms of proviso to Sub- clause (i) to Clause (1) and Clause (3) of Sub- section (1) of Section 85 of the B. P. Act, 1949?

(iii) Whether Innovative Judicial Directions and prescription of New Format, for recording plea of guilty of an accused, when statutory prescription of such a process or procedure has been prescribed in the Act, would be competent and legal?

Statutory Mechanism :

2. Chapter VII of the B. P. Act deals with the offences and penalties statutorily prescribed. This chapter consists of the provisions relating to the penalty for the offences committed under the B. P. Act. Section 66 provides for penalty in the case of person having committed offence in contravention of the provisions of the Act or of any Rule, Regulation or Order made or of any licence, pass, permit or authorisation issued thereunder, whereas, Section 85, B. P. Act, prescribes penalty for being drunk, for disorderly behaviour and drunk without permit or ineligible to hold permit under the B. P. Act. The relevant provisions of both the Sections, firstly, need to be evaluated and examined for the purpose of interpretation and applicability, and adjudication of the points in Focus. Therefore, let us at the outset, have the benefit of those relevant statutory provisions, which read hereasbelow :

Statutory provisions :

I. Section 66(1)(b) along with the proviso for the first offence, reads hereasunder :

"66. (1) Whoever in contravention of the provisions of this Act, or of any rule, regulation or order made, or any licence, permit, pass or authorisation issued, thereunder :

(b) consumes, uses, possesses or transports any intoxicant other than opium or hemp,

(c) to (e) * * * * * * * *

shall, on conviction, be punished, -

(i) For a first offence, with imprisonment for a term which may extend to six months and with fine which may extend to one thousand rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than five hundred rupees :

(ii) to (iii) * * * * * * * *"

II. Section 85(1) along with the proviso for the first offence reads hereasunder :

"85. (1) Whoever in any street, or thoroughfare or public place or in any place to which the public have or are permitted to have access -

(1) is drunk and incapable of taking care of himself, or

(2) behave in a disorderly manner under the influence of drink, or

(3) is found drunk but who is not the holder of permit granted under the provisions of this Act or is not eligible to hold a permit under Sections 40, 41, 46 or 46A

shall, on conviction, be punished -

(i) for an offence under Clause (1) or Clause (3),

(a) for a first offence, with imprisonment for a term which may extend to one month and with fine which may extend to two hundred rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than seven days and fine shall not be less than twenty five rupees; and

(ii) for an offence under Clause (2) -

(a) for a first offence with imprisonment for a term which may extend to three months and with fine which may extend to five hundred rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than one month and fine shall not be less than one hundred rupees; and

(b) * * * * * *

(2) * * * * * *"

3. In view of the important interpretative exercise and jurisprudential exposition, so far as, proviso to the minimum sentence in those provisions of B. P. Act is concerned, which, obviously, would have wider legal implications and far- reaching ramifications, it was thought expedient to request the learned Senior Advocate, Mr. P.M. Thakkar, to assist and enlighten the Court, as an "amicus curiae" to which, he spontaneously and unhesitatingly, responded and agreed to assist, and he has rendered very good and valuable assistance in this group of matters, and therefore, we place on record our appreciation and grateful thanks to him for his useful assistance.

4. The learned A.P.P. Mr. L. R. Pujari has also rendered very useful and fruitful assistance in reaching the conclusion. We, also, place on record our appreciation for his assistance.

Penology and Minimum Sentence :

5. In the realm of penology, the Courts are empowered and invested with higher and wider discretion. Once, the conviction is established, the difficult and delicate issue of imposition of the penalty would arise requiring, the Court to consider, various aspects and variety of factors, particularly, "special to the accused", so as to reach a correct, appropriate, proportionate and just conclusion of imposition of sentence, which could be reasonable, adequate and proportionate to the category and nature of culpability and type of criminality established against the each accused persons. However, of late, the legislatures, State, as well as Central, have thought it fit and expedient in their wisdom, while exercising legislative prerogatives and powers, to provide 'minimum sentence', and thereby, in the result, restricting the discretionary role and exercise of the powers, by Courts, in imposition of sentences in certain cases or certain enactments. The prescription of 'minimum sentence' is an important issue in the sentencing policy and legislative measures for penalties for offences.

6. Of course, there is a purpose and policy behind providing 'minimum sentence'. There are variety of reasons which have led to legislative prescription of minimum sentences for certain offences and in certain enactments. Again, it will be interesting to note, at this juncture, that the legislatures, while enacting and providing for minimum sentence, have made further provisions in many enactments, with the help of proviso or 'explanation' or otherwise for discretion, so that in a given fit case, on being satisfied, in presence of special and adequate reasons to be recorded

in the judgment of the Court, the Court can exercise discretion vested in imposing the punishment lesser than 'minimum sentence'.

7. Wherever and whenever a minimum sentence is prescribed by the legislature, it is incumbent upon the Court to impose minimum punishment, once the conviction is recorded. However, in certain provisions or in any certain enactments, by providing for either proviso or otherwise, the Courts are conferred powers, for special and adequate reasons to be recorded in writing, to impose less than minimum, as in case of Sections 66(1)(b) and 85(1)(1) and (3) of the B. P. Act, which have also, strong nexus, sound reason, and sufficient rationale, as the commission of the offence is the outcome of variety of socio- economic and psycho- legal reasons, and at times, there may be cases, wherein, sufficient and adequate reasons, "special and peculiar to the accused" in a given case, may be available or may be present, and on being satisfied, in this behalf, the legislatures, in its wisdom, have further invested the Courts with discretion to impose less than minimum sentence in such a given situation. Of course, 'Change' and 'Revision' may be necessary upon change in socio- economic etc., reasons, as nothing could be static except 'Change'. But, it will be for the appropriate jurisdictions to consider.

Doctrine of Statutory Elasticity : Discretion

8. The basis for this is that in a proper and fit case, the Court must have more discretion having nexus and relevance with the "Doctrine of Statutory Elasticity" for power of imposing punishment or sentence than the rigidity or orthodoxy in treating all the guilty, of all the cases; upon conviction, with the same yardstick or standard of minimum sentence, on account of there being or in presence of any special and adequate reasons, in a given case and peculiar to the each accused. Let us, also, remember and recall the provisions mandated in Sections 235(2), 248(2) and 255(2) of the Criminal Procedure Code, 1973, which were absent, hitherto, in 'Repealed Code' of 1898. They, indubitably, radiate an imprint of the said Doctrine, as there is purpose and philosophy behind it, as articulated in 14th Report of the Law Commission of India in 1958, on Law Reform of Civil and Criminal Law, and also, 41st Report of Law Commission, on comprehensive Revision of the Code of Criminal Procedure, in 1969.

9. The proviso of both the Sections, Section 66(1) and Section 85(1)(1) and (3) of the B. P. Act, evidently, make it, unambiguous, that the Court is ordinarily under an obligation to impose a minimum punishment, once the conviction is recorded either under Section 66(1) or 85(1)(1) or (3) of the B. P. Act. Undoubtedly, the proviso, clearly, empowers, the Court to award less than the minimum punishment, if the Court, after convicting and before sentencing the accused, is of the opinion that for any special and adequate reasons to be recorded in writing in the judgment, the sentence of imprisonment for a term lesser than minimum is called for, and then, in that case, the Court can award lesser than minimum. Once, the discretion is vested in the Court to award less than minimum for any special and adequate reasons, the Court is under an obligation to record same in writing, the sentence of imprisonment or of a fine for a term lesser than minimum, in terms, of the proviso statutorily prescribed.

10. The quantum of sentence, is thus, in the discretion of the trial Court. Where the legislature has stepped in and circumscribed and fettered, partially, the discretion by directing the imposition of minimum sentence, the Court can exercise its discretion within the minimum sphere left open by the legislature. It could very well be visualised from the proviso to Section 66(1) and proviso to Section 85(1)(1) or (3) of the B. P. Act, That the State Legislature has circumscribed the discretion, requiring the Court to impose minimum sentence and left it open to award less than the minimum sentence, statutorily prescribed, for special and adequate reasons to be recorded in writing in the judgment. It leaves no any manner of doubt in our minds that it is always open for the competent Court to impose lesser than minimum, for in (sic.) presence of special and adequate reasons, to the contrary to be mentioned in the judgment of the Court, which are attributable and relatable to the accused in a given factual profile of the case of each accused.

11. It cannot be interpreted that the minimum sentence, prescribed in the proviso to both the Sections, would not give any option, whatsoever, to the Court or leave open any discretion to impose lesser punishment than "minimum". Although, surprisingly, unusually, it is in negative phrase or term. But, while reading plainly, it is evident, that by providing in the proviso in both the Sections, even in presence of special and adequate reasons to be recorded by the Court in the judgment, such an interpretation, in our opinion, would be diametrically opposite to the legislative prescription of sentence of minimum period and fine of minimum amount, and will efface and defy further discretion by vesting and empowering the Court to impose minimum sentence leaving Court to be unmindful of the mandate of statutory proviso in the said Sections to award less than the statutorily prescribed for special and adequate reasons in terms of the proviso. Would it not violate the proviso and underlying legislative jurisdictional design and desideratum? Answer is positively 'yes'.

12. Two negative words, "in the absence of" and "shall not be" obviously, would mean and radiate an imprint of presence of special and adequate reasons, to the contrary to be mentioned in the judgment, peculiar to the each accused, in a given case or trial. Therefore, in a given case, upon being satisfied by presence of special and adequate reasons, peculiar to the accused, the Court is empowered and invested with statutory discretion to impose lesser than minimum sentence as provided in proviso in both such Sections and similar such provisions in the B. P. Act. Even for that purpose in a given case, the Court is, obviously and completely, competent, upon satisfaction of Court, to impose, so far as, lesser sentence than minimum sentence is concerned, and in presence of special and adequate reasons, peculiar to the accused, even "Till Rising", and also, any amount of fine upon satisfaction of the Court less than minimum prescribed in proviso in both the Sections and other identical provisions.

13. This has been the consistent judicial adjudication policy and interpretations by host of pronouncements of single Bench of this Court to which references have been made in course of marathon submissions and resorted to. In our opinion, it is the correct and real interpretation. Any other view or interpretation would not only militate against the plain language, but also, would violate relevant statutory provisions, policy and purity of proviso laid down by the

Legislature in its domain and prerogative legislative jurisdictional and statutory wisdom and prudence. Any pronouncement or judicial adjudication contrary to such forensic and jurisprudential interpretation and statutory mechanism cannot be upheld and sustained, as it would not lay down or expound the real and correct interpretation and proposition of relevant provisions of law. Thus, such an interpretation as suggested shall, diametrically, run opposite to the provisions of proviso laid down by the Legislature, in its domain and prerogative legislative-jurisdiction. Any pronouncement of" the judicial adjudication propounded in the judgments of single Bench, and relied on by the State contrary to such forensic and jurisprudential mechanism of provisions in proviso cannot he upheld and sustained, being contrary to the provisions of proviso of those Sections of B. P. Act.

The Minimum Sentence in the context of Criminology and Penology :

14. A person who is an accused who has been found guilty of a criminal offence is liable to be sentenced by the Court. The exercise of process of sentencing is of considerable significance for the contours of criminal liability; when legislatures create a crime, they authorise not only a stigma or affixing a labour of censor, on the offender or perpetrator , but also, the imposition of the certain deprivations by means of sentence. There are many forms of sentence. The most serious sentence is custodial one, and in number of cases, custodial sentence should be imposed, where the offence is so serious that only custodial sentence can be justified in terms of relevant law. The length of any custodial sentence should in most case be : "commensurate with the seriousness of the offence". In deciding on the sentence in particular cases, the Court should take note and cognizance of various factors, including aggravating and mitigating the offence, and also other extenuating circumstances relevant to, in the given case. It is in this context, intimate interactions between sentencing process and criminal law policy and the legislative mandates must be kept live on mental radar.

Doctrine of Proportionality :

15. In sentencing terms, one consequences of this is that there are more broad offences with high maximum sentences, giving more discretion to the Courts at the sentencing stage. No doubt, criminal law itself proclaims individual responsibility for actions, maintaining strict standards of contact and setting its phase publicly against idea that social or other circumstances can excuse incriminating behaviour or conduct. Whereas, at the sentencing stage, Courts do not recognize from time to time exculpatory by proceeding or surrounding circumstances. It is in these context, in criminal law in certain provisions and in certain criminal enactments statutory and judicial discretion is invested in the Courts, so that, upon exercising the sentencing process the Court can take into consideration, write upon circumstances, special and adequate reasons for each accused emanating from the record and peculiar to the each accused so that idea of 'proportionality' can be considered and maintained. Whilst the notion is cruel as an underlying justification for the punishment system, the idea of proportionality ought to have been of central importance to the choice and quantum of sanction in a particular case and keeping in mind the special and adequate

reasons attributable and referable peculiar to the each accused. Therefore, 'proportionately' in this sense, also finds a place in and several other views and approaches to sentence.

16. The aims of sentence are not simply part background of the criminal law : they have implications for the sake of the criminal law itself. Thus, 'proportionately' should be a key factor in the structure of the criminal law. It is a major function of the criminal law not, only, to divide the criminal from the non- criminal, but also, to grade offence and to brand or label them 'proportionately'. There is a deep divergence between desert theories and deterrence on the question of culpability and excuses for causing harm or resultant injury. The answer to the question "Does this person deserve punishment?", sometimes differs from the answer to the question, "Would the punishment of this person deter others in similar situation?"

17. There are, also, frequent references to search and research that as material appearing of criminal justice, to give some interaction of social context in which the criminal law operates. Much more coverage given to this contextual issues, such as enforcement policy, police powers, the pre- trial concession of case, and sentencing but within the confines of this, where these issues have been treated, as less important than the constitution of doctrine. It is, therefore, an exercise to recognise the constitutional responsibility of the Courts in developing the law and interpreting legislations. There is, also an endeavour to remain alert to the implications for law enforcements of living areas of discretion when formulating laws.

Characteristics of sentencing doctrine :

18. The guilt once established, the sentencing dilemma commences. The statutory discretion is given to the Courts in sentencing the offenders. Needless to reiterate that the determination of appropriate sentence for the convicted persons is, as important as the adjudication of the guilt of the accused in the modern sentencing system. The importance of the modern sentencing system lies in the individualisation of the punishment, which itself lends to rehabilitation and reformation of the offenders in the modem sentencing system in the realm of Neo- Penology and Modern Criminology.

19. Indeed, in the process of sentencing or deciding the punishment, relevant circumstances, special and adequate reasons, peculiar to each of the accused, including aggravating or mitigating factors are important. There cannot be an exhaustive list of special and adequate circumstances and reasons, peculiar to the accused, as it would depend upon variety of circumstances. Really, there is impossibility of laying down standards for special and adequate reasons, mainly, due to the fact that it would be a domain of circumstances or reasons, special and adequate, peculiar in a given fact situation in a particular case of each accused.

Landmark Case- Law :

20. Upon the pronouncement of landmark decision in "Jagmohan Singh v. State of U. P., MANU/SC/0139/1972 : AIR 1973 SC 947" and considering the recommendation made by the Law Commission of India on Judicial Reform and Revision of Law and Procedure in Court in the Code of Criminal Procedure, 1973, there came to be incorporated for the first time, Sections 235(2) and 248(2), to ensure a great awareness on the part of the Courts to examine the case of each accused on the facts of each case, more closely, so as to determine the most appropriate sentence. This read :

"Section 235(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."

"Section 248(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."

Section 360 of the Code provides for probation in certain cases, whereas, Section 325 of the Code refers to procedure when the Magistrate cannot sentence with sufficient severity or that the accused ought to receive punishment, different in time from them than which Magistrate is empowered to award, for submitting his proceedings and forward the accused to the Chief Judicial Magistrate to whom the Magistrate is subordinate.

Pre- sentencing Policy Desideratum :

21. The very benign design and object of hearing the accused before passing the sentence is to direct the Court's attention to such matters, as to emerging from factual spectrum, including the following :

(i) The nature of offence.

(ii) The circumstances :- extenuating or aggravating of the offence.

(iii) The prior criminal record, if any, of the offender.

(iv) The age of the accused and also his dependents.

(v) The record as to the employment.

(vi) The background of the offender with reference to education, home- life, sobriety and social adjustment, emotional and mental condition of the offender.

(vii) The prospects for rehabilitation.

(viii) The possibility of return to normal life in the community.

(ix) The possibility of treatment or training of the offender.

(x) The possibility that the sentence may serve as a deterrent to crime to the offender or to others and the community needs, if any, for such deterrence in respect to the particular types of offences in the larger social interest and public good.

(xi) Anthropological reasons :

(a) Influence of social environment on the conduct.

(b) Resultant impact of the crime so as to see whether there is harm to the individual like accused or others, for keeping in mind interest and good of larger section of society.

(xii) Any other special and adequate reasons not covered in (i) to (xi).

22. The cumulative legislative mechanism and its effects of the provisions of Sections 235(2), 248(2), 354(3), 354(4), 360 and 361 of the Code of Criminal Procedure, 1973, by and large, is that the Court is to ensure, greater seriousness and awareness in examining each case with a view to determining the most appropriate sentence or for passing other post- conviction orders. It will be interesting to refer to the observations made in the Report of the "Indian Delay Committee", as early as, in 1919- 1920, which are still vivid and valued even today. The Report observes :

"The Criminal Courts.....are to a great extent without reasons necessary to enable them to adjust the punishment to the offender."

"...In this country, if not in all countries, the information, which is available to the Judge at the time of trial as to the antecedents of a prinsoner, his character and environment and causes which conducted to the commission of the crime, is found very inadequate."

Other Important Contours of Minimum Sentence :

23. Indubitably, the Courts can exercise discretion while fixing the appropriate sentence where maximum punishments have been provided, but they are helpless in situations where minimum sentences are laid down. It is said that it creates danger to the individualisation of punishment when the law enjoins the Court to pass a fixed sentence. The danger has become all the more serious because of the increasing use of minimum punishment in recent legislations. Of course, one major reason advanced in support of minimum punishment is that such punishments are effective deterrents for curbing the crime. The Law Commission of India in its 11th Report of Judicial Administration, has clearly adverted to this problem and has observed :

"The theory that more severe the punishment the greater the deterrent effect is itself a matter of controversy. If has not been ascertained whether there has been a fall in commission of these offences where enhanced penalty has been assured by prescribing minimum sentence."

Another theory advanced in favour of minimum sentence does not receive more attention. Minimum sentences have become necessary, it is said, because of the tendency on the part of the Judges to impose inadequate and inappropriate sentences. Though, the Law Commission considered this argument, also, but doubted the correctness of its premise and its basis. Here, at this stage, we do not propose to divulge in meticulous analysis and evaluation of the imposition of statutory minimum sentence, whereby, denying the accused the benefit of any special equity of mitigating circumstances, which otherwise would result in a lighter sentence itself is marked of unusual severity.

Proportionality in Punishment and Justifiable Sentences :

24. The basic principle of Criminal Jurisprudence has been that the punishment that fits the crime is the appropriate punishment in proportion to the culpability of the criminal conduct and it is what the offender or the perpetrator deserves for his crime. Having once reached to the issue of culpability, the next question will follow will be of sentencing. It will be easy enough then to decide on greater or lesser punishment according to law, lesser criminality or culpability and to assign penalties on the scale that reflects relative culpability amongst the crimes, both different kinds of crime and for different instances of same kind of crime. But, yes, that is only step in

keeping the crime and punishment in propotion. However, the scale must itself be pitched, at a level, neither too high nor too low for otherwise, even though punishments for different crimes might not be out of proportion to one another on the scale, the scale itself might be generally out of proportion as, uniformly, excessive or uniformly inadequate or deficient. Therefore, in theory, all criminal justice, it is evidently articulated by author, Mr. Hyman Gross that the Criminal law adheres in general to the principle of "proportionality" in prescribing law according to the culpability of each kind of criminal conduct.

25. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges, in essence, affirm that punishment ought always to fit that crime; yet in practice sentences are determined largely by other considerations. Sometimes, it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes are, desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. It is, therefore, said that, inevitably these consideration cause a departure from just desert, as the basis of punishment and create cases of apparent injustice that are serious and wide- spread.

26. In this context, it is rightly said that when there are certain reasons why a person who is punished more generously or liberally for his crime, such punishment less than what he deserves for what he has done justifiable, and punishment in excess of what is not. It be remembered that peculiar and special conditions favouring the accused or the offender are absent and he will get away with his crime to the extent that he is punished less than he deserves to be, punishment less then he deserves is fruitless and also impose and for that reason alone it may not be justifiable, though certainly there are certain important things to be said against it, as well.

27. It is, also required to be noted that disproportionately large sentences in excess of blameworthiness would be as unjustifiable as disproportionately small sentences. Disproportionately small accountability is useful because it may not maintain respect for the law amongst the law- abiding, whereas disproportionately large sentences would be also futile and useless infliction of suffering, it represents needless suffering. Therefore, with a view to keeping law efficient and effective, as a measure for the law- abiding, the Court need not give those who break law no more than they deserve for breaking it, and what they deserve is measured precisely by the criminality of the conduct that violated the law.

28. The principle of mitigation like principle of proportionality, has both, the legislative and judicial applications. Discretional dispassionate can be granted by the Court appropriately in order to make sentences right with regard these and other things, after the Court has fixed the culpability. Condemnation for the crime would be no less, though it would be accomplished in a given fact situation, in many cases by less severe measures of punishment.

Utility v. Disparity :

29. In this context, it will be useful to mention that because of mitigating considerations, standards are uncertain. Good reasons turn out to be problematic and considerations though not be admitted at all often influence the sentencing Judge towards a more lenient sentence. The two major aspects which are exclusionary conditions for mitigating circumstances provide a foundation for suitable sentencing standards :

(i) Whether a proposed mitigating consideration would impair the utility of the sentences.

(ii) Inequitable disparity results when there is a special treatment for some that cannot be justified by principle that apply to all, and since everyone is entitled to equal standing before the law, such treatment cannot be encouraged.

30. The legislature, in one sense, has disfavoured the sentence to plummet below the minimum limit prescribed in view of the expression "shall not be less than", which is peremptory in tone. It appears, therefore, that, normally, the Court has no discretion even to award a sentence less than the said minimum. Nonetheless, the legislature was not oblivious of certain very special and adequate situational realities obtainable in a given case and peculiar to the each accused in the given case and the profile of facts and circumstances of case in which the sentence is being awarded.

Speciality with or versus Adequacy of Reasons :

31. It will be really interesting to refer the expression special and adequate reasons. It, clearly, indicates and evidently manifests that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a set of conjunction, both for enabling the Court to invoke the discretion. The reasons which are general or common in many cases also cannot be regarded as "special and adequate reasons", but such reasons should be peculiar and attributable to the each accused in a case, as all the general or common reasons or grounds cannot be regarded as "special and adequate reasons". Therefore, the Court has to remain very altert and serious, and considering the overall factual profile and conspectus referable to each accused in such case, in view of the clear mandate of the proviso in a given case for admitting the case of the prescriptive periphery of the proviso and making departure from minimum sentence, by exercising discretion, the Court has an incumbency to record that there are special and adequate reasons for that and such reasons should be articulated clearly in the judgment of the Court, as statutorily prescribed.

Flagship Appeal and others :

32. In this group, in Flagship matter, Criminal Appeal No. 477 of 2002, and allied other matters, arising from various judgments and orders recorded by the learned trial Magistrates, relating to commission of various offences punishable under Sections 66(1)(b), and 85(1)(3) of the provisions of the B. P. Act read with Sections 110, 117 and 135, of the Bombay Police Act, the main grievance voiced, on behalf of the State, has been that, notwithstanding there being a minimum sentence requiring to be imposed for the first offence, the learned trial Magistrates, in this group of matters, have imposed sentences less than the minimum. Therefore, in short, the main contention, of the State is that the learned trial Magistrates could not have imposed sentences lesser than the minimum prescribed in view of three judgments of the single Bench. To reinforce this contention, serious reliance has been placed on the following three judgments of the same learned single Judge of this Court :

(i) "State of Gujarat v. Uttam Bhikabhai Prajapati MANU/GJ/0132/1990".

(ii) "State of Gujarat v. Thakore Somaji MANU/GJ/0172/1994".

(iii) "V.K. Bhatt, Provident Fund Inspector v. Aryodaya Ginning Mills, Ahmedabad MANU/GJ/0395/1995".

33. Placing strong reliance on the aforesaid three decisions of this Court, it has been, vehemently, submitted that it was not open for the learned trial Magistrates to accept the 'plea of guilty' offered by the accused- persons and award sentences lesser than the minimum prescribed. Thus, it is the submission, raised on behalf of the State, that in view of the aforesaid decisions and judgments of this Court, it was not open for the trial Magistrate to accept the 'plea of guilty' as being not in judicially prescribed format in the said judgments, but also not open to award sentences lesser than the minimum, even for the 'first offence', as it would be contrary to the said judgments until reconsidered or amendment in law is made. Such submission is devoid of any force of law and logic, even on a plain, if not, forensic, interpretative exposition of the proviso, which is common in both the Sections of the B. P. Act, and the reasons we propose to assign hereinafter.

34. The challenge in this group of Criminal Appeals and other allied matters is against the approach and the outcome in the impugned judgments rendered by the learned trial Magistrates in imposing sentences less than the minimum for the first offence while exercising the discretion vested in the Court by the proviso to Clause (i) of Section 66(1)(b) and Section 85(1)(3) and others of the B. P. Act, which may again be referred to, and it reads hereasunder :

"Section 66(1) * * * *

(b) to (e) * * * *

(i) for a first offence, with imprisonment for a term which may extend to six months and with fine which may extend to one thousand rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than five hundred rupees;

(ii) to (iii) * * * *"

Whereas, the proviso to Section 85(1)(i)(a) referable to Clauses (1) and (3) reads hereasunder :

"Section 85(1) * * * *

(1) to (3) * * * * *

(i) for an offence under Clause (1) or Clause (3),

(a) for a first offence, with imprisonment for a term which may extend to one month and with fine which may extend to two hundred rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than seven days and fine shall not be less than twenty five rupees; and

(b) * * * *"

Whereas, the proviso to Section 85(1)(ii)(a) referable to Clauses (2) reads hereasunder ;

"Section 85(1) * * *

(1) to (3) * * *

(i) * * *

(ii) for an offence under Clause (2)-

(a) for a first offence with imprisonment for a term which may extend to three months and with fine which may extend to five hundred rupees :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than one month and fine shall not be less than one hundred rupees; and

(b) * * * *"

35. From the plain reading and interpretation of the aforesaid proviso contained in Section 66(1)(b) to (e) and Section 85(1)(1) or (3), for the first offence, it becomes, immensely evident, and totally, unambiguous that the said provisions permit the learned trial Magistrates to award and impose less than the minimum sentence of imprisonment, as well as, fine provided, the Court is satisfied about the presence of special and adequate reasons to the contrary to be mentioned in the judgment and which are peculiar to the accused in a given case.

36. What should constitutes special and adequate reasons for the proper exercise of this discretion is obviously and indubitably by very nature of circumstances cannot be standardised. Such discretion, as employed, in the phraseology in the proviso, would depend upon the factual profile of special and adequate reasons available and present in each case. Naturally, there cannot be any die- hard recipe or fixity of circumstances or any straight- jacket formula for reaching subjective satisfaction, upon evaluation of the objective considerations of factual matrix of each accused in each case or the existence or presence of special and adequate reasons. The learned trial Magistrates are obviously, statutorily permitted to exercise the discretion and certain amount of latitude in such cases by legislative prescription, as articulated in the special provisions.

What Constitutes Adequate and Special Reasons :

37. In this context, it would be profitable to refer to the beautiful exposition and clear proposition in this behalf propounded by the Hon'ble Apex Court in a recent decision in "State of Karnataka v. Krishnappa AIR 2004 SC 1470". Para 11, of this judgment is very material and relevant. It has been observed by the Hon'ble Supreme Court in that Para as under :

".....Whether there exist any 'special and adequate reasons' would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application."

38. Indeed, it would be impossible to conceive all the different factual situational realities, which may, in a given case, constitute special and adequate reasons for awarding less than minimum sentence with the help of proviso. Needless to mention, exercise of such discretion would depend upon the type and the category of objectives of legislation, the characteristic and resultant outcome of a nature of offence and such and other relevant circumstances. For example, special and adequate reasons for awarding lesser than the minimum sentence in a Prohibition Act may not even constitute special and adequate reasons for awarding lesser than the minimum sentence for offences under the Prevention of Corruption Act or Prevention of Food Adulteration Act and so on and so forth. What is important to be seriously considered in exercise of such discretion is the totality of circumstances, some of which may be individual factors peculiar and special to the each accused, whereas, some of others may be the resultant ramification and impact of the nature of offence committed by the accused on society at large and chances of repetition of such offences, etc., may all go into consideration. We are attracted to refer and quote the relevant observations lucidly articulated by the Hon'ble Apex Court in "State of Jammu & Kashmir v. Vinay Nanda. MANU/SC/0028/2001 : 2001 (2) SCC 504", wherein in Para 18, it has been observed :

"...None of the circumstances, stated in his affidavit, by itself constitute a "special reason." However, keeping in view the general conspectus of the case, we felt that under the totality of the circumstances narrated, the respondent has made out a case for invoking the proviso to Sub-section (2) of Section 5 of the Act."

39. The learned single Judge of this Court in "State of Gujarat v. Uttam Bhikhabhai Prajapati (supra)", arising form the commission of the offences punishable under Sections 65(a)(e), 66(1)(b) and 81 of the B. P. Act, has made certain observations, which are relied on by the State, to substantiate the contention that the aforesaid provisos do not admit any discretion to award the punishment less than the minimum. This submission cannot be upheld on various counts including being divorced from Text and Context, Colour and Content and misconceived perceptions of the observations made therein.

40. Upon true and correct evaluation and analysis of the said provisions engrafted in both the proviso, such observations cannot be taken and should not be taken to have laid down the appropriate and correct legal propositions as argued, when and upon the correct interpretative evaluation, forensic and jurisprudential exposition and interpretation of proviso has been appropriately projected into direct focus. Again, any interpretation of provision, which is contrary to the interpretation and exposition of law, expounded by the Hon'ble Supreme Court in the decisions referred to hereinabove and others, which are proposed to be referred to, hereinafter, would not be in accordance with law, and obviously therefore, cannot be sustained and approved,

41. In the light of the facts of the case, the learned single Judge of this Court in case of "State of Gujarat v. Uttam Bhikhabhai Prajapati (supra)" did not accept the "plea of guilty" and made certain observations, which at the best ought to be confined to the facts of that case. It cannot be contended that this Court in that judgment has laid down clear proposition of law and will have universal application in all such cases. At the best, it was the decision rendered in the light of the peculiar facts noticed by the learned single Judge, upon reaching to positive conclusion of illegal "plea bargaining". Therefore, the State cannot be permitted to contend that all offences under the B. P. Act, where minimum sentence is prescribed, the learned trial Magistrates must adhere to and invariably follow said three decisions of same learned single Judge of this Court, irrespective of peculiar and special fact situation and circumstantial and contextual profiles, Truly speaking, the words, "special and adequate reasons" in the context in which they are employed, would only mean "special and peculiar" to the accused, upon whom sentence is proposed or is being imposed. It is incumbent upon the Court to consider and evaluate objectively reasons advanced in support of each individual accused and in each case, wherein, sentence is to be awarded, so as to reach clear and correct subjective satisfaction based on objective assessment of facts whether or not, to award less than minimum sentence, in terms of proviso.

42. It is rightly said the word "special" has to be understood in contradiction to word "general" or "ordinary". It becomes apparent and unquestionable from the language employed in the proviso that the reasons to be recorded in writing in judgment for less than the minimum sentence, on the ground of presence of special and adequate reasons in the light of sentencing process must be special and adequate to the circumstances in a given case and peculiar to the accused in each case. It is, therefore, very clear that the discretionary jurisdiction empowered in the trial Magistrates must be based on and in presence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court for each case and each accused.

43. What is special and peculiar to the accused in one case may not be same or special and peculiar for the accused in other case. It is, therefore, true that reason should not be "general" or "ordinary", but it must be special and adequate peculiar to the each accused in a given case. The contention of the State that the trial- Magisterial Courts should have taken and treated the aforesaid three judgments of this Court as a clear proposition of law that in no case less than minimum punishment could be imposed is not sustainable, as, it would lead to a situation where there is no discretion left open for the trial Magistrates to impose less than the minimum, even in presence of special and adequate reasons referable and attributable to the fact situations of the case and peculiar and pertaining to the each accused and it is also; diametrically opposite to the legislative intendment of proviso in both the Section. Otherwise, provisions of proviso would be rendered otiose and nugatory.

44. Such discretion is always open for the Court, while passing through, the process of sentencing the accused for the offences under the aforesaid provisions of the B. P. Act. The trial Court for the first offence has to award minimum sentence in absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court. For the first offence, the maximum punishment is, also, prescribed, whereas, minimum sentence statutorily prescribed is required to

be awarded, provided there is absence of special and adequate reasons to be mentioned in the judgment of the Court. However, if special and adequate reasons, peculiar to the facts of each accused in a given case, are not absent, in other words, are present, then the Court is obliged to consider and evaluate those reasons, peculiar to the accused for the purpose of exercising the discretion engrafted in the proviso, while undergoing the process of awarding sentence for the 'first offence',

45. We are surprised to learn from the submissions that the Courts of trial Magistrates have many times taken or have been lead to, treat the aforesaid three decisions of the same learned single Judge, as if the trial Courts have no discretion to award less than minimum sentences, even, in absence of special and adequate reasons to be mentioned in the judgment of the Court, more so, when, "plea of guilty" has been raised. In fact, minimum sentence has to be awarded, only, in absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, and when two negatives are employed in both the proviso, it would mean that in absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, the trial Court has real discretion to award less than the minimum sentence of imprisonment, as well as, fine. As such, this is the real and manifest statutory frame and purpose and object enshrined in the proviso by the legislature in its wisdom in B. P. Act.

46. We are, therefore, in full agreement with the contention, advanced on behalf of the accused persons and by learned amicus curiae in this group of matters, that the observations and the conclusions reached by the learned single Judge in that case of "State of Gujarat v. Uttam Bhikhabhai Prajapati (supra)", arising from the offences punishable under the B. P. Act, are not supportable and acceptable as submitted and desired by the State. We find substance in the plea that the real forensic perception and correct jurisprudential exposition was not brought to the notice of the Court in those cases as a result of which those observations and conclusions are contrary to the plain and proper propositions of the provisions of proviso and case law laid down by the Hon'ble Apex Court in the cases referred to, in this judgment by us and relied on by the amicus curiae, learned Senior Advocate Mr. P. M. Thakkar.

47. Where there are mitigating or extenuating circumstances present or available on the record, which are peculiar and special to the accused and which may justify imposition of any sentence including "Till Rising", less than the prescribed minimum to the accused, it is always open for the Court to exercise the discretion, in terms of the provisions incorporated in the proviso. What is special and adequate will have to be judged by the trial Court, objectively, depending upon the facts of each case. If the conditions specified in the proviso are present, the Court has power to award less than the minimum sentence. Of course, for that, there must be special and adequate reasons and such reasons should be recorded in the judgment.

48. The Hon'ble Apex Court in "State of Orissa v. Janmejoy Dinda MANU/SC/0149/1998 : 1998 (3) SCC 63", fully supports the view, which we propose to take in this group of matters. In that case, the question was interpretation of the proviso contained in Section 27(b)(ii) of the "Drugs

and Cosmetics Act, 1940". It was held in that case that the proviso to Section 27(b)(ii) of the Act confers discretion and jurisdiction on the Court to reduce the sentence of imprisonment less than the minimum prescribed, if the conditions specified in the provisos are present.

49. In "Gurmukh Singh v. State of Punjab MANU/SC/0109/1971 : AIR 1972 SC 824", while considering and interpreting the proviso to Section 16(1) of the Prevention of Food Adulteration Act, 1954, it has been held that though offences for adulteration of food must be severely dealt with, no doubt, depending upon the facts of each case, which cannot be considered as precedents in other cases. In that instant case, having regard to the fact that the offence was only for non-renewal of the licence within a reasonable time and the appellants were only petty traders, a mitigation in this sentence under - the proviso is justified. This proposition, also, supports the view, which we propose to take in this judgment, that when discretionary powers exist special and adequate reasons of the case and peculiar to the accused out to be considered.

50. The second reliance by the State is on the decision in the case of "State of Gujarat v. Somaji Jamaji (supra)", wherein, the respondent came to be tried for the alleged offences, punishable under Section 66(1)(b) of the B. P. Act (For possession) on his raising plea of guilty was convicted for the same and sentenced "till the rising of the Court and to pay a fine of Rs. 20." While dealing with that Criminal Appeal, the learned single Judge observed that though the minimum sentence is provided in the Act, the learned trial Magistrate has awarded lesser sentence and such a "plea bargaining" is not legal and deprecated the practice adopted by the Magistrate.

51. The third decision relied on by the State is the case of "V.K. Bhatt, Provident Fund Inspector v. Aryodaya Ginning Mills, Ahmedabad MANU/GJ/0395/1995." The learned single Judge, in this case, while dealing with the Criminal Revision Application in the matter under Employees' Provident Fund Act, prescribed a pro- forma to "plead guilty". The observations made in this decision and the judicial prescription of the pro- forma for pleading guilty, is seriously criticised on behalf of the accused and also by the learned amicus curiae.

52. As regards judicial prescription of a format for recording the plea of guilty by the learned single Judge in "V.K. Bhatt case (supra)", the learned amicus curiae has rightly submitted that the specimen format for the purpose of pleading guilty and praying for mercy in sentence as condition precedent, is also not in consonance with the Criminal Jurisprudence and specific provisions provided in the Code of Criminal Procedure, 1973. In Para 12 of the said decision, it has been observed :

"12. ....Accordingly, what occurs to this Court is laying down some conditions as conditions precedent for the accused to submit the purshis at the time of pleading guilty. If that is done and scrupulously followed, in all probability, neither the accused concerned dare even to pretend to plead guilty, nor the Court haunted by disposal mania would render wander away from its judicial path in accepting the same by imposing by flea- bite sentence, sometimes inadvertently,

may be, sometimes advertently, even in not imposing the statutory minimum sentence prescribed under the Act. Accordingly, it is hereby ordered that - "No Court shall accept "plea of guilty" tendered by the accused person, more particularly, in cases where in the statute has prescribed minimum sentence, unless and until, he submits the purshis in the specified form prescribed hereunder for pleading guilty along with adequate and special reasons, if any, for taking a lenient view of the matter, in the matter of awarding sentence."

SPECIMEN FORM

FORM OF PURSHIS PLEADING GUILTY AND PRAYING FOR

MERCY IN SENTENCE

In the Court of the Learned Magistrate at ..... Court No. .....

Criminal Case No. ..... / 1999..... State/Complainant

v.

..... Accused

Sub. : "Plead guilty and mercy in the matter of sentence."

Respected Sir,

I, ... accused No. ..... in this case state that I have read / read over the complaint filed against me for the alleged offence(s) punishable under [A Sections ..... of the ..... Code/Act.

2. I have also been read- over and explained the charge against me, which is as under :-

CHARGE

.....

.....

3. I have also been informed by the learned Magistrate that for the alleged offences, the statutory minimum prescribed is S.I./R.I. for not less than the .....years/months and/or fine of Rs..... or both.

4. I have also been further informed by the Court that even if I plead guilty, it has no option to impose less than the minimum sentence prescribed under the Act; as stated above, unless I have some adequate and special reasons for praying less than the said minimum sentence.

5. Accordingly, having fully understood the consequences of "pleading guilty" I voluntarily plead guilty, I have not been promised to impose the lighter sentence, till rising of the Court and/or some small amount of fine only, if I pleaded guilty.

6. That I on being convicted on pleading guilty pray that having regard to the following "adequate and special reasons" your Honour be kind enough to impose less than the statutory minimum sentence prescribed.

ADEQUATE & SPECIAL REASONS

(i) For less than the minimum period of imprisonment.

(ii) For less than the minimum amount of fine.

.....

.....

.....

(If reasons are more, then separate sheet can be annexed.)

7. On the basis of my above submissions, my plea of guilty be kindly accepted and I be imposed with some lighter sentence.

....

Before me

.....

Signature of the learned Magistrate

Date :-

It is further observed in Para 12.1 as under :

"12.1 It shall be the duty of every Court before which the accused pleads guilty, to record the same in the specimen form of purshis prescribed hereinabove, and accordingly, not to record the plea of guilty as directed would not only render the said plea illegal, but would also render the concerned learned Magistrate liable to proceedings for judicial misconduct."

Arraignment and its Premise :

53. It is very well known that the plea of the accused is an event occurring at the general trial Court level that formally initiates the trial process. As such, it is the offence again on which the accused is given an opportunity to answer the accusation. Here, at this stage, the accused is required to enter a plea. Punishment is held in open and generally, it begins with a formal reading of the accusation or indictment or charge, by which the accused is again, formally, advised of the charges against him. The accused, is therefore, required to answer the charge by entering a plea, at this juncture. This is the right of the accused, and no doubt, the plea may take one of the two forms : One, he may deny the accusation or charge against him, or another, he may plead guilty to the crime, as charged. If the accused pleads guilty, the Magistrate shall record the plea, as nearly as possible, in the words used by the accused, and may in his discretion, convict thereon.

54. In the criminal matters as in this group of Appeals, cases are tried by the Magistrates under Chapter XX of the Code of Criminal Procedure, 1973, which deals with the trial of Summons Cases by the Magistrates, the statutory mechanism and the frame of Chapter XX, the procedures for Summary trial have been prescribed in Chapter XXI of the Code of Criminal Procedure and

the principles of" Criminal Jurisprudence would not permit the prescription of the format by Judicial fiat for the purpose of mode and manner for raising the "plea of guilty". The Court of law cannot add or subtract or ignore the statutory provisions incorporated in the enactment by the legislature in its wisdom. The making of a law or an enactment is a constitutional prerogative of the competent legislatures.

55. The function of the Court is to interpret the provisions of law. Law and statute making is exclusively within the jurisdictional domain of the legislatures. The Court cannot re- write any provision of any law by any judicial fiat or direction. Even the Constitutional Court, dealing with the constitutionality of the provision, cannot create or take away by adding or substracting from any of the provisions employed by the competent legislatures. Even the Constitutional Courts, while interpreting the correct meaning and real object of the law by its constitutional jurisdictional interpretation and adjudication, can propound and interpret correct law. Therefore, it is one of the fundamental principles, that no Court can re- write or reframe the provisions contained in the enactment made by the competent legislatures. The enthusiasm with which the direction to record the "plea of guilty" and prayer for mercy by prescribing specimen profoma for pleading guilty and praying for mercy in sentence and the manner and mode in which the specimen form is required to be filled up and signed by not only the accused, but also the complainant, as well as, the prosecutor concerned in the case before the trial Magistrate, in our opinion, is nothing, but re- writing and adding in the provisions of an enactment, and therefore, such a direction or judicial prescription of a form against the specific statutory provision, obviously, would be impermissible, unsustainable and not legal.

56. To an extent, it makes an inroad on the statutory rights and duties of the complainant, the accused and the Court. A general judicial fiat that no Court would accept the plea of guilty tendered by the accused person more particularly, in cases, wherein, the statute has prescribed a minimum sentence unless and until the accused submits the purshis in the "specimen form prescribed in the judgment for pleading guilty" along with adequate and special reasons, is not supportable, being contrary and not in consonance with the statutory provisions and outside the competence of the judicial adjudication. Such a direction and prescription of a form, contrary to the provisions specifically provided in the Code of Criminal Procedure would be incompetent and impermissible and illegal.

57. Though, we appreciate the enthusiasm anxiety and innovation to place in focus the said malpractice in raising "plea of guilty", we are unable to jurisprudentially and by settled proposition of law, uphold and maintain with utmost due respect, to the learned single Judge, such a judicial fiat by en block direction, to all trial Courts in all criminal cases, where minimum sentence is prescribed, and "plea of guilty" is raised. The fundamental canons of criminal jurisprudence much less against statutory provisions would not permit or allow such a view or perception and prescription of format. Therefore, in our opinion, the observations and directions contained in Paras 12 and 12.1 in "V.K. Bhatt's case (supra)", are also not compatible with the statutory provisions, and therefore, they cannot be sustained, being beyond the jurisdictional competence, and consequently, not legal and binding on trial Magistrates.

Statutory Prescription for Recording Plea of Guilty :

58. Let us at this stage have a close look into the statutory and mandatory provisions for trial and recording of plea in trial of cases before the Magistrate. Since, we are concerned with cases which are arising from the trial before the Magistrates the procedure is prescribed for trial of warrant cases by the Magistrate in Chapter IX of the Cr.P.C. which includes cases instituted on a police report, as well as, cases instituted otherwise then on police report.

59. It is interesting to note that Sub- section (2) of Section 240 provides that the charge shall then be read and explained to the accused and he shall be asked as to whether he pleads guilty of the offence charged or claims to be tried. Section 241 provides that if the accused pleads guilty Magistrates shall record the plea and may in his discretion convict him thereon. Now, it is not obligatory on the part of the Magistrate to convict him even if the accused pleads guilty, he may proceed with the trial.

60. In Chapter XX of the Cr.P.C., the procedure is prescribed for the trial of summons - cases by the Magistrates. Section 251 in this Chapter provides, that the substance of the accusation shall be stated to the accused and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. Whereas, Section 252 provides for conviction of plea of guilty. If the accused pleads guilty the Magistrate is obliged to record the plea, "as nearly as possible" in the words used by the accused and may in his discretion convict him thereon. Section 252 is corresponding Section to old Section 243 of the old Repealed Code of 1898. It becomes quite clear and unambiguous from the plain text and tenor of the Section 252, that the trial (Magisterial) Court is bound to record the plea, as nearly as, possible in the words used by the accused, but is not bound to convict him upon such a plea.

61. In our opinion, it is a mandatory provision. It will be material to highlight here that the requirement of Section 252 are mandatory in character, we are reinforced by the decision of the Hon'ble Apex Court in "Mahant Kaushalya Das v. State of Madras", reported in MANU/SC/0082/1965 : AIR 1966 SC 22. This Court, has also followed the principle enunciated in the said decision in a reported decision in "Chhotu Bhagirath v. State of Gujarat" MANU/GJ/0095/1971. The judicial prescription of recording a plea in a prescribed format as directed in V.K. Bhatt's case (supra) by the learned single Judge with utmost respect within our commands, if followed would run counter to the plain meaning and interpretation of Section 252, the provisions of which are mandatory in character.

62. Probably, the attention of the learned single Judge was not drawn to the said provision of Section 252 and the provisions of Section 262. The Section 262 of the Cr.P.C. provides a procedure in summary trial. In the summary trial, the procedure prescribed for the trial of summons case is

required to be followed. The case on hand and the three decisions relied on by the State are the cases falling within the procedures of Chapter XX and XXI of the Code relating to trial of summons case by the Magistrate. It is in this respect and in this context the observations and directions of the learned single Judge in the case of V. K. Bhatt (supra) with respect are contrary to the provisions of law and the prescribed format cannot be maintained or sustained as legal and binding to the trial Magistrates.

63. It will be also material to refer the provisions contained in Para 103 of Criminal Manual provided in Chapter IV - for summary trials which reads, hereasunder :

"Though, it is not necessary to frame a formal charge in cases tried, summarily, it is always desirable that the ingredients of the offence, as also, the particulars thereof with which accused is charged are clearly stated to him. In case the accused pleads guilty the Magistrate should question the accused, in respect of each particular of the offence and record in full his answer to the same".

64. In Mahant Kaushalyadas case (supra), the accused was facing trial for the offence under Section 4(1)(a) of the Madras Prohibition Act. At the initiation of the trial, the particulars of the offence were explained to the accused by the interpreter, it was translated to the accused in Hindi by one Shri M. Sukumara Rao, Bench clerk of that Court, who had passed examination in Hindi. The "plea of guilty" by the accused was also interpreted to the Court by the same gentleman. The trial Court found accused guilty for the said offence, charged against him, and upon conviction, the sentence of one year's rigorous imprisonment and a fine of Rs. 50 was inflicted on the accused, which was confirmed by the Madras High Court in Appeal. On behalf of the accused, the plea was raised before the Hon'ble Supreme Court in an Appeal, which was brought by certificate granted under Article 134(1)(c) of the Constitution, from a judgment of the Madras High Court, that he was not afforded with fair and just trial of course, he had raised the "plea of guilty". It was contended that there was mis- carriage of justice.

65. It was held by the Hon'ble Supreme Court, considering the record, that the admission of the accused- appellant had not been recorded, "as nearly as possible in the words used by him" as required by Section 243 of the Criminal Procedure Code, 1898, a corresponding provision in the Code of 1973 is Section 252. The conviction was set aside on the ground that material mandatory requirements of old Section 243 of the old Code were not observed, and therefore, there was a violation of the said provision, vitiating the trial, and rendered the conviction legally invalid. It is, therefore, very obvious that Section 252 (old Section 243) is mandatory and the requirements of Section is not a mere empty formality, but is a matter of substance intended to secure and serve proper administration of justice. It is, therefore, an incumbency upon the Court to follow the mandate of Section 252 while recording plea, "as nearly as possible in the words used by the accused" as required under this Section. How could such a statutory mandatory provision be substituted by a judicial direction or adjudication by prescribing special format in this behalf?

66. The case of Mahant Kaushalyadas (supra) was also followed by the learned single Bench Judge of this Court in Chhotu Bhagirath v. State of Gujarat MANU/GJ/0095/1971 (Coram : T.U. Mehta,

J. as His Lordship then was). In that case, also there was a summary trial, as in the case of the criminal appeals in this group. The reference made by the Court of Sessions Judge, Rajkot, was allowed, holding that trial of the accused was vitiated and order of conviction and sentence passed by the trial Court was set aside, holding that old Section 243 (new Section 252) provided that if the accused "pleads guilty", the said plea should be recorded by the Magistrate, "as nearly as possible in the exact words used by the accused". It was further observed and held that if the Magistrate fails in doing so then obviously he does not provide any record to the appellate or revising authority to know any of the actual words, the accused had pleaded guilty and also to judge whether the said words really amounted to a plea of guilty or not.

67. It is therefore, evident that the reason behind the mandatory provisions of Section 252 (old Section 243) requires the Magistrate to record the plea of accused, "as nearly as possible" in his own words so that it could be evaluated and examined by the higher forum, as to whether there was actual plea of guilty or not and the procedure contemplated is very important and substantial because the plea of guilty raised by an accused would debar him from preferring an appeal against his conviction. Under these circumstances, it would not be open to any Court to disregard the specific provision contained in Section 252 of the new Code (old Section 243), and non-compliance of this provision, would, therefore, not be controlled even by the provisions contemplated by Section 465 or Sec, 537. It is therefore, incumbent upon the Court to record, whenever, an accused in a summary trial raises the plea of guilty, so as to place on record, what was the exact plea with a view to afford protection to the accused and proper administration of justice. It is in this context, how could a Court with a judicial adjudication or direction prescribe new format for recording the plea of guilty and to be also signed by the complainant contrary to constitutional safeguards for the offender and statutory mandate?

Contours and Contradiction of plea of guilty and "plea bargaining"

68. We make it clear that the grievance and voice raised by the learned single Judge against impermissible "plea bargaining" is not, hereby, sought to be belittled or in any way intended to be diluted. But the 'plea bargaining' and the raising of "plea of guilty", both things should not have been treated, as the same and common. There it appears to be mixed up. Nobody can dispute that "plea bargaining" is not permissible, but at the same time, it cannot be overlooked that raising of "plea of guilty", at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether, "plea of guilty" really on facts is "plea bargaining" or not is a matter of proof. Every "plea of guilty", which is a part of statutory process in criminal trial, cannot be said to be a "plea bargaining" ipso facto. It is a matter requiring evaluation of factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be based upon facts and proof not on fanciful or surmises without necessary factual supporting profile for that.

69. It is unquestionable that concept of "plea bargaining" is not recognised in any jurisdictions in our country. Therefore, it is illegal. The Hon'ble Apex Court has time and again raised clear and consistent voice, in host of the judicial pronouncements, and also has come down heavily, against the trick and play of the "plea bargaining". Therefore, so far so "plea bargaining" is held not only illegal and unconstitutional but also intending to encourage the complain, collusion and pollution of the poor punt of justice. Therefore, the observation by the learned single Judge in those cases against the "plea bargaining" and short circuiting the proceedings cannot be questioned.

70. However, as observed by us, hereinabove, that every "plea of guilty" during the course of observance of the mandatory procedure prescribed in Code and particularly in Sections 228(2), 240(2), 252 and also in Section 253 for the trial of case by the Magistrates, when plea of guilty is recorded as per the procedure prescribed cannot be said to be a "plea bargaining". In a criminal trial there must be justifiable material on record and any assumption, presumption or surmise having no nexus with the factual profile of a given case of an each accused cannot be sustained. It is matter of proof like any other proof of fact, as provided in the Evidence Act. It cannot be contended that, whenever, the "plea of guilty" is raised, then less than minimum sentence awarded though may be in the light of "special and adequate reasons" peculiar to the each accused and in the factual and contextual profile of a given cases, is only "plea bargaining". It has to be proved and shown to the satisfaction of the Court. It cannot be straightaway deduced. In the said case before the learned single Judge, there may be supporting and justifiable material to hold it as "plea- bargain". But each and every case cannot be termed or treated same way.

71. However, we are also tempted to state and suggest that in view of the inordinate delay in disposal of cases in general and criminal cases in particular, and huge backlog of cases in Courts, in the changed circumstances, introduction of concept of "plea bargaining" in our Criminal Jurisprudence and jurisdiction requires re- thinking and re- consideration. In some jurisdictions in other countries, "plea bargaining" in some of the cases, where larger interest is not involved and when the dispute revolves around the individuals, has been, successfully, introduced. It will be interesting to refer here the concept of "Nolo Contendere", practised in some of the jurisdictions like the United States.

72. Let it be reiterated that at present, there cannot be any question that "plea bargaining" is not recognised, so far and is not permissible. Whether "plea of guilty" is "plea bargaining" or not, will be a matter of fact to be examined in each case, from the factual matrix of the case and totality of the context and entire profile. It cannot be contended that every "plea of guilty" is always plea bargaining in case of each case and each accused. It cannot be also assumed without supporting facts and attending circumstances. It is a matter of proof and if on objective and independent evaluation of facts, it is found to the satisfaction of the Court, then it cannot be allowed and sustained, being not legal and permissible; in those cases based on facts and proof thereof. Thus, it is a matter of proof and evaluation of evidence in each case.

Doctrine of Nolo- Contendere : Practice and Prominence :

73. In United States, in some jurisdictions, the plea of "Nolo Contendere" is available "Nolo Contender" or "no contest" is not an 'admission of guilt', but rather a 'willingness to accept declaration of guilt', rather than to go to trial. It is treated as a guilty plea to serve one purpose not served by a guilty plea in a subsequent civil suit possibly arising out of same event. Guilty plea is admissible as evidence against the defendant (accused) but plea of "Nolo Contendere" is not. It may be stated that the expression, "defendant" is used in India in the civil dispute against whom civil action is taken whereas in United States, this expression is used in criminal trial also, and thus, the defendant is an accused. David Gorden has observed that the Latin word, 'nolo' means "I do not choose it'. This statement, variously, defined as 'plea of no contest' and 'not a plea of guilty' does not mean that defendant will not fight the same charges against him of the same as that of guilty plea. It admits the fact charged, but cannot be used as a confession of guilt in other proceedings. Acceptance of such a plea by a Court is discretionary.

74. The judgment of, conviction entered on a plea of "Nolo Contendere", may be used, by the accused as a basis of 'plea of double jeopardy', since conviction and punishment, after the "Nolo Contendere" plea operates for the protection of the accused against subsequent proceedings, is as full as a form of conviction or an acquittal after the plea of guilty or not guilty.

75. As held in "Fox v. Schedit and in State exrel Clark v. Adams 363 US 807", the plea of "Nolo Contendere" sometimes called also "Plea of Nolvut" or "Nolle Contendere" means, in its literal sense, "I do no wish to contend", and it does not origin in early English Common Law. This doctrine, is also, expressed as an implied confession, a quasi- confession of guilt, a plea of guilty, substantially though not technically a conditional plea of quality, a substitute for plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on plea- guilt, a promise between the Government and the accused, and a Government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only.

76. Be it noted, that raising of plea of "Nolo Contendere" is not ipso facto, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, if the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that if such plea is once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on any questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light of special facts and circumstances of the given case. It is, also held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also important to mention, at this stage that in the absence of statutory provisions to the contrary, consent of a prosecutor is not required as a condition for refusing the plea of 'Nolo Contendere' by the Court. And the fact that the prosecutor's consent is not generally required would not tantamount to non- consideration of his version or attitude. The Court is required to consider the prosecutor's version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

77. Upon the acceptance of a plea of "Nolo Contendere" for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; that is the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, rather than the same, as of a plea of guilty, of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted as guilty, but the Court may immediately impose sentence. This proposition is very well elucidated in "United States v. Risfeld 340 US 914". However, it may be noted a new dimension was evolved in "Lott v. United States 367 US 421", where the Court, after stating that the plea is tantamount to an admission of a guilt for the purpose of the case, added that the plea itself, does not constitute a conviction, and hence, is not a determination of guilt. As found from some of the judicial pronouncements, it is beyond the purview of the Court once a plea of "Nolo Contendere" is needed to make in adjudication to the guilt of the accused.

78. The plea of "Nolo Contendere", barring a few percentages of cases, has been recognised in the administration of criminal justice in many countries, including the United States, and has resulted into substantial reduction in the workload of the criminal justice system. Such a plea, it has been stated, has a success of practical aspect over the technical one. In the criminal justice delivery system, should India not consider the introduction and employment of such a plea when Courts are flooded with astronomical arrears, the trial life- span is inordinately long and the expenditure is very heavy, as an effective Alternative Dispute Resolution in certain identified criminal cases? This issue, undoubtedly, requires serious consideration at this juncture, and a trial on experiment basis, also, when we are at the crossroads and Courts are obliged to engage and address itself in early, easy, less expensive and simple way of disposal of criminal cases in the criminal justice system. Of course, the introduction of such a system will have to be considered at the level of Government by appropriate legislative measures. However, our voice shall not be a cry in wilderness more so when innovative and dynamic strategies are evolved for "Excellence in Judiciary" in 2005, by My Lord Chief Justice of Supreme Court, Hon'ble Mr. Justice R.C. Lahoti. We, are concerned collectively, collaboratively and constructively, and therefore, we ought to take seriously and strive assiduously and honestly for such ingeniously and innovatively ordained by My Lord, Chief Justice of Supreme Court, Hon'ble Mr. Justice R. C. Lahoti, as a novel and noble, neo- dynamics in the armoury of Judicial Reforms and Legal Rehabilitation of the ideal Fold and System, which is undoubtedly Basic and Cornerstone in the philosophy of our Constitution. We all belong to such a Fold, wherein we owe a duty to contribute for restructuring and reshaping Administration of Law and Justice, so as to provide expeditious easy and less complex and less processual, for making it easily accessible and affordable for common and pauper litigant, which is as such a heart of Judicial Anatomical Atlas and a Consumer of Justice Dispensation in our country, for the recovery and rejuvenation the faith of such litigants and resultant enhancement of the Majesty of Justice.

79. The plea of "Nolo Contendere" in our country is not used in strict sense in absence of any statutory provision or necessary enactment. However, this plea plays a very important role in many jurisdictions in United States, Scotland and other European and non- European Courts.

80. When in India, the Courts are flooded with astronomical arrears of cases and reduction of backlog of cases is important and out of the pending cases, almost 70% - 80% of the cases are reportedly arising from criminal jurisdiction, and again, reportedly, the rate of conviction is below 5% to 7% out of 100 cases. Could it be not said that it is opportune time, to at least, consider such a plea which has been usefully and successfully employed as an effective A.D.R. in some parts of the world and that too, in petty cases and cases in which only individual interests are concerned and larger public interests are not at stake or involved, to begin with and that too on experimental basis for a short period as one of the means and methods to reduce the unbreakable heavy and huge backlog of cases with existing means and measures in India and particularly in Criminal Courts. We have suggested this jurisprudential "Doctrine of Nolo Contendere" as one of the alternatives to arrest menace of arrears with a view to find out whether in certain type of criminal cases and in certain type of (identified- earmarked) criminal trials, it needs to be tried and experimented for speedy and easy justice, as an effective A.D.R. more so, when in many jurisdictions in foreign countries, it has been gainfully and successfully used and employed as such a plea does not enter into the consideration in other litigation in clear terms of such a doctrine.

Propositions of Criminal Justice reforms :

81. It is true that the idea of "plea bargaining" in jurisdictions in India is not permissible, but in view of the changed circumstances and present state of affairs of the criminal justice delivery system in our country, a Bill has been introduced by the Government, known as "The Criminal Law (Amendment) Bill, 2003 (Bill No. LX of 2003)" in which Chapter XXIA, relating to "plea bargaining" is proposed to be introduced in the Code of Criminal Procedure, 1973. In the said Bill, new Sections, i.e. Section 265A to Section 265K are proposed to be added in the Code of Criminal Procedure so as to provide for raising the "plea bargaining" in certain types of Criminal Cases.

82. One of the main aims and objects of introduction of certain provisions in general and for the introduction of "plea bargaining" by amendment in the Code of Criminal Procedure in particular, has been the speedy disposal of criminal cases. The disposal of criminal cases in Courts, unquestionably, takes considerable long time and in that, in many cases, trials do not commence for as long as period as 3 to 5 years after the accused has been remitted to the judicial custody. Large number of persons accused of criminal offences particularly, indigent, illiterate and rustic persons are unable to secure bail, for one or the other reason and have to languish in jail, as undertrial prisoners, for years. Though, not recognised so far by the Criminal Jurisprudence, it is seen as an alternative method to deal with the huge arrears of criminal cases. It is really a measure and redressal, if brought on statute and also operative, it shall also add a new dimension in the realm of Judicial Reforms.

83. To reduce the delay in the disposal of criminal trials and appeals as also to alleviate the suffering of undertrial prisoners, as well as, their dependents and keeping in mind the real

purpose of Victimology, it has been rightly proposed to introduce the concept of "plea bargaining", as recommended by the Law Commission of India, in its 154th Report, on the Code of Criminal Procedure. The Committee of Criminal Justice Reforms under the Chairmanship of Dr. (Justice) V.S. Malimath (formerly, Chief Justice of the Kerala High Court), has also endorsed the Commission's recommendations, as well as, by Review Committee on Constitutional Reforms. The system of plea bargaining (as recommended by the Law Commission of India in its Report) should be introduced, as part of the process of decriminalization . It means pre- trial negotiations between the parties during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. The benefit of "plea bargaining" would, however, not be admissible to habitual offenders.

84. We are tempted to mention here that law should be stable but not standstill. The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases, and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. As such, "Change is only constant thing in the world". If the individual, society or for that purpose, nation feels allergic to the change for the reforms and remaining oblivious to the realism and prevalent situations, the very existence may be in jeopardy. It is, therefore, rightly said that all must have an open mind, as mind is like a parachute; it starts working when it is open. Although, hitherto, as a part of colonial legacy, "plea bargaining" has not been recognised, so far in our system and Criminal Jurisprudence. However, keeping in mind the huge arrears and long time spent in trials and resultant hardships to parties, and particularly, the accused and the victims of the crimes, the benefit of "plea bargaining" as an alternative method to deal with the dispute or question of offence requires serious consideration, which would not be admissible and available to the habitual offenders. We should remember a saying that "every saint has past and every sinner has a future" and also that "taw and justice should not be distant neighbours."

Epilogue :

85. After having threadbare considered, evaluated and discussed the rival submissions and valued submissions of 'amicus curiae' learned Senior Advocate Mr. Thakkar and the relevant and material provisions of Bombay Prohibition Act and Code of the Criminal Procedure, as well as, important pronouncements of the Hon'ble Apex Court coupled with the principles of Criminal Jurisprudence in summing up, we hold and decide upon all the three points formulated by us in the very commencement of this judgment, hereasunder :

(i) in the affirmative

(ii) also in the affirmative

(iii) not competent and not legal and not binding to Courts. Observations in that judgment in Para 12.1 are not legal, and therefore, not approved.

86. In short, in our conclusions on objective assessment and evaluation of the factual and legal profile, in this group of criminal appeals, a sentence of imprisonment for a period of less than minimum with the help of proviso and in terms of the requirements and on proof of existence of special and adequate reasons for a first offence, the Court is empowered and entitled to award less than minimum sentence on finding accused guilty either by evidence or by raising "plea of guilty" and judicial directions and prescription of special format contrary to the statutory provisions as observed by us, hereinabove, are not binding and required to be followed for recording the plea of guilty of accused and the proposition provided in three decisions relied on by the State are not affirmed and approved by us to the extent as stated above for the elaborate reasons and factual matrix and legal profile given hereinabove and upon true and correct interpretation and legislative intendments, forensic and jurisprudential exposition of the relevant propositions of the said provisions of Bombay Prohibition Act in general and proviso to Sections 66 and 85, so far as first offence is concerned.

87. In the end- result, all the appeals, at the instance of the State are without any substance and quite meritless, and therefore, they shall stand dismissed for the foregoing discussions and reasons.

MANU/SC/0518/1981

Back to Section 304 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Writ Petition No. 5670 of 1980

Decided On: 19.12.1980

Khatri and Ors. Vs. State of Bihar and Ors.

Hon'ble Judges/Coram:

P.N. Bhagwati and A.P. Sen, JJ.

ORDER

P.N. Bhagwati, J.

1. This case has now come before us after service of notice on the State of Bihar. When this case was taken up for appearing by us on 2nd December, 1980, we expressed our displeasure that the State of Bihar had not chosen to appear in answer to the notice, but this expression of displeasure was made by us on the assumption that the notice was served on the State of Bihar. We are however informed by Mr. K.G. Bhagat, learned advocate, appearing on behalf of the State of Bihar that the notice of the writ petition was served upon the State only on 6th December, 1980 and that is the reason why it was not possible for the State to appear before us on 2nd December, 1980. We accept this explanation offered by Mr. K. G. Bhagat and exonerate the State of Bihar from remissness in appearing before the Court on 2nd December, 1980.

2. The State has filed before us a counter affidavit sworn by Tarkeshwar Parshad, Under Secretary, Home (Police) Department of the State Government giving various particulars required by us by our order dated 2nd December, 1980. We have also before us the counter affidavit filed by Jitendra Narain Singh, Assistant Jailer, Bhagalpur Central Jail, on behalf of the State and this affidavit gives certain other particulars required by us. The State has also in addition to these particulars, filed statements giving various particulars in regard to the blinded prisoners drawn from the records of the judicial magistrates dealing with their cases. The District and Sessions Judge has also addressed a letter to the Registrar (Judicial) of this Court stating that for the reasons given in his letter, no inspection of the Bhagalpur Central Jail has been carried out by the District and Sessions Judge in the year 1980. The Registrar (Judicial) has also furnished to us copies of the statements of the blinded prisoners and B.L. Das, former Superintendent of the Bhagalpur Central Jail, recorded by him pursuant to the order of this Court dated 1st December, 1980. Full and detailed arguments have been advanced before" us on the basis of the particulars contained in these documents, but we do not, at this stage, propose to deal with the arguments in regard to each of the blinded prisoners and we shall examine only the broad contentions advanced before us, leaving the arguments in regard to each specific blinded prisoner to be dealt with at a later stage when the writ petition again comes up for hearing.

3. Before we deal with the main contentions urged before us on behalf of the parties, we must dispose of one serious question which raises a rather difficult problem and which has to be resolved with some immediacy. The problem is not so much a legal problem as a human one and it arises because the blinded prisoners who are undergoing treatment in the Rajendra Prashad Ophthalmic Institute, New Delhi are likely to be discharged from that Institute since their vision is so totally impaired that it is not possible to restore it by any medical or surgical treatment, and the question is wherever they can go. Mrs. Hingorani, on behalf of the blinded prisoners, expressed apprehension that it may not be safe for them to go back to Bhagalpur, particularly when investigation into the offences of blinding was still in progress and some arrangement should, therefore, be made for housing them in New Delhi at the cost of the State. We cannot definitely state that the apprehension expressed by Mrs. Hingorani is totally unfounded nor can we say at the present stage that it is justified, but we feel that at least until the next date of hearing, it would be desirable not to send the blinded prisoners back to Bhagalpur We would, therefore, suggest that the blinded prisoners who are discharged from the Rajendra Parshad Ophthalmic Institute, New should be kept in the Home which is being run by the Blind Relief Association of Delhi on the Lal Bahadur Shastri Marg, New Delhi and the State of Bihar should bear the cost of their boarding and lodging in that Home, We hope and trust and, in fact, we would strongly recommend that the Blind Relief Association of Delhi will accept these blinded prisoners in the Home run by them and look(sic) after them until the next hearing of the petition. The State of Bihar will pay by way of advance or otherwise as may be required the costs, charges and expenses of maintaining the blinded prisoners such Home.

4. The other question raised by Mrs. Hingorani on behalf of the blinded prisoners was whether the State was liable to pay compensation to the blinded prisoners for violation of their Fundamental Right under Article 21 of the Constitution. She contended that the blinded prisoners were deprived of their eye sight by the Police Officers who were Government servant acting on behalf of the State and since this constituted a violation of the constitutional right under Article 21, the state was liable to pay compensation to the blinded prisoners. The liability to compensate a person deprived of his life or personal liberty otherwise than in accordance with procedure established by law was, according to Mrs. Hingorani, implicit in Article 21. Mr. K.G. Bhagat on behalf of the State, however, contended that it was not yet established that the blinding of the prisoners was done by the Police and that the investigation was in progress and he further urged that even if blinding was done by the police and there was violation of the constitutional right enshrined in Article 21, the State could not be held liable to pay compensation to the persons wronged. These rival arguments raised a question of great constitutional importance as to what relief can a court give for violation of the constitutional right guaranteed in Article 21. The court can certainly injunct the State from depriving a person of his life or personal liberty except in accordance with procedure established by law, but if life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered- such deprivation ? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious Fundamental Right to life and personal liberty.

These were the issues raised before us on the contention of Mrs. Hingorani, and to our mind, they are issues of the gravest constitutional importance involving as they do, the exploration of a new dimension of the right to life and personal liberty. We, therefore, intimated to the counsel appearing on behalf of the parties that we would hear detailed arguments on these issues at the next hearing of the writ petition and proceed to lay down the correct implications of the constitutional right in Article 21 in the light of the dynamic constitutional jurisprudence which we are evolving in this Court.

5. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first lime before the judicial magistrate nor at the tune when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the judicial magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the judicial magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a. few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatonn's case MANU/SC/0121/1979 : 1979CriLJ1045 . This Court has pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.

It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding through- out the territory of India. Mr. K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to (sic) indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in Rhem v. Malcolm. 377 F. Supp. 995 the law does not per(sic) any Government to deprive its citizens of constitutional rights on a plea of poverty"

and to quote the words of Justice Blackmum in Jackson v. Bishop 404. F. Supp. 2d 571: "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations." Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.

6. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is; so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or Indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.

7. There are two other irregularities appearing from the record to which we think it is necessary to refer. In the first place in a few cases the accused persons do not appear to have been produced before the Judicial Magistrates within 24 hours of their arrest as required by Article 22 of the Constitution. We do not wish to express any definite opinion in regard to this irregularity which prima facie appears to have occurred in a few cases, but we would strongly urge upon the State and its police authorities to see that this constitutional and legal requirement to produce an

arrested person before a Judicial Magistrate within 24 hours of the arrest must be scrupulously observed. It is also clear from the particulars furnished to us from the records of the Judicial Magistrates that in some cases particularly those relating to Patel Sahu, Raman Bind, Shaligram Singh and a few others the accused persons were not produced before the judicial Magistrates subsequent to their first production and they continued to remain in jail without any remand orders being passed by the judicial Magistrates. This was plainly contrary to law. It is difficult to understand how the State continued to detain these accused persons in jail without any remand orders. We hope and trust that the State Government will inquire as to why (sic) this irregularity was allowed to be perpetrated and will see to com that in future no such violations of the law are permitted to be committed by the administrators of the law. The provision inhibiting detention without remand is a very healthy provision which enables the Magistrates to keep check over the police investigation and it is necessary that the Magistrates should try to enforce this requirement and where it is found to be disobeyed, come down heavily upon the police.

8. We also cannot help expressing our unhappiness at the lack of concern shown by the judicial magistrates in not enquiring from the blinded prisoners, when they were first produced before the judicial magistrates and thereafter from time to time for the purpose of remand to how they had received injuries in the eyes. It is true that most of the blinded prisoners have said in their statements before the Registrar that they were not actually produced before the judicial magistrates at any time, but we cannot, without further inquiry in that behalf, accept the ex parte statement of the blinded prisoners. Their statements may be true or may not be true; it is a matter which may require investigation. But one thing is clear that in the case of almost all the blinded prisoners, the for- warding report sent by the Police Officer In Charge stated that the accused had sustained injuries and yet the judicial magistrates did not care to enquire as to how injuries had been caused. This can give rise only to two inferences; either the blinded prisoners were not physically produced before the judicial magistrates and the judicial magistrates mechanically signed the orders of remand or they did not bother to enquire even if they found that the prisoners before them had received injuries in the eyes. It is also regrettable that no inspection of the Central Jail, Bhagalpur was carried out by the District & Sessions Judge at any time during the year 1980. We would request the High Court to look into these matters closely and ensure that such remissness on the part of the judicial officers does not occur in the future.

9. We would also like to advert to one more matter before we close and that is rather a serious matter. It appears from the record that one blinded prisoner by the name of Umesh Yadav sent a petition to the District and Sessions Judge, Bhagalpur, on 30th July, 1980 complaining that he had been blinded by Shri B. K. Sharma, District Superintendent of Police and since he had no money to prosecute this police officer, he should be provided a lawyer at Government expense so that he might be able to bring the police atrocities before the court and seek justice. Ten other blinded prisoners also made a similar petition and all these petitions were forwarded to the District & Sessions Judge on 30th July, 1980. The District & Sessions Judge by this letter dated 5th August, 1980, addressed to the Superintendent of the Bhagalpur Central Jail stated that there was no provision in the CrPC under which legal assistance could be provided to the blinded prisoners who had made a petition to him and that the had forwarded their petitions to the chief judicial magistrate for necessary action. The Chief Judicial Magistrate also expressed this inability to do anything in the matter. It appears that the Superintendent of the Bhagalpur Central Jail also sent

the petitions of these blinded prisoners to the Inspector General of Prisons, Patna on 30th July, 1980 with a request that this matter should be brought to the notice of the State Government. The Inspector General of Prisons forwarded these petitions to the Home Department. The Inspector General of Prisons was also informed by three blinded prisoners on 9th September 1980 when he visited the Banks Jail that they had been blinded by the police and the Inspector General of Prisons observed in his inspection note that it would be necessary to place the matter before the Government so that, the police atrocities may be stopped. The facts disclose a very disturbing state of affairs. In the first place we find it difficult to appreciate why the Chief Judicial Magistrate to whom the petitions of these blinded prisoners had been forwarded by the District & Sessions Judge did not act upon the complaint contained in these petitions and either take cognizance of the offence revealed in these petitions or order investigation by the higher police officers. ' The information appearing in these petitions disclosed very serious offences alleged to have been committed by the Police and the Chief Judicial Magistrate should not have nonchalantly ignored these petitions and expressed , his inability to do anything in the matter. But apart from that, one thing is certain that within a few days after 30th July 80 the Home Department did come to know from the Inspector General of Prisons that according to the blinded prisoners who had sent their petitions, they had been blinded by the Police, and from the inspection note of the Inspector General of Police it would seem reasonable to assume that he must have brought the matter to the notice of the Government. We should like to know from the Inspector General of Prisons as to who was the individual or which was the department of the State Government to whose notice he brought this matter and what steps did the State Government take on receipt of the petitions of the blinded prisoners forwarded by the Inspector General of Prisons as also on the matter being brought to their attention by the Inspector General of Prisons as observed by him in his inspection note. We should like the State Government to inform us clearly and precisely as to what steps they took after 30th July, 1980 to bring the guilty to book and to stop recurrence of such atrocities. We want to have this information because we should like to satisfy ourselves whether the Windings which took place in October 1980 could have been prevented by the State Government by taking appropriate steps on receipt of information in regard to the complaint of the blinded prisoners from the Inspector General of Prisons.

10. We would direct the State Government to furnish us full and detailed particulars in this behalf before the next hearing of the writ petition.

11. The writ petition will now be taken up for further hearing on 6th January, 1981.

MANU/SC/0140/1986

Back to Section 304 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 725 of 1985

Decided On: 10.03.1986

Suk Das Vs. Union Territory of Arunachal Pradesh

Hon'ble Judges/Coram:

P.N. Bhagwati, C.J., D.P. Madon and G.L. Oza, JJ.

JUDGMENT

P.N. Bhagwati, C.J.

1. This appeal by special leave raises a question of considerable importance relating to the administration of criminal justice in the country. The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperiling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance or the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost: if he is not so informed and in consequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside? This question is extremely important because we have almost 50% population which is living below the poverty line and around 70% is illiterate and large sections of people just do not know that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance provided to them at State cost.

2. The facts giving rise to this appeal are not material because the question posed for our consideration is a pure question of law. But even so the broad facts may be briefly set out since they provide the back- drop against which the question of law arises for consideration.

3. The appellants and five other accused were charged in the court of the Additional Deputy Commissioner, Dibang Valley, Anini, Arunachal Pradesh for an offence under Section 506 read with Section 34 of the Indian Penal Code on the allegation that the appellants and the other five accused threatened Shri H.S. Kohli, Assistant Engineer, Central Public Works Department, Anini with a view to compelling him to cancel the transfer orders of the accused which had been passed by him. The case was tried as a warrant case and at the trial 8 witnesses, on behalf of the prosecution, were examined. The appellant was not represented by any lawyer since he was admittedly unable to afford legal representation on account of his poverty and the result was that

he could not cross- examine the witnesses of the prosecution. The appellants wished to examine 7 witnesses in defence but out of them two could not be examined since they were staying far away and moreover, in the opinion of the court, they were not material witnesses. The remaining 5 witnesses were examined by the appellants without any legal assistance. The result was that at the end of the trial four of the other accused were acquitted but the appellant and another accused were convicted of the offence under Section 506 of the Indian Penal Code and they were sentenced to undergo simple imprisonment for a period of two years.

4. The appellant thereupon preferred an appeal before the Gauhati High Court. There were several contentions urged in support of the appeal but it is not necessary to refer to them, since there is one contention which in our opinion goes to the root of the matter and has invalidating effect on the conviction and sentence recorded against the appellant. That contention is that the appellant were not provided free legal aid for his defence and the trial was therefore vitiated. This self- same contention was also advanced before the High Court in the appeal preferred by the appellant but the High Court took the view that, though it was undoubtedly the right of the appellant to be provided free legal assistance, the appellant did no make any request to the learned Additional Deputy Commissioner praying for legal aid and since no application for legal aid was made by him, "it could not be said in the facts and circumstances of the case that failure to provide legal assistance vitiated the trial". The High Court in the circumstances confirmed the conviction of the appellant but in view of the fact that he was already in jail for a period of nearly 8 months, the High Court held that the ends of justice would be met if the sentence on the appellant was reduced to that already undergone by him. The appellant was accordingly ordered to be, set at liberty forthwith but since the order of conviction passed against him was sustained by the High Court, he preferred the present appeal with special leave obtained from this Court.

5. It is now well established as a result of the decision of this Court in Hussainara Khatoon's case MANU/SC/0121/1979 : 1979CriLJ1045 that "the right to free legal service is ...clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer". This Court pointed out that it is an essential ingredient of reasonable, fair and just procedure to prisoner who is to seek his liberation through the court's process that he should have legal service available to him. The same view was taken by a Bench of this Court earlier in M.H. Hoskot v. State of Maharashtra MANU/SC/0119/1978 : 1978CriLJ1678 . It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involved jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. Of course, it must be recognised that there may be cases involving offences, such as, economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal service may not be provided by the State. There can in the circumstances be no doubt that the appellant was entitled to a free legal assistance at State cost when he was

placed in peril of their personal liberty by reason of being accused of an offence which is proved would clearly entail imprisonment for a terra of two years.

6. But the question is whether this fundamental right could lawfully be denied to the appellant if he did not apply for free legal aid. Is the exercise of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advise in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self- reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor finds themselves can be alleviating to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. This is the reason why in Khatri and Ors. v. State of Bihar and Ors. MANU/SC/0518/1981 : 1981CriLJ597 , we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. We deplored that in that case where the accused were blinded prisoners the Judicial Magistrate failed to discharge obligation and contented themselves by merely observing that no legal representation had been asked for by the blinded prisoners and hence none was provided. We accordingly directed "the Magistrates and Sessions Judges in the country to inform every accused who appear before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State" unless he is not willing to take advantage of the free legal services provided by the State. We also gave a general direction to every State in the country "...to make provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations," the only qualification being that the offence charged against an accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and that the needs of social justice require that he should be given free legal representations. It is quite possible that since the trial was held before the learned Additional Deputy Commissioner prior to the declaration of the law by this Court in Khatri and Ors. v. State of Bihar (supra), the learned Additional Deputy Commissioner did not inform the appellant that if he was not in a position to engage a lawyer on account of lack of material resources he was entitled to free legal assistance at State cost nor asked him whether he would like to have free

legal aid. But it is surprising that despite this declaration of the law in Khatri and Ors. v. State of Bihar and Ors. (supra) on 19th December 1980 when the decision was rendered in that case, the High Court persisted in taking the view that since the appellant did not make an application for free legal assistance, no unconstitutionality was involved in not providing him legal representation at State cost. It is obvious that in the present case the learned Additional Deputy Commissioner did not inform the appellant that he was entitled to free legal assistance nor did he inquire from the appellant whether he wanted a lawyer to be provided to them at State cost. The result was that the appellant remained unrepresented by a lawyer and the trial ultimately resulted in his conviction. This was clearly a violation of the fundamental right of the appellant under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellant must be set aside.

7. The appellant contended that if the conviction and sentence recorded against him is set aside, the order dismissing the appellant from service passed on the basis of his conviction by the learned Additional Deputy Commissioner must also be quashed and he must be reinstated in service with back wages. Now it is true that the appellant was dismissed from service without holding an inquiry on account of his being convicted for a criminal offence and since the conviction of the appellant is being set aside by us, the order of dismissal must also fall and the appellant must be reinstated in service with back wages. But the result of our quashing the conviction of the appellants would be that the appellant would have to be tried again in accordance with law after providing free legal assistance to him at State cost and that would mean that the appellant would continue to be exposed to the risk of conviction and imprisonment and the possibility cannot be ruled out that the offence charged may ultimately be proved against him and he might land- up in jail and also lose their service. We therefore felt that it would not only meet the ends of justice but also be in the interest of the appellant that no fresh trial should be held against him and he should be reinstated in service but without back wages. We accordingly direct that the appellant shall be reinstated in service but he shall not be entitled to claim any back wages and no fresh trial shall be held against him. The appeal will stand disposed of in these terms.

MANU/SC/0147/1961

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 195 of 1960

Decided On: 24.11.1961

K.M. Nanavati Vs. State of Maharashtra

Back to Section 307 of Code of Criminal Procedure, 1973

Back to Section 431 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

K. Subba Rao, Raghubar Dayal and S.K. Das, JJ.

JUDGMENT

K. Subba Rao, J.

1. This appeal by special leave arises out of the judgment of the Bombay High Court sentencing Nanavati, the appellant, to life imprisonment for the murder of Prem Bhagwandas Ahuja, a businessman of Bombay.

2. This appeal presents the commonplace problem of an alleged murder by an enraged husband of a paramour of his wife : but it aroused considerable interest in the public mind by reason of the publication it received and the important constitutional point it had given rise to at the time of its admission.

3. The appellant was charged under s. 302 as well as under s. 304, Part I, of the Indian Penal Code and was tried by the Sessions Judge, Greater Bombay, with the aid of special jury. The jury brought in a verdict of "not guilty" by 8 : 1 under both the sections; but the Sessions Judge did not agree with the verdict of the jury, as in his view the majority verdict of the jury was such that no reasonable body of men could, having regard to the evidence, bring in such a verdict. The learned Sessions Judge submitted the case under s. 307 of the Code of Criminal Procedure to the Bombay High Court after recording the grounds for his opinion. The said reference was heard by a division bench of the said High Court consisting of Shelat and Naik, JJ. The two learned Judges gave separate judgments, but agreed in holding that the accused was guilty of the offence of murder under s. 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life. Shelat, J., having held that there were misdirections to the jury, reviewed the entire evidence and came to the conclusion that the accused was clearly guilty of the offence of murder, alternatively, he expressed the view that the verdict of the jury was perverse, unreasonable and, in any event, contrary to the weight of evidence. Naik, J., preferred to base his conclusion on the alternative ground, namely, that no reasonable body of persons could have

come to the conclusion arrived at by the jury. Both the learned Judges agreed that no case had been made out to reduce the offence from murder to culpable homicide not amounting to murder. The present appeal has been preferred against the said conviction and sentence.

4. The case of the prosecution may be stated thus : This accused, at the time of the alleged murder, was second in command of the Indian Naval Ship "Mysore". He married Sylvia in 1949 in the registry office at Portsmouth, England. They have three children by the marriage, a boy aged 9 1/2 years a girl aged 5 1/2 years and another boy aged 3 years. Since the time of marriage, the couple were living at different places having regard to the exigencies of service of Nanavati. Finally, they shifted to Bombay. In the same city the deceased Ahuja was doing business in automobiles and was residing, along with his sister, in a building called "Shreyas" till 1957 and thereafter in another building called "Jivan Jyot" in Setalvad Road. In the year 1956, Agniks, who were common friends of Nanavatis and Ahujas, introduced Ahuja and his sister to Nanavatis. Ahuja was unmarried and was about 34 years of age at the time of his death, Nanavati, as a Naval Officer, was frequently going away from Bombay in his ship, leaving his wife and children in Bombay. Gradually, friendship developed between Ahuja and Sylvia, which culminated in illicit intimacy between them. On April 27, 1959, Sylvia confessed to Nanavati of her illicit intimacy with Ahuja. Enraged at the conduct of Ahuja, Nanavati went to his ship, took from the stores of the ship a semi- automatic revolver and six cartridges on a false pretext, loaded the same, went to the flat of Ahuja entered his bed- room and shot him dead. Thereafter, the accused surrendered himself to the police. He was put under arrest and in due course he was committed to the Sessions for facing a charge under s. 302 of the Indian Penal code.

5. The defence version, as disclosed in the statement made by the accused before the Sessions Court under s. 342 of the Code of Criminal Procedure and his deposition in the said Court, may be briefly stated : The accused was away with his ship from April 6, 1959, to April 18, 1959. Immediately after returning to Bombay, he and his wife went to Ahmednagar for about three days in the company of his younger brother and his wife. Thereafter, they returned to Bombay and after a few days his brother and his wife left them. After they had left, the accused noticed that his wife was behaving strangely and was not responsive or affectionate to him. When questioned, she used to evade the issue. At noon on April 27, 1959, when they were sitting in the sitting- room for the lunch to be served, the accused put his arm round his wife affectionately, when she seemed to go tense and unresponsive. After lunch, when he questioned her about her fidelity, she shook her head to indicate that she was unfaithful to him. He guessed that her paramour was Ahuja. As she did not even indicate clearly whether Ahuja would marry her and look after the children, he decided to settle the matter with him. Sylvia pleaded with him not go to Ahuja's house, as he might shoot him. Thereafter, he drove his wife, two of his children and a neighbour's child in his car to a cinema, dropped them there and promised to come and pick them up at 6 P.M. when the show ended. He then drove his car to his ship, as he wanted to get medicine for his sick dog, he represented to the authorities in the ship, that he wanted to draw a revolver and six rounds from the stores of the ship as he was going to drive alone to Ahmednagar by night, though the real purpose was to shoot himself. On receiving the revolver and six cartridges, and put it inside a brown envelope. Then he drove his car to Ahuja's office, and not finding him there, he drove to Ahuja's flat, range the door bell, and, when it was opened by a servant, walked to Ahuja's bed- room, went into the bed- room and shut the door behind him. He also carried with

him the envelope containing the revolver. The accused saw the deceased inside the bed- room, called him a filthy swine and asked him whether he would marry Sylvia and look after the children. The deceased retorted, "Am I to marry every woman I sleep with ?" The accused became enraged, put the envelope containing the revolver on a cabnit nearby, and threatened to thrash the deceased. The deceased made a sudden move to grasp at the envelope, when the accused whipped out his revolver and told him to get back. A struggle ensued between the two and during that struggle two shots went off accidentally and hit Ahuja resulting in his death. After the shooting the accused went back to his car and drove it to the police station where he surrendered himself. This is broadly, omitting the details, the case of the defence.

6. It would be convenient to dispose of at the outset the questions of law raised in this case.

7. Mr. G. S. Pathak, learned counsel for the accused, raised before us the following points : (1) Under s. 307 of the Code of Criminal Procedure, the High Court should decide whether a reference made by a Sessions Judge was competent only on a perusal of the order of reference made to it and it had no jurisdiction to consider the evidence and come to a conclusion whether the reference was competent or not. (2) Under s. 307(3) of the said Code, the High Court had no power to set aside the verdict of a jury on the ground that there were misdirections in the charge made by the Sessions Judge. (3) There were no misdirections at all in the charge made by the Sessions Judge; and indeed his charge was fair to the prosecution as well to the accused. (4) The verdict of the jury was not perverse and it was such that a reasonable body of persons could arrive at it on the evidence placed before them. (5) In any view, the accused shot at the deceased under grave and sudden provocation, and therefore even if he had committed an offence, it would not be murder but only culpable homicide not amounting to murder.

8. Mr. Pathak elaborates his point under the first heading thus : Under s. 307 of the Code of Criminal Procedure, the High Court deals with the reference in two stages. In the first stage, the High Court has to consider, on the basis of the referring order, whether a reasonable body of persons could not have reached the conclusion arrived at by the jury; and, if it is of the view that such a body could have come to that opinion the reference shall be rejected as incompetent. At this stage, the High Court cannot travel beyond the order of reference, but shall confine itself only to the reasons given by the Sessions Judge. If, on a consideration of the said reasons, it is of the view that no reasonable body of persons could have come to that conclusion, it will then have to consider the entire evidence to ascertain whether the verdict of the jury is unreasonable. If the High Court holds that the verdict of the jury is not unreasonable, in the case of a verdict of "not guilty", the High Court acquits the accused, and in the case where the verdict is one of "guilty" it convicts the accused. In case the High Court holds that the verdict of "not guilty", is unreasonable, it refers back the case to the Sessions Judge, who convicts the accused; thereafter the accused will have a right of appeal wherein he can attack the validity of his conviction on the ground that there were misdirections in the charge of the jury. So too, in the case of a verdict of "guilty" by the jury, the High Court, if it holds that the verdict is unreasonable, remits the matter to the Sessions Judge, who acquits the accused, and the State, in an appeal against that acquittal, may question the correctness of the said acquittal on the ground that the charge to the jury was vitiated by

misdirections. In short, the argument may be put in three propositions, namely, (i) the High Court rejects the reference as incompetent, if on the face of the reference the verdict of the jury does not appear to be unreasonable, (ii) if the reference is competent, the High Court can consider the evidence to come to a definite conclusion whether the verdict is unreasonable or not, and (iii) the High Court has no power under s. 307 of the Code of Criminal Procedure to set aside the verdict of the jury on the ground that it is vitiated by misdirections in the charge to the jury.

9. The question raised turns upon the construction of the relevant provisions of the Code of Criminal Procedure. The said Code contains two fascicule of sections dealing with two different situations. Under s. 268 of the Code, "All trials before a Court of Session shall be either by jury, or by the Judge himself." Under s. 297 thereof :

"In cases tried by jury, when the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided....."

10. Section 298 among other imposes a duty on a judge to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to be proved, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and to decide upon all matters of fact which it is necessary to prove in order to enable evidence of particular matter to be given. It is the duty of the jury "to decide which view of the facts is true and then to return the verdict which under such view ought, according to the directions of the Judges, to be returned." After charge to the jury, the jury retire to consider their verdict and, after due consideration, the foreman of the jury informs the Judge what is their verdict or what is the verdict of the majority of the jurors.

11. Where the Judge does not think it necessary to disagree with the verdict of the jurors or of the majority of them, he gives judgment accordingly. If the accused is acquitted, the Judge shall record a verdict of acquittal; if the accused is convicted, the Judge shall pass sentence on him according to law. In the case of conviction, there is a right of appeal under s. 410 of the Code, and in a case of acquittal, under s. 417 of the Code, to the High Court. But s. 418 of the Code provides :

"(1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only."

12. Sub- section (2) thereof provides for a case of a person sentenced to death, with which we are not now concerned. Section 423 confers certain powers on an appellate Court in the matter of disposing of an appeal, such as calling for the record, hearing of the pleaders, and passing appropriate orders therein. But sub- s. (2) of s. 423 says :

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owning to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

13. It may be noticed at this stage, as it will be relevant in considering one of the arguments raised in this case, that sub- s. (2) does not confer any power on an appellate court, but only saves the limitation on the jurisdiction of an appellate court imposed under s. 418 of the Code. It is, therefore, clear that in an appeal against conviction or acquittal in a jury trial, the said appeal is confined only to a matter of law.

14. The Code of Criminal Procedure also provides for a different situation. The Sessions Judge may not agree with the verdict of the jurors or the majority of them; and in that event s. 307 provides for a machinery to meet that situation. As the argument mainly turns upon the interpretation of the provisions of this section, it will be convenient to read the relevant clauses thereof.

15. Section 307 : (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

16. (3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

17. This section is a clear departure from the English law. There are good reasons for its enactment. Trial by jury outside the Presidency Towns was first introduced in the Code of Criminal Procedure of 1861, and the verdict of the jury was, subject to re- trial on certain events, final and conclusive. This led to miscarriage of justice through jurors returning erroneous verdicts due to ignorance and inexperience. The working of the system was reviewed in 1872, by a Committee appointed for that purpose and on the basis of the report of the said Committee, s. 262 was introduced in the Code of 1872. Under that section, where there was difference of view between the jurors and the judge, the Judge was empowered to refer the case to the High Court in the ends of justice, and the High Court dealt with the matter as an appeal. But in 1882 the section was amended and under the amended section the condition for reference was that the High Court should differ from the jury completely; but in the Code of 1893 the section was

amended practically in terms as it now appears in the Code. The history of the legislation shows that the section was intended as a safeguard against erroneous verdicts of inexperienced jurors and also indicates the clear intention of the Legislature to confer on a High Court a separate jurisdiction, which for convenience may be described as "reference jurisdiction". Section 307 of the Code of Criminal Procedure, while continuing the benefits of the jury system to persons tride by a Court of Session, also guards against any possible injustice, having regard to the conditions obtaining in India. It is, therefore clear that there is an essential difference between the scope of the jurisdiction of the High Court in disposing of an appeal against a conviction or acquittal, as the case may be, in a jury trial, and that in a case submitted by the Sessions Judge when he differs from the verdict of the jury : in the former the acceptance of the verdict of the jury by the Sessions Judge is considered to be sufficient guarantee against its perversity and therefore an appeal is provided only on questions of law, whereas in the latter the absence of such agreement necessitated the conferment of a larger power on the High Court in the matter of interfering with the verdict of the jury.

18. Under s. 307(1) of the Code, the obligation cast upon the Sessions Judge to submit the case to the High Court is made subject to two conditions, namely, (1) the Judge shall disagree with the verdict of the jurors, and (2) he is clearly of the opinion that it is necessary in the ends of justice to submit the case to the High Court. If the two conditions are complied with, he shall submit the case, recording the grounds of his opinion. The words "for the ends of justice" are comprehensive, and coupled with the words "is clearly of opinion", they give the Judge a discretion to enable him to exercise his power under different situations, the only criterion being his clear opinion that the reference is in the ends of justice. But the Judicial Committee, in Ramanugrah Singh v. King Emperor (1946) L.R. 173, IndAp 174, construed the words "necessary for the ends of justice" and laid down that the words mean that the Judge shall be of the opinion that the verdict of the jury is one which no reasonable body of men could have reached on the evidence. Having regard to that interpretation, it may be held that the second condition for reference is that the Judge shall be clearly of the opinion that the verdict is one which no reasonable body of men could have reached on the evidence. It follows that if a Judge differs from the jury and is clearly of such an opinion, he shall submit the case to the High Court recording the grounds of his opinion. In that event, the said reference is clearly competent. If on the other hand, the case submitted to the High Court does not ex facie show that the said two conditions have been complied with by the Judge, it is incompetent. The question of competency of the reference does not depend upon the question whether the Judge is justified in differing from the jury or forming such an opinion on the verdict of the jury. The argument that though the Sessions Judge has complied with the conditions necessary for making a reference, the High Court shall reject the reference as incompetent without going into the evidence if the reasons given do not sustain the view expressed by the Sessions Judge, is not supported by the provisions of sub- s. (1) of s. 307 of the Code. But it is said that it is borne out of the decision of the Judicial Committee in Ramanugrah Singh's case [(1946) L.R. 73, I.A. 174, 182, 186]. In that case the Judicial Committee relied upon the words "ends of justice" and held that the verdict was one which no reasonable body of men could have reached on the evidence and further laid down that the requirements of the ends of justice must be the determining factor both for the Sessions Judge in making the reference and for the High Court in disposing of it. The Judicial Committee observed :

"In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that on the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded."

19. The Judicial Committee proceeded to state :

"In their Lordships' opinion had the High Court approached the reference on the right lines and given due weight to the opinion of the jury they would have been bound to hold that the reference was not justified and that the ends of justice did not require any interference with the verdict of the jury."

20. Emphasis is laid on the word "justified", and it is argued that the High Court should reject the reference as incompetent if the reasons given by the Sessions Judge in the statement of case do not support his view that it is necessary in the ends of the justice to refer the case to the High Court. The Judicial Committee does not lay down any such proposition. There, the jury brought in a verdict of not "guilty" under s. 302, Indian Penal Code. The Sessions Judge differed from the jury and made a reference to the High Court. The High Court accepted the reference and convicted the accused and sentenced him to transportation for life. The Judicial Committee held, on the facts of that case, that the High Court was not justified in the ends of justice to interfere with the verdict of the jury. They were not dealing with the question of competency of a reference but only with that of the justification of the Sessions Judge in making the reference, and the High Court in accepting it. It was also not considering a case of any disposal of the reference by the High Court on the basis of the reasons given in the reference, but were dealing with a case where the High Court on a consideration of the entire evidence accepted the reference and the Judicial Committee held on the evidence that there was no justification for the ends of justice to accept it. This decision, therefore, has no bearing on the competency of a reference under s. 307(1) of the Code of Criminal Procedure.

21. Now, coming to sub- s. (3) of s. 307 of the Code, it is in two parts. The first part says that the High Court may exercise any of the powers which it may exercise in an appeal. Under the second part, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, the High Court shall acquit or convict the accused. These parts are combined by the expression "and subject thereto". The words "subject thereto" were added to the section by an amendment in 1896. This expression gave rise to conflict of opinion and it is conceded that it lacks clarity. That may be due to the fact that piecemeal amendments have been made to the section from time to time to meet certain difficulties. But we cannot ignore the expression, but we must give it a reasonable construction consistent with the intention of the Legislature in enacting the said section. Under the second part of the section, special jurisdiction to decide a case referred to it is conferred on the High Court. It also defines the scope of its jurisdiction and its limitations. The High Court can acquit or convict an accused of an offence of

which the jury could have convicted him, and also pass such sentence as might have been passed by the Court of Session. But before doing so, it shall consider the entire evidence and give due weight to the opinions of the Sessions Judge and the jury. The second part does not confer on the High Court any incidental procedural powers necessary to exercise the said jurisdiction in a case submitted to it, for it is neither an appeal nor a revision. The procedural powers are conferred on the High Court under the first part. The first part enables the High Court to exercise any of the powers which it may exercise in appeal, for without such powers it cannot exercise its jurisdiction effectively. But the expression "subject to" indicates that in exercise of its jurisdiction in the manner indicated by the second part, it can call in aid only any of the powers of an appellate court, but cannot invoke a power other than that conferred on an appellate court. The limitation on the second part implied in the expression "subject thereto" must be confined to the area of the procedural powers conferred on a appellate court. If that be the construction, the question arises, how to reconcile the provisions of s. 423(2) with those of s. 307 of the Code ? Under sub- s. (2) of s. 423 :

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

22. It may be argued that, as an appellate court cannot alter or reverse the verdict of a jury unless such a verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him, the High Court, in exercise of its jurisdiction under s. 307 of the Code, likewise could not do so except for the said reasons. Sub- section (2) of s. 423 of the Code does not confer any power of the High Court; it only restates the scope of the limited jurisdiction conferred on the court under s. 418 of the Code, and that could not have any application to the special jurisdiction conferred on the High Court under s. 307. That apart, a perusal of the provisions of s. 423(1) indicates that there are powers conferred on an appellate court which cannot possibly be exercised by courts disposing of a reference under s. 307 of the Code, namely, the power to order commitment etc. Further s. 423(1)(a) and (b) speak of conviction, acquittal, finding and sentence, which are wholly inappropriate to verdict of a jury. Therefore, a reasonable construction will be that the High Court can exercise any of the powers conferred on an appellate court under s. 423 or under other sections of the Code which are appropriate to the disposal of a reference under s. 307. The object is to prevent miscarriage of the justice by the jurors returning erroneous or perverse verdict. The opposite construction defeats this purpose, for it equates the jurisdiction conferred under s. 307 with that of an appellate court in a jury trial. That construction would enable the High Court to correct an erroneous verdict of a jury only in a case of misdirection by the Judge but not in a case of fair and good charge. This result effaces the distinction between the two types of jurisdiction. Indeed, learned counsel for the appellant has taken a contrary position. He would say that the High Court under s. 307(3) could not interfere with the verdict of the jury on the ground that there were misdirections in the charge to the jury. This argument is built upon the hypothesis that under the Code of Criminal Procedure there is a clear demarcation of the functions of the jury and the Judge, the jury dealing with facts and the Judge with law, and therefore the High Court could set aside a verdict on the ground of misdirection only when an appeal comes to it under s. 418 and could only interfere with the verdict of the jury for the ends of justice, as interpreted by the Privy Council, when the matter comes to it under s. 307(3). If this interpretation be accepted, we would be attributing to

the Legislature an intention to introduce a circuitous method and confusion in the disposal of criminal cases. The following illustration will demonstrate the illogical result of the argument. The jury brings in a verdict of "guilty" on the basis of a charge replete with misdirections; the Judge disagrees with that verdict and states the case to the High Court; the High Court holds that the said verdict is not erroneous on the basis of the charge, but is of the opinion that the verdict is erroneous because of the misdirections in the charge; even so, it shall hold that the verdict of the jury is good and reject the reference thereafter, the Judge has to accept the verdict and acquit the accused; the prosecution then will have to prefer an appeal under s. 417 of the Code on the ground that the verdict was induced by the misdirections in the charge. This could not have been the intention of the Legislature. Take the converse case. On similar facts, the jury brings in a verdict of "guilty"; the Judge disagrees with the jury and makes a reference to the High Court; even though it finds misdirections in the charge to the jury, the High Court cannot set aside the conviction but must reject the reference; and after the conviction, the accused may prefer an appeal to the High Court. This procedure will introduce confusion in jury trials, introduce multiplicity of proceedings, and attribute ineptitude to the Legislature. What is more, this construction is not supported by the express provisions of s. 307(3) of the Code. The said sub-section enables the High Court to consider the entire evidence, to give due weight to the opinions of the Sessions Judge and the jury, and to acquit or convict the accused. The key words in the sub-section are "giving due weight to the opinions of the Sessions Judge and the jury". The High Court shall give weight to the verdict of the jury; but the weight to be given to a verdict depends upon many circumstances - it may be one that no reasonable body of persons could come to; it may be a perverse verdict; it may be a divided verdict and may not carry the same weight as the united one does; it may be vitiated by misdirections or non- directions. How can a Judge give any weight to a verdict if it is induced and vitiated by grave misdirections in the charge ? That apart, the High Court has to give due weight to the opinion of the Sessions Judge. The reasons for the opinion of the Sessions Judge are disclosed in the case submitted by him to the High Court. If the case stated by the Sessions Judge discloses that there must have been misdirections in the charge, how can the High Court ignore them in giving due weight to his opinion ? What is more, the jurisdiction of the High Court is couched in very wide terms in sub- s. (3) of s. 307 of the Code : it can acquit or convict an accused. It shall take into consideration the entire evidence in the case; it shall give due weight to the opinions of the Judge and the jury; it combines in itself the functions of the Judge and jury; and it is entitled to come to its independent opinion. Tee phraseology used does not admit of an expressed or implied limitation on the jurisdiction of the High Court.

23. It appears to us that the Legislature designedly conferred a larger power on the High Court under s. 307(3) of the Code than that conferred under s. 418 thereof, as in the former case the Sessions Judge differs from the jury while in the latter he agrees with the jury.

24. The decisions cited at the Bar do not in any way sustain in narrow construction sought to be placed by learned counsel on s. 307 of the Code. In Ramanugrah Singh's case [(1945- 46) L.R. 73 I.A. 174, 182], which has been referred to earlier, the Judicial Committee described the wide amplitude of the power of the High Court in the following terms :

"The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and jury, and then acquit or convict the accused."

25. The Judicial Committee took care to observe :

".....the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably."

26. This passage indicates that the Judicial Committee did not purport to lay down exhaustively the circumstances under which the High Court could interfere under the said sub- section with the verdict of the jury. This Court in Akhlakali Hayatalli v. The State of Bombay MANU/SC/0137/1953 : 1954CriLJ451 accepted the view of the Judicial Committee on the construction of s. 307 of the Code of Criminal Procedure, and applied it to the facts of that case. But the following passage of this Court indicates that it also does not consider the test of reasonableness as the only guide in interfering with the verdict of the jury :

"The charge was not attacked before the High Court nor before us as containing any misdirections or non- directions to the jury such as to vitiate the verdict."

27. This passage recognizes the possibility of interference by the High Court with the verdict of the jury under the said sub- section if the verdict is vitiated by misdirections or non- directions. So too, the decision of this Court in Ratan Rai v. State of Bihar [1957] S.C.R. 273 assumes that such an interference is permissible if the verdict of the jury was vitiated by misdirections. In that case, the appellants were charged under Sections 435 and 436 of the Indian Penal Code and were tried by a jury, who returned a majority verdict of "guilty". The Assistant Sessions Judge disagreed with the said verdict and made a reference to the High Court. At the hearing of the reference the counsel for the appellants contended that the charge to the jury was defective, and did not place the entire evidence before the Judges. The learned Judges of the High Court considered the objections as such and nothing more, and found the appellants guilty and convicted them. This Court, observing that it was incumbent on the High Court to consider the entire evidence and the charge as framed and placed before the jury and to come to its own conclusion whether the evidence was such that could properly support the verdict of guilty against the appellants, allowed the appeal and remanded the matter to the High Court for disposal in accordance with the provisions of s. 307 of the Code of Criminal Procedure. This decision also assumes that a High Court could under s. 307(3) of the Code of Criminal Procedure interfere with the verdict of the jury, if there are misdirections in the charge and holds that in such a case it is incumbent on the court to consider the entire evidence and to come to its own conclusion, after giving due weight to the opinions of the Sessions Judge, and the verdict of the jury. This Court again in Sashi Mohan Debnath v. The State of West Bengal [1958] S.C.R. 960, held that where the Sessions Judge disagreed with the verdict of the jury and was of the opinion that the case should be submitted to the High Court, he should submit the whole case and not a part of it. There, the jury returned a verdict of "guilty" in respect of some charges and "not guilty" in respect of others. But the Sessions Judge recorded his judgment of acquittal in respect of the latter charges in agreement

with the jury and referred the case to the High Court only in respect of the former. This Court held that the said procedure violated sub- s. (2) of s. 307 of the Code of Criminal Procedure and also had the effect of preventing the High Court from considering the entire evidence against the accused and exercising its jurisdiction under sub- s. (3) of s. 307 of the said Code. Imam, J., observed that the reference in that case was incompetent and that the High Court could not proceed to exercise any of the powers conferred upon it under sub- s. (3) of s. 307 of the Code, because the very foundation of the exercise of that power was lacking, the reference being incompetent. This Court held that the reference was incompetent because the Sessions Judge contravened the express provisions of sub- s. (2) of s. 307 of the Code, for under that sub- section whenever a Judge submits a case under that section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail. As in that case the reference was made in contravention of the express provisions of sub- s. (2) of s. 307 of the Code and therefore the use of the word 'incompetent' may not be inappropriate. The decision of a division bench of the Patna High Court in Emperor v. Ramadhar Kurmi A.I.R. 1948 Pat. 79 may usefully be referred to as it throws some light on the question whether the High Court can interfere with the verdict of the jury when it is vitiated by serious misdirections and non- directions. Das, J., observed :

"Where, however, there is misdirection, the principle embodied in s. 537 would apply and if the verdict is erroneous owing to the misdirection, it can have no weight on a reference under s. 307 as on an appeal."

28. It is not necessary to multiply decisions. The foregoing discussion may be summarized in the form of the following propositions : (1) The competency of a reference made by a Sessions Judge depends upon the existence of two conditions, namely, (i) that he disagrees with the verdict of the jurors, and (ii) that he is clearly of the opinion that the verdict is one which no reasonable body of men could have reached on the evidence, after reaching that opinion, in the case submitted by him he shall record the grounds of his opinion. (2) If the case submitted shows that the conditions have not been complied with or that the reasons for the opinion are not recorded, the High Court may reject the reference as incompetent : the High Court can also reject it if the Sessions Judge has contravened sub- s. (2) of s. 307. (3) If the case submitted shows that the Sessions Judge has disagreed with the verdict of the jury and that he is clearly of the opinion that no reasonable body of men could have reached the conclusion arrived at by the jury, and he discloses his reasons for the opinion, sub- s. (3) of s. 307 of the Code comes into play, and thereafter the High Court has an obligation to discharge its duty imposed thereunder. (4) Under sub- s. (3) of s. 307 of the Code, the High Court has to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused. (5) The High Court may deal with the reference in two ways, namely, (i) if there are misdirections vitiating the verdict, it may, after going into the entire evidence, disregard the verdict of the jury and come to its own conclusion, and (ii) even if there are no misdirections, the High Court can interfere with the verdict of the jury if it finds the verdict "perverse in the sense of being unreasonable", "manifestly wrong", or "against the weight of evidence", or, in other words, if the verdict is such that no reasonable body of men could have reached on the evidence. (6) In the disposal of the said reference, the High Court can exercise any of the procedural powers appropriate to the occasion, such as, issuing of notice, calling for records, remanding the case, ordering a retrial, etc. We therefore, reject the first contention of learned counsel for the appellant.

29. The next question is whether the High Court was right in holding that there were misdirections in the charge to the jury. Misdirection is something which a judge in his charge tells the jury and is wrong or in a wrong manner tending to mislead them. Even an omission to mention matters which are essential to the prosecution or the defence case in order to help the jury to come to a correct verdict may also in certain circumstances amount to a misdirection. But, in either case, every misdirection or non- direction is not in itself sufficient to set aside a verdict, but it must be such that it has occasioned a failure of justice.

30. In Mushtak Hussein v. The State of Bombay MANU/SC/0026/1953 : [1953]4SCR809 , this Court laid down :

"Unless therefore it is established in a case that there has been a serious misdirection by the judge in charging the jury which has occasioned a failure of justice and has misled the jury in giving its verdict, the verdict of the jury cannot be set aside."

31. This view has been restated by this Court in a recent decision, viz., Smt. Nagindra Bala Mitra v. Sunil Chandra Roy MANU/SC/0074/1960 : 1960CriLJ1020 .

32. The High Court in its judgment referred to as many as six misdirections in the charge to the jury which in its view vitiated the verdict, and it also stated that there were many others. Learned counsel for the appellant had taken each of the said alleged misdirections and attempted to demonstrate that they were either no misdirections at all, or even if they were, they did not in any way affect the correctness of the verdict.

33. We shall now take the first and the third misdirections pointed out by Shelat, J., as they are intimately connected with each other. They are really omissions. The first omission is that throughout the entire charge there is no reference to s. 105 of the Evidence Act or to the statutory presumption laid down in that section. The second omission is that the Sessions Judge failed to explain to the jury the legal ingredients of s. 80 of the Indian Penal code, and also failed to direct them that in law the said section was not applicable to the facts of the case. To appreciate the scope of the alleged omissions, it is necessary to read the relevant provisions.

34. Section 80 of the Indian Penal Code.

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. "

35. Evidence Act.

36. Section 103 : "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. "

37. Section 105 : "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XLV of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. "

38. Section 3 : "In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

39. A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non- existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

40. Section 4 : ..... "Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

41. The legal impact of the said provisions on the question of burden of proof may be stated thus : In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, s. 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non- existence of such circumstances as proved till they are disproved.

An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in s. 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of circumstances bringing the case within the provisions of s. 80

of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged : that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under s. 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations : (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused : (see Sections 4 and 5 of the Prevention of Corruption Act). (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients : (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence : (see s. 80 of the Indian Penal Code). In the first case the burden of proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the exception lies on the accused. In the third case, though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of s. 300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a presumption is drawn under s. 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in s. 80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of s. 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of s. 300, Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder. In that event though the accused failed to bring his case within the terms of s. 80 of the Indian Penal Code, the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.

42. The English decisions relied upon by Mr. Pathak, learned counsel for the accused, may not be of much help in construing the provisions of s. 105 of the Indian Evidence Act. We would, therefore, prefer not to refer to them, except to one of the leading decisions on the subject, namely,

Woolmington v. The Director of Public Prosecutions L.R. (1935) A.C. 462. The headnote in that decision gives its gist, and it read :

"In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. "

43. In the course of the judgment Viscount Sankey, L.C., speaking for the House, made the following observations:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence..... Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."

44. These passages are not in conflict with the opinion expressed by us earlier. As in England so in India, the prosecution must prove the guilt of the accused, i.e., it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt. In India if an accused pleads an exception within the meaning of s. 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him. In England there is no provision similar to s. 80 of the Indian Penal Code, but Viscount Sankey, L.C., makes it clear that such a burden lies upon the accused if his defence is one of insanity and in a case where there is a statutory exception to the general rule of burden of proof. Such an exception we find in s. 105 of the Indian Evidence Act. Reliance is placed by learned counsel for the accused on the decision of the Privy Council in Attygalle v. Emperor A.I.R. 1936 P.C. 169 in support of the contention that notwithstanding s. 105 of the Evidence Act, the burden of establishing the absence of accident within the meaning of s. 80 of the Indian Penal Code is on the prosecution. In that case, two persons were prosecuted, one for performing an illegal operation and the other for abetting him in that crime. Under s. 106 of the Ordinance 14 of 1895 in the Ceylon Code, which corresponds to s. 106 of the Indian Evidence Act, it was enacted that when any fact was especially within the knowledge of any person, the burden of proving that fact was upon him. Relying upon that section, the Judge in his charge to the jury said :

"Miss Maye - that is the person upon whom the operation was alleged to have been performed - was unconscious and what took place in that room that three- quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says, is upon him, namely that no criminal operation took place but what took place was this and this speculum examination."

45. The Judicial Committee pointed out:

"It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge. The summing- up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there."

46. The said observations do not support the contention of learned counsel. Section 106 of Ordinance 14 of 1895 of the Ceylon Code did not cast upon the accused a burden to prove that he had not committed any crime; nor did it deal with any exception similar to that provided under s. 80 of the Indian Penal Code. It has no bearing on the construction of s. 105 of the Indian Evidence Act. The decisions of this Court in The State of Madras v. A. Vaidyanatha Iyer MANU/SC/0108/1957 : 1958CriLJ232 , which deals with s. 4 of the Prevention of Corruption Act, 1947, and C.S.D. Swami v. The State MANU/SC/0025/1959 : 1960CriLJ131 , which considers the scope of s. 5(3) of the said Act, are examples of a statute throwing the burden of proving and even of establishing the absence of some of the ingredients of the offence on the accused; and this Court held that notwithstanding the general burden on the prosecution to prove the offence, the burden of proving the absence of the ingredients of the offence under certain circumstances was on the accused. Further citations are unnecessary as, in our view, the terms of s. 105 of the Evidence Act are clear and unambiguous.

47. Mr. Pathak contends that the accused did not rely upon any exception within the meaning of s. 80 of the Indian Penal Code and that his plea all through has been only that the prosecution has failed to establish intentional killing on his part. Alternatively, he argues that as the entire evidence has been adduced both by the prosecution and by the accused, the burden of proof became only academic and the jury was in a position to come to one conclusion or other on the evidence irrespective of the burden of proof. Before the Sessions Judge the accused certainly relied upon s. 80 of the Indian Penal Code, and the Sessions Judge dealt with the defence case in his charge to the jury. In paragraph 6 of the charge, the learned Sessions Judge stated:

"Before I proceed further I have to point out another section which is section 80. You know by now that the defence of the accused is that the firing of the revolver was a matter of accident during a struggle for possession of the revolver. A struggle or a fight by itself does not exempt a person. It is the accident which exempts a person from criminal liability because there may be a fight, there may be a struggle and in the fight and in the struggle the assailant may over- power the victim and kill the deceased so that a struggle or a fight by itself does not exempt an assailant. It is only an accident, whether it is in struggle or a fight or otherwise which can exempt an assailant. It is only an accident, whether it is in a struggle or a fight of otherwise which can exempt a prisoner from criminal liability. I shall draw your attention to section 80 which says : .....

(section 80 read). You know that there are several provisions which are to be satisfied before the benefit of this exception can be claimed by an accused person and it should be that the act itself must be an accident or misfortune, there should be no criminal intention or knowledge in the doing of that act, that act itself must be done in a lawful manner and it must be done by lawful means and further in the doing of it, you must do it with proper care and caution. In this connection, therefore, even while considering the case of accident, you will have to consider all the factors, which might emerge from the evidence before you, whether it was proper care and caution to take a loaded revolver without a safety catch to the residence of the person with whom you were going to talk and if you do not get an honourable answer you were prepared to thrash him. You have also to consider this further circumstance whether it is an act with proper care and caution to keep that loaded revolver in the hand and thereafter put it aside, whether that is taking proper care and caution. This is again a question of fact and you have to determine as Judges of fact, whether the act of the accused in this case can be said to be an act which was lawfully done in a lawful manner and with proper care and caution. If it is so, then and only then can you call it accident or misfortune. This is a section which you will bear in mind when you consider the evidence in this case."

48. In this paragraph the learned Sessions Judge mixed up the ingredients of the offence with those of the exception. He did not place before the jury the distinction in the matter of burden of proof between the ingredients of the offence and those of the exception. He did not tell the jury that where the accused relied upon the exception embodied in s. 80 of the Indian Penal Code, there was a statutory presumption against him and the burden of proof was on him to rebut that presumption. What is more, he told the jury that it was for them to decide whether the act of the accused in the case could be said to be an act which was lawfully done in a lawful manner with proper care and caution. This was in effect abdicating his functions in favour of the jury. He should have explained to them the implications of the terms "lawful act", "lawful manner", "lawful means" and "with proper care and caution" and pointed out to them the application of the said legal terminology to the facts of the case. On such a charge as in the present case, it was not possible for the jury, who were laymen, to know the exact scope of the defence and also the circumstances under which the plea under s. 80 of the Indian Penal Code was made out. They would not have also known that if s. 80 of the Indian Penal Code applied, there was a presumption against the accused and the burden of proof to rebut the presumption was on him. In such circumstances, we cannot predicate that the jury understood the legal implications of s. 80 of the Indian Penal Code and the scope of the burden of proof under s. 105 of the Evidence Act, and gave their verdict correctly. Nor can we say that the jury understood the distinction between the ingredients of the offence and the circumstances that attract s. 80 of the Indian Penal Code and the impact of the proof of some of the said circumstances on the proof of the ingredients of the offence. The said omissions therefore are very grave omissions which certainly vitiated the verdict of the jury.

49. The next misdirection relates to the question of grave and sudden provocation. On this question, Shelat, J., made the following remarks:

"Thus the question whether a confession of adultery by the wife of accused to him amounts to grave and sudden provocation or not was a question of law. In my view, the learned Session Judge was in error in telling the jury that the entire question was one of fact for them to decide. It was for the learned Judge to decide as a question of law whether the sudden confession by the

wife of the accused amounted to grave and sudden provocation as against the deceased Ahuja which on the authorities referred to hereinabove it was not. He was therefore in error in placing this alternative case to the jury for their determination instead of deciding it himself."

50. The misdirection according to the learned Judge was that the Sessions Judge in his charge did not tell the jury that the sudden confession of the wife to the accused did not in law amount to sudden and grave provocation by the deceased, and instead he left the entire question to be decided by the jury. The learned judge relied upon certain English decisions and textbooks in support of his conclusion that the said question was one of law and that it was for the Judge to express his view thereon. Mr. Pathak contends that there is an essential difference between the law of England and that of India in the matter of the charge to the jury in respect of grave and sudden provocation. The House of Lords in Holmes v. Director of Public Prosecution L.R. (1946) A.C. 588 laid down the law in England thus:

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self- control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

51. Viscount Simon brought out the distinction between the respective duties of the judge and the jury succinctly by formulating the following questions:

"The distinction, therefore, is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did ?' and, if so, 'Did the accused act under the stress of such provocation' ?"

52. So far as England is concerned the judgment of the House of Lords is the last word on the subject till it is statutorily changed or modified by the House of Lords. It is not, therefore, necessary to consider the opinions of learned authors on the subject cited before us to show that the said observations did not receive their approval.

53. But Mr. Pathak contends that whatever might be the law in England, in India we are governed by the statutory provisions, and that under the explanation to Exception I to s. 300 of the Indian Penal Code, the question "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is one of fact", and therefore, unlike in England, in India both the aforesaid questions fall entirely within the scope of the jury and they are for them to decide. To put it in other words, whether a reasonable person in the circumstances of a particular case

committed the offence under provocation which was grave and sudden is a question of fact for the jury to decide. There is force in this argument, but it is not necessary to express our final opinion thereon, as the learned Attorney- General has conceded that there was no misdirection in regard to this matter.

54. The fourth misdirection found by the High Court is that the learned Sessions Judge told the jury that the prosecution relied on the circumstantial evidence and asked them to apply the stringent rule of burden of proof applicable to such cases, whereas in fact there was direct evidence of Puransingh in the shape of extra- judicial confession. In paragraph 8 of the charge the Sessions Judge said:

"In this case the prosecution relies on what is called circumstantial evidence that is to say there is no witness who can say that he saw the accused actually shooting and killing deceased. There are no direct witnesses, direct witnesses as they are called, of the event in question. Prosecution relies on certain circumstances from which they ask you to deduce an inference that it must be the accused and only the accused who must have committed this crime. That is called circumstantial evidence. It is not that prosecution cannot rely on circumstantial evidence because it is not always the case or generally the case that people who go out to commit crime will also take witnesses with them. So that it may be that in some cases the prosecution may have to rely on circumstantial evidence. Now when you are dealing with circumstantial evidence you will bear in mind certain principles, namely, that the facts on which the prosecution relies must be fully established. They must be fully and firmly established. These facts must lead to one conclusion and one only namely the guilt of the accused and lastly it must exclude all reasonable hypothesis consistent with the innocence of the accused, all reasonable hypothesis consistent with the innocence of the accused should be excluded. In other words you must come to the conclusion by all the human probability, it must be the accused and the accused only who must have committed this crime. That is the standard of proof in a case resting on circumstantial evidence."

55. Again in paragraph 11 the learned Sessions Judge observed that the jury were dealing with circumstantial evidence and graphically stated:

"It is like this, take a word, split it up into letters, the letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the circumstances together and judge for yourself whether the prosecution have established their case."

56. In paragraph 18 of the charge, the learned Sessions Judge dealt with the evidence of Puransingh separately and told the jury that if his evidence was believed, it was one of the best forms of evidence against the man who made the admission and that if thy accepted that evidence, then the story of the defence that it was an accident would become untenable. Finally he summarized all the circumstances on which the prosecution relied in paragraph 34 and one of the circumstances mentioned was the extra- judicial confession made to Puransingh. In that paragraph the learned Sessions Judge observed as follows:

"I will now summarize the circumstances on which the prosecution relies in this case. Consider whether the circumstances are established beyond all reasonable doubt. In this case you are dealing with circumstantial evidence and therefore consider whether they are fully and firmly established and consider whether they lead to one conclusion and only one conclusion that it is the accused alone who must have shot the deceased and further consider that it leaves no room for any reasonable hypothesis consistent with the innocence of the accused regard being had to all the circumstances in the case and the conclusion that you have to come to should be of this nature and by all human probability it must be the accused and the accused alone who must have committed this crime."

57. Finally the learned Sessions Judge told them:

"If on the other hand you think that the circumstances on which the prosecution relies are fully and firmly established, that they lead to one and the only conclusion and one only, of the guilt of the accused and that they exclude all reasonable hypothesis of the innocence of the accused then and in that case it will be your duty which you are bound by the oath to bring verdict accordingly without any fear or any favour and without regard being had to any consequence that this verdict might lead to."

58. Mr. Pathak contends that the learned Sessions Judge dealt with the evidence in two parts, in one part he explained to the jury the well settled rule of approach to circumstantial evidence, whereas in another part he clearly and definitely pointed to the jury the great evidentiary value of the extra- judicial confession of guilt by the accused made to Puransingh, if that was believed by them. He therefore, argues that there was no scope for any confusion in the minds of the jurors in regard to their approach to the evidence or in regard to the evidentiary value of the extra-judicial confession. The argument proceeds that even if there was a misdirection, it was not such as to vitiate the verdict of the jury. It is not possible to accept this argument. We have got to look at the question from the standpoint of the possible effect of the said misdirection in the charge on the jury, who are laymen. In more than one place the learned Sessions Judge pointed out that the case depended upon circumstantial evidence and that the jury should apply the rule of circumstantial evidence settled by decisions. Though at one place he emphasized upon evidentiary value of a confession he later on included that confession also as one of the circumstances and again directed the jury to apply the rule of circumstantial evidence. It is not disputed that the extra- judicial confession made to Puransingh is direct piece of evidence and that the stringent rule of approach to circumstantial evidence does not apply to it. If that confession was true, it cannot be disputed that the approach of the jury to the evidence would be different from that if that was excluded. It is not possible to predicate that the jury did not accept that confession and therefore applied the rule of circumstantial evidence. It may well have been that the jury accepted it and still were guided by the rule of circumstantial evidence as pointed out by the learned Sessions Judge. In these circumstances we must hold, agreeing with the High Court, that this is a grave misdirection affecting the correctness of the verdict.

59. The next misdirection relied upon by the High Court is the circumstance that the three letters written by Sylvia were not read to the jury by the learned Sessions Judge in his charge and that the jury were not told of their effect on the credibility of the evidence of Sylvia and Nanavati. Shelat, J., observed in regard to this circumstance thus :

"It cannot be gainsaid that these letters were important documents disclosing the state of mind of Mrs. Nanavati and the deceased to a certain extent. If these letters had been read in juxtaposition of Mrs. Nanavati's evidence they would have shown that her statement that she felt that Ahuja had asked her not to see him for a month for the purpose of backing out of the intended marriage was not correct and that they had agreed not to see each other for the purpose of giving her and also to him an opportunity to coolly think out the implications of such a marriage and then to make up her own mind on her own. The letters would also show that when the accused asked her, as he said in his evidence, whether Ahuja would marry her, it was not probable that she would fence that question. On the other hand, she would, in all probability, have told him that they had already decided to marry. In my view, the omission to refer even once to these letters in the charge especially in view of Mrs. Nanavati's evidence was a non- direction amounting to misdirection."

60. Mr. Pathak contends that these letters were read to the jury by counsel on both sides and a reference was also made to them in the evidence of Sylvia and, therefore the jury clearly knew the contents of the letters, and that in the circumstances the non- mention of the contents of the letters by the Sessions Judge was not a misdirection and even if it was it did not affect the verdict of the jury. In this context reliance is placed upon two English decisions, namely, R. v. Roberts [1942] 1 All. E.R. 187 and R. v. Attfield [1961] 3 All. E.R. 243. In the former case the appellant was prosecuted for the murder of a girl by shooting her with a service rifle and he pleaded accident as his defence. The Judge in his summing- up, among other defects, omitted to refer to the evidence of certain witnesses; the jury returned a verdict of "guilty" not the charge of murder and it was accepted by the judge, it was contended that the omission to refer to the evidence of certain witnesses was a misdirection. Rejecting that plea, Humphreys, J., observed :

"The jury had the Dagduas before them. They had the whole of the evidence before them, and they had, just before the summing up, comments upon those matters from counsel for the defence, and from counsel for the prosecution. It is incredible that they could have forgotten them or that they could have misunderstood the matter in any way, or thought, by reason of the fact that the judge did not think it necessary to refer to them, that they were not to pay attention to them. We do not think there is anything in that point at all. A judge, in summing- up, is not obliged to refer to every witness in the case, unless he thinks it necessary to do so. In saying this, the court is by no means saying that it might not have been more satisfactory if the judge had referred to the evidence of the two witnesses, seeing that he did not think it necessary to refer to some of the Dagduas made by the accused after the occurrence. No doubt it would have been more satisfactory from the point of view of the accused. All we are saying is that we are satisfied that there was no misdirection in law on the part of judge in omitting those statements, and it was within his discretion."

61. This passage does not lay down as a proposition of law that however important certain documents or pieces of evidence may be from the standpoint of the accused or the prosecution, the judge need not refer to or explain them in his summing- up to the jury, and, if he did not, it would not amount to misdirection under any circumstances. In that case some Dagduas made by witnesses were not specifically brought to the notice of the jury and the Court held in the circumstances of that case that there was no misdirection. In the latter case the facts were simple

and the evidence was short; the judge summed up the case directing the jury as to the law but did not deal with evidence except in regard to the appellant's character. The jury convicted the appellant. The court held that, "although in a complicated and lengthy case it was incumbent on the court to deal with the evidence in summing- up, yet where, as in the present case, the issues could be simply and clearly stated, it was not fatal defect for the evidence not to be reviewed in the summing- up." This is also a decision on the facts of that case. That apart, we are not concerned with a simple case here but with a complicated one. This decision does not help us in deciding the point raised. Whether a particular omission by a judge to place before the jury certain evidence amounts to a misdirection or not falls to be decided on the facts of each case.

62. These letters show the exact position of Sylvia in the context of her intended marriage with Ahuja, and help to test the truthfulness or otherwise of some of the assertions made by her to Nanavati. A perusal of these letters indicates that Sylvia and Ahuja were on intimate terms, that Ahuja was willing to marry her, that they had made up their minds to marry, but agreed to keep apart for a month to consider coolly whether they really wanted to marry in view of the serious consequences involved in taking such a step. Both Nanavati and Sylvia gave evidence giving an impression that Ahuja was backing out of his promise to marry Sylvia and that was the main reason for Nanavati going to Ahuja's flat for an explanation. If the Judge had read these letters in his charge and explained the implication of the contents thereof in relation to the evidence given by Nanavati and Sylvia, it would not have been possible to predicate whether the jury would have believed the evidence of Nanavati and Sylvia. If the marriage between them was a settled affair and if the only obstruction in the way was Nanavati, and if Nanavati had expressed his willingness to be out of the way and even to help them to marry, their evidence that Sylvia did not answer the direct question about the intentions of Ahuja to marry her, and the evidence of Nanavati that it became necessary for him to go to Ahuja's flat to ascertain the latter's intentions might not have been believed by the jury. It is no answer to say that the letters were read to the jury at different stages of the trial or that they might have read the letters themselves for in a jury trial, especially where innumerable documents are filed, it is difficult for a lay jury, unless properly directed, to realise the relative importance of specified documents in the context of different aspects of a case. That is why the Code of Criminal Procedure, under s. 297 thereof, imposes a duty on the Sessions Judge to charge the jury after the entire evidence is given, and after counsel appearing for the accused and counsel appearing for the prosecution have addressed them. The object of the charge to the jury by the Judge is clearly to enable him to explain the law and also to place before them the facts and circumstances of the case both for and against the prosecution in order to help them in arriving at a right decision. The fact that the letters were read to the jury by prosecution or by the counsel for the defence is not of much relevance, for they would place the evidence before the jury from different angles to induce them to accept their respective versions. That fact in itself cannot absolve the Judge from his clear duty to put the contents of the letters before the jury from the correct perspective. We are in agreement with the High Court that this was a clear misdirection which might have affected the verdict of the jury.

63. The next defect pointed out by the High Court is that the Sessions Judge allowed the counsel for the accused to elicit from the police officer, Phansalkar, what Puransingh is alleged to have stated to him orally, in order to contradict the evidence of Puransingh in the court, and the Judge also dealt with the evidence so elicited in paragraph 18 of his charge to the jury. This contention

cannot be fully appreciated unless some relevant facts are stated. Puransingh was examined for the prosecution as P.W. 12. He was a watchman of "Jivan Jyot". He deposed that when the accused was leaving the compound of the said building, he asked him why he had killed Ahuja, and the accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. At about 5- 5 P.M. on April 27, 1959, this witness reported this incident to Gamdevi Police Station. On that day Phansalkar (P.W. 13) was the Station House Duty Officer at that station from 2 to 8 P.M. On the basis of the statement of Puransingh, Phansalkar went in a jeep with Puransingh to the place of the alleged offence. Puransingh said in his evidence that he told Phansalkar in the jeep what the accused had told him when he was leaving the compound of "Jivan Jyot". After reaching the place of the alleged offence, Phansalkar learnt from a doctor that Ahuja was dead and he also made enquiries from Miss Mammie, the sister of the deceased. He did not record the statement made by Puransingh. But latter on between 10 and 10-30 P.M. on the same day, Phansalkar made a statement to Inspector Mokashi what Puransingh had told him and that statement was recorded by Mokashi. In the statement taken by Mokashi it was not recorded that Puransingh told Phansalkar that the accused told him why he had killed Ahuja. When Phansalkar was in the witness- box to a question put to him in cross- examination he answered that Puransingh did not tell him that he had asked Nanavati whey he killed Ahuja and that the accused replied that he had a quarrel with the deceased as the latter had "connections" with his wife and that he had killed him. The learned Sessions Judge not only allowed the evidence to go in but also, in paragraph 18 of his charge to the jury, referred to that statement. After giving the summary of the evidence given by Puransingh, the learned Sessions Judge proceeded to state in his charge to the jury :

"Now the conversation between him and Phansalkar (Sub- Inspector) was brought on record in which what the chowkidar told Sub- Inspector Phansalkar was, the servants of the flat of Miss Ahuja had informed him that a Naval Officer was going away in the car. He and the servants had tried to stop him but the said officer drove away in the car saying that he was going to the Police Station and to Sub- Inspector Phansalkar he did not state about the admission made by Mr. Nanavati to him that he killed the deceased as the deceased had connections with his wife. The chowkidar said that he had told this also to sub- Inspector Phansalkar. Sub- Inspector Phansalkar said the Puransingh had not made this statement to him. You will remember that this chowkidar went to the police station at Gamdevi to give information about this crime and while coming back he was with Sub- Inspector Phansalkar and Sub- Inspector Phansalkar in his own statement to Mr. Mokashi has referred to the conversation which he had between him and this witness Puransingh and that had been brought on record as a contradiction."

64. The learned Sessions Judge then proceeded to state other circumstances and observed, "Consider whether you will accept the evidence of Puransingh or not." It is manifest from the summing- up that the learned Sessions Judge not only read to the jury the evidence of Phansalkar wherein he stated that Puransingh did not tell him that the accused told him why he killed Ahuja but also did not tell the jury that the evidence of Phansalkar was not admissible to contradict the evidence of Puransingh. It is not possible to predicate what was the effect of the alleged contradiction on the mind of the jury and whether they had not rejected the evidence of Puransingh because of that contradiction. If the said evidence was not admissible, the placing of that evidence before the jury was certainly a grave misdirection which must have affected their verdict. The question is whether such evidence is legally admissible. The alleged omission was

brought on record in the cross- examination of Phansalkar, and, after having brought it in, it was sought to be used to contradict the evidence of Puransingh. Learned Attorney- General contends that the statement made by Phansalkar to Inspector Mokashi could be used only to contradict the evidence of Phansalkar and not that of Puransingh under s. 162 of the Code of Criminal Procedure; and the statement made by Puransingh to Phansalkar, it not having been recorded, could not be used at all to contradict the evidence of Puransingh under the said section. He further argues that the alleged omission not being a contradiction, it could in no event be used to contradict Puransingh. Learned counsel for the accused, on the other hand, contends that the alleged statement was made to a police officer before the investigation commenced and, therefore, it was not hit by s. 162 of the Code of Criminal Procedure, and it could be used to contradict the evidence of Puransingh. Section 162 of the Code of Criminal Procedure reads :

(1) No statement made by any person to a Police officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872), and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination.

65. The preliminary condition for the application of s. 162 of the Code is that the statement should have been made to a police- officer in the course of an investigation under Chapter XIV of the Code. If it was not made in the course of such investigation, the admissibility of such statement would not be governed by s. 162 of the Code. The question, therefore, is whether Puransingh made the statement to Phansalkar in the course of investigation. Section 154 of the Code says that every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police- station shall be reduced to writing by him or under his direction; and section 156(1) is to the effect that any officer in charge of a police- station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIV relating to the place of inquiry or trial. The evidence in the case clearly establishes that Phansalkar, being the Station House Duty Officer at Gamdevi Police- station on April 27, 1959, from 2 to 8 P.M., was an officer in charge of the Police- station within the meaning of the said sections. Puransingh in his evidence says that he went to Gamdevi Police- station and gave the information of the shooting incident to the Gamdevi Police. Phansalkar in his evidence says that on the basis of the information he went along with Puransingh to the place of the alleged offence. His evidence also discloses that he had questioned Puransingh, the doctor and also Miss Mammie in regard to the said incident. On this uncontradicted evidence there cannot be any doubt that the investigation of the offence had commenced and Puransingh made the statement

to the police officer in the course of the said investigation. But it is said that, as the information given by Puransingh was not recorded by Police Officer Phansalkar as he should do under s. 154 of the Code of Criminal Procedure, no investigation in law could have commenced with the meaning of s. 156 of the Code. The question whether investigation had commenced or not is a question of fact and it does not depend upon any irregularity committed in the matter of recording the first information report by the concerned police officer. If so, s. 162 of the Code is immediately attracted. Under s. 162(1) of the Code, no statement made by any person to a Police-officer in the course of an investigation can be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. But the proviso lifts the ban and says that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing, any part of his statement, if duly proved, may be used by the accused to contradict such witness. The proviso cannot be invoked to bring in the statement made by Phansalkar to Inspector Mokashi in the cross- examination of Phansalkar, for the statement made by him was not used to contradict the evidence of Phansalkar. The proviso cannot obviously apply to the oral statement made by Puransingh to Phansalkar, for the said statement of Puransingh has not been reduced into writing. The faint argument of learned counsel for the accused that the statement of Phansalkar recorded by Inspector Mokashi can be treated as a recorded statement of Puransingh himself is to be stated only to be rejected, for it is impossible to treat the recorded statement of Phansalkar as the recorded statement of Puransingh by a police- officer. If so, the question whether the alleged omission of what the accused told Puransingh in Puransingh's oral statement to Phansalkar could be used to contradict Puransingh, in view of the decision of this Court in Tahsildar Singh's case MANU/SC/0053/1959 : [[1959] Supp. (2) S.C.R. 875], does not arise for consideration. We are, therefore, clearly of the opinion that not only the learned Sessions Judge acted illegally in admitting the alleged omission in evidence to contradict the evidence of Puransingh, but also clearly misdirected himself in placing the said evidence before the jury for their consideration.

66. In addition to the misdirections pointed out by the High Court, the learned Attorney- General relied upon another alleged misdirection by the learned Sessions Judge in his charge. In paragraph 28 of the charge, the learned Sessions Judge stated thus :

"No one challenges the marksmanship of the accused but Commodore Nanda had come to tell you that he is a good shot and Mr. Kandalawala said that here was a man and good marksman, would have shot him, riddled him with bullets perpendicularly and not that way and he further said that as it is not done in this case it shows that the accused is a good marksman and a good shot and he would not have done this thing, this is the argument."

67. The learned Attorney- General points out that the learned Sessions Judge was wrong in saying that no one challenged the marksmanship of the accused, for Commodore Nanda was examined at length on the competency of the accused as a marksman. Though this is a misdirection, we do not think that the said passage, having regard to the other circumstances of the case, could have in any way affected the verdict of the jury. It is, therefore, clear that there were grave misdirections in this case, affecting the verdict of the jury, and the High Court was certainly within its rights to consider the evidence and come to its own conclusion thereon.

68. The learned Attorney- General contends that if he was right in his contention that the High Court could consider the evidence afresh and come to its own conclusion, in view of the said misdirection, this Court should not, in exercise of its discretionary jurisdiction under Art. 136 of the Constitutions interfere with the findings of the High Court. There is force in this argument. But, as we have heard counsel at great length, we propose to discuss the evidence.

69. We shall now proceed to consider the evidence in the case. The evidence can be divided into three parts, namely, (i) evidence relating to the conduct of the accused before the shooting incident, (ii) evidence in regard to the conduct of the accused after the incident, and (iii) evidence in regard to the actual shooting in the bed- room of Ahuja.

70. We may start with the evidence of the accused wherein he gives the circumstances under which he came to know of the illicit intimacy of his wife Sylvia with the deceased Ahuja, and the reasons for which he went to the flat of Ahuja in the evening of April 27, 1959. After his brother and his brother's wife, who stayed with him for a few days, had left, he found his wife behaving strangely and without affection towards him. Though on that ground he was unhappy and worried, he did not suspect of her unfaithfulness to him. On the morning of April 27, 1959, he and his wife took out their sick dog to the Parel Animal Hospital. On their way back, they stopped at the Metro Cinema and his wife bought some tickets for the 3- 30 show. After coming home, they were sitting in the room for the lunch to be served when he put his arm around his wife affectionately and she seemed to go tense and was very unresponsive. After lunch, when his wife was reading in the sitting room, he told her "Look, we must get these things straight" or something like that, and "Do you still love me ?" As she did not answer, he asked her "Are you in love with some one else ?", but she gave no answer. At that time he remembered that she had not been to a party given by his brother when he was away on the sea and when asked why she did not go, she told him that she had a previous dinner engagement with Miss Ahuja. On the basis of this incident, he asked her "Is it Ahuja ?" and she said "Yes." When he asked her "Have you been faithful to me ?", she shook her head to indicate "No." Sylvia in her evidence, as D.W. 10, broadly supported this version. It appears to us that this is clearly a made- up conversation and an unnatural one too. Is it likely that Nanavati, who says in his evidence that prior to April 27, 1959, he did not think that his wife was unfaithful to him, would have suddenly thought that she had a lover on the basis of a trivial circumstance of her being unresponsive when he put his arm around her affectionately ? Her coldness towards him might have been due to many reasons. Unless he had a suspicion earlier or was informed by somebody that she was unfaithful to him, this conduct of Nanavati in suspecting his wife on the basis of the said circumstance does not appear to be the natural reaction of a husband. The recollection of her preference to attend the dinner given by Miss Mammie to that of his brother, in the absence of an earlier suspicion or information, could not have flashed on his mind the image of Ahuja as a possible lover of his wife. There was nothing extraordinary in his wife keeping a previous engagement with Mis Mammie and particularly when she could rely upon her close relations not to misunderstand her. The circumstances under which the confession of unfaithfulness is alleged to have been made do not appear to be natural. This inference is also reinforced by the fact that soon after the confession, which is alleged to have upset him so much, he is said to have driven his wife and children to the

cinema. If the confession of illicit intimacy between Sylvia and Ahuja was made so suddenly at lunch time, even if she had purchased the tickets, it is not likely that he would have taken her and the children to the cinema. Nanavati then proceeds to say in his evidence : on his wife admitting her illicit intimacy with Ahuja, he was absolutely stunned; he then got up and said that he must go and settle the matter with the swine; he asked her what were the intentions of Ahuja and whether Ahuja was prepared to marry her and look after the children; he wanted an explanation from Ahuja for his caddish conduct. In the cross- examination he further elaborated on his intentions thus : He thought of having the matters settled with Ahuja; he would find out from him whether he would take an honourable way out of the situation; and he would thrash him if he refused to do so. The honourable course which he expected of the deceased was to marry his wife and look after the children. He made it clear further that when he went to see Ahuja the main thing in his mind was to find out what Ahuja's intentions were towards his wife and children and to find out the explanation for his conduct. Sylvia in her evidence says that when she confessed her unfaithfulness to Nanavati, the latter suddenly got up rather excitedly and said that he wanted to go to Ahuja's flat and square up the things. Briefly stated, Nanavati, according to him, went to Ahuja's flat to ask for an explanation for seducing his wife and to find out whether he would marry Sylvia and take care of the children. Is it likely that a person, situated as Nanavati was, would have reacted in the manner stated by him ? It is true that different persons react, under similar circumstances, differently. A husband to whom his wife confessed of infidelity may kill his wife, another may kill his wife as well as her paramour, the third, who is more sentimental, may commit suicide, and the more sophisticated one may give divorce to her and marry another. But it is most improbable, even impossible, that a husband who has been deceived by his wife would voluntarily go to the house of his wife's paramour to ascertain his intentions, and, what is more, to ask him to take charge of his children. What was the explanation Nanavati wanted to get from Ahuja ? His wife confessed that she had illicit intimacy with Ahuja. She is not a young girl, but a woman with three children. There was no question of Ahuja seducing an innocent girl, but both Ahuja and Sylvia must have been willing parties to the illicit intimacy between them. That apart, it is clear from the evidence that Ahuja and Sylvia had decided to marry and, therefore, no further elucidation of the intention of Ahuja by Nanavati was necessary at all. It is true that Nanavati says in his evidence that when he asked her whether Ahuja was prepared to marry her and look after the children, she did not give any proper rely; and Sylvia also in her evidence says that when her husband asked her whether Ahuja was willing to marry her and look after the children she avoided answering that question as she was too ashamed to admit that Ahuja was trying to back out from the promise to marry her. That this version is not true is amply borne out by the letters written by Sylvia to Ahuja. The first letter written by Sylvia is dated May 24, 1958, but that was sent to him only on March 19, 1959, along with another letter. In that letter dated May 24, 1958, she stated :

"Last night when you spoke about your need to marry and about the various girls you may marry, something inside me snapped and I know that I could not bear the thought of your loving or being close to someone else."

71. Reliance is placed upon these words by learned counsel for the accused in support of his contention that Ahuja intended to marry another girl. But this letter is of May 1958 and by that time it does not appear that there was any arrangement between Sylvia and Ahuja to marry. It may well have been that Ahuja was telling Sylvia about his intentions to marry another girl to

make her jealous and to fall in for him. But as days passed by, the relationship between them had became very intimate and they began to love each other. In the letter dated March 19, 1959, she said : "Take a chance on our happiness, my love. I will do my best to make you happy; I love you, I want you so much that everything is bound to work out well." The last sentence indicates that they had planned to marry. Whatever ambiguity there may be in these words, the letter dated April 17, 1959, written ten days prior to the shooting incident, dispels it; therein she writes.

"In any case nothing is going to stop my coming to you. My decision is made and I do not change my mind. I am taking this month so that we may afterwards say we gave ourselves every chance and we know what we are doing. I am torturing myself in every possible way as you asked, so that, there will be no surprise afterwards."

72. This letter clearly demonstrates that she agreed not to see Ahuja for a month, not because that Ahuja refused to marry her, but because it was settled that they should marry, and that in view of the far- reaching effects of the separation from her husband on her future life and that of her children, the lovers wanted to live separately to judge for themselves whether they really loved each other so much as to marry. In the cross- examination she tried to wriggle out of these letters and sought to explain them away; but the clear phraseology of the last letter speaks for itself, and her oral evidence, contrary to the contents of the letters, must be rejected. We have no doubt that her evidence, not only in regard to the question of marriage but also in regard to other matters, indicates that having lost her lover, out of necessity or out of deep penitence for her past misbehavior, she is out to help her husband in his defence. This correspondence belies the entire story that Sylvia did not reply to Nanavati when the latter asked her whether Ahuja was willing to marry her and that that was the reason why Nanavati wanted to visit Ahuja to ask him about his intentions. We cannot visualize Nanavati as a romantic lover determined to immolate himself to give opportunity to his unfaithful wife to start a new life of happiness and love with her paramour after convincing him that the only honourable course open to him was to marry her and take over his children. Nanavati was not ignorant of the ways of life or so gullible as to expect any chivalry or honour in a man like Ahuja. He is an experienced Naval Officer and not a sentimental hero of a novel. The reason therefore for Nanavati going to Ahuja's flat must be something other than asking him for an explanation and to ascertain his intention about marrying his wife and looking after the children.

73. Then, according to Nanavati, he drove his wife and children to cinema, and promising them to come and pick them up at the end of the show at about 6 P.M., he drove straight to his ship. He would say that he went to his ship to get medicine for his sick dog. Though ordinarily this statement would be insignificant, in the context of the conduct of Nanavati, it acquires significance. In the beginning of his evidence, he says that on the morning of the day of the incident he and his wife took out their sick dog to the Parel Animal Hospital. It is not his evidence that after going to the hospital he went to his ship before returning home. It is not even suggested that in the ship there was a dispensary catering medicine for animals. This statement, therefore, is not true and he did not go to the ship for getting medicine for his dog but for some other purpose, and that purpose is clear from his subsequent evidence. He met Captain Kolhi and asked for his permission to draw a revolver and six rounds because he was going to drive to Ahmednagar by night. Captain Kolhi gave him the revolver and six rounds, he immediately

loaded the revolver with all the six rounds and put the revolver inside an envelope which was lying in his cabin. It is not the case of the accused that he really wanted to go to Ahmednagar and he wanted the revolver for his safety. Then why did he take the revolver ? According to him, he wanted to shoot himself after driving far away from his children. But he did not shoot himself either before or after Ahuja was shot dead. The taking of the revolver on a false pretext and loading it with six cartridges indicate the intention on his part to shoot somebody with it.

74. Then the accused proceeded to state that he put the envelope containing the revolver in his car and found himself driving to Ahuja's office. At Ahuja's office he went in keeping the revolver in the car, and asked Talaja, the Sales Manager of Universal Motors of which Ahuja was the proprietor whether Ahuja was inside. He was told that Ahuja was not there. Before leaving Ahuja's office, the accused looked for Ahuja in the Show Room, but Ahuja was not there. In the cross- examination no question was put to Nanavati in regard to his statement that he kept the revolver in the car when he entered Ahuja's office. On the basis of this statement, it is contended that if Nanavati had intended to shoot Ahuja he would have taken the revolver inside Ahuja's office. From this circumstance it is not possible to say that Nanavati's intention was not to shoot Ahuja. Even if his statement were true, it might well have been that he would have gone to Ahuja's office not to shoot him there but to ascertain whether he had left the office for his flat. Whatever it may be, from Ahuja's office he straightway drove to the flat of Ahuja. His conduct at the flat is particularly significant. His version is that he parked his car in the house compound near the steps, went up the steps, but remembered that his wife had told him that Ahuja might shoot him and so he went back to his car, took the envelope containing the revolver, and went up to the flat. He rang the doorbell; when a servant opened the door, he asked him whether Ahuja was in. Having ascertained that Ahuja was in the house, he walked to his bedroom, opened the door and went in shutting the door behind him. This conduct is only consistent with his intention to shoot Ahuja. A person, who wants to seek an interview with another in order to get an explanation for his conduct or to ascertain his intentions in regard to his wife and children, would go and sit in the drawing- room and ask the servant to inform his master that he had come to see him. He would not have gone straight into the bed- room of another with a loaded revolver in hand and closed the door behind. This was the conduct of an enraged man who had gone to wreak vengeance on a person who did him a grievous wrong. But it is said that he had taken the loaded revolver with him as his wife had told him that Ahuja might shoot him. Earlier in his cross- examination he said that when he told her that he must go and settle the matter with the "swine" she put her hand upon his arm and said, "No, No, you must not go there, don't go there, he may shoot you." Sylvia in her evidence corroborates his evidence in this respect : But Sylvia has been cross- examined and she said that she knew that Ahuja had a gun and she had seen it in Ashoka Hotel in New Delhi and that she had not seen any revolver at the residence of Ahuja at any time. It is also in evidence that Ahuja had not licence for a revolver and no revolver of his was found in his bed- room. In the circumstances, we must say that Sylvia was only attempting to help Nanavati in his defence. We think that the evidence of Nanavati supported by that of Sylvia was a collusive attempt on their part to explain away the otherwise serious implication of Nanavati carrying the loaded revolver into the bed- room of Ahuja. That part of the version of the accused in regard to the manner of his entry into the bed- room of Ahuja, was also supported by the evidence of Anjani (P.W. 8), the bearer, and Deepak, the Cook. Anjani opened the door of the flat to Nanavati at about 4- 20 P.M. He served tea to his master at about 4- 15 P.M. Ahuja then telephoned to ascertain the correct time and then went to his bed- room. About five minutes

thereafter this witness went to the bed- room of his master to bring back the tea- tray from there, and at that time his master went into the bathroom for his bath. Thereafter, Anjani went to the kitchen and was preparing tea when he heard the door- bell. He then opened the door to Nanavati. This evidence shows that at about 4- 20 P.M. Ahuja was taking his bath in the bathroom and immediately thereafter Nanavati entered the bed- room. Deepak, the cook of Ahuja, also heard the ringing of the door- bell. He saw the accused opening the door of the bed- room with a brown envelope in his hand and calling the accused by his name "Prem"; he also saw his master having a towel wrapped around his waist and combing his hair standing before the dressing-table, when the accused entered the room and closed the door behind him. These two witnesses are natural witnesses and they have been examined by the police on the same day and nothing has been elicited against them to discredit their evidence. The small discrepancies in their evidence do not in any way affect their credibility. A few seconds thereafter, Mammie, the sister of the deceased, heard the crack of the window pane. The time that elapsed between Nanavati entering the bed- room of Ahuja and her hearing the noise was about 15 to 20 seconds. She describes the time that elapsed between the two events as the time taken by her to take up her saree from the door of her dressing- room and her coming to the bed- room door. Nanavati in his evidence says that he was in the bed- room of Ahuja for about 30 to 60 seconds. Whether it was 20 seconds, as Miss Mammie says, or 30 to 60 seconds, as Nanavati deposes, the entire incident of shooting took place in a few seconds.

75. Immediately after the sounds were heard, Anjani and Miss Mammie entered the bed- room and saw the accused.

76. The evidence discussed so far discloses clearly that Sylvia confessed to Nanavati of her illicit intimacy with Ahuja; that Nanavati went to his ship at about 3.30 P.M. and took a revolver and six rounds on a false pretext and loaded the revolver with six rounds; that thereafter he went to the office of Ahuja to ascertain his whereabouts, but was told that Ahuja had left for his house; that the accused then went to the flat of the deceased at about 4- 20 P.M.; that he entered the flat and then the bed- room unceremoniously with the loaded revolver, closed the door behind him and a few seconds thereafter sounds were heard by Miss Mammie, the sister of the deceased, and Anjani, a servant; that when Miss Mammie and Anjani entered the bed- room, they saw the accused with the revolver in his hand, and found Ahuja lying on the floor of the bathroom. This conduct of the accused to say the least, is very damaging for the defence and indeed in itself ordinarily sufficient to implicate him in the murder of Ahuja.

77. Now we shall scrutinize the evidence to ascertain the conduct of the accused from the time he was found in the bed- room of Ahuja till he surrendered himself to the police. Immediately after the shooting, Anjani and Miss Mammie went into the bed- room of the deceased. Anjani says in his evidence that he saw the accused facing the direction of his master who was lying in the bathroom.; that at that time the accused was having a "pistol" in his hand; that when he opened the door, the accused turned his face towards this witness and saying that nobody should come in his way or else he would shoot at them, he brought his "pistol" near the chest of the witness;

and that in the meantime Miss Mammie came there, and said that the accused had killed her brother.

78. Miss Mammie in her evidence says that on hearing the sounds, she went into the bed- room of her brother, and there she saw the accused nearer to the radiogram than to the door with a gun in his hand; that she asked the accused "what is this ?" but she did not hear the accused saying anything.

79. It is pointed out that there are material contradictions between what was stated by Miss Mammie and what was stated by Anjani. We do not see any material contradictions. Miss Mammie might not have heard what the accused said either because she came there after the aforesaid words were uttered or because in her anxiety and worry she did not hear the words. The different versions given by the two witnesses in regard to what Miss Mammie said to the accused is not of any importance as the import of what both of them said is practically the same. Anjani opened the door to admit Nanavati into the flat and when he heard the noise he must have entered the room. Nanavati himself admitted that he saw a servant in the room, though he did not know him by name; he also saw Miss Mammie in the room. These small discrepancies, therefore, do not really affect their credibility. In effect and substance both saw Nanavati with a fire- arm in his hand - though one said pistol and the other gun - going away from the room without explaining to Miss Mammie his conduct and even threatening Anjani. This could only be the conduct of a person who had committed a deliberate murder and not of one who had shot the deceased by accident. If the accused had shot the diseased by accident, he would have been in a depressed and apologetic mood and would have tried to explain his conduct to Miss Mammie or would have phoned for a doctor or asked her to send for one or at any rate he would not have been in a belligerent mood and threatened Anjani with his revolver. Learned counsel for the accused argues that in the circumstances in which the accused was placed soon after the accidental shooting he could not have convinced Miss Mammie with any amount of explanation and therefore there was no point in seeking to explain his conduct to her. But whether Miss Mammie would have been convinced by his explanation or not, if Nanavati had shot the deceased by accident, he would certainly have told her particularly when he knew her before and when she happened to be the sister of the man shot at. Assuming that the suddenness of the accidental shooting had so benumbed his senses that he failed to explain the circumstances of the shooting to her, the same cannot be said when he met others at the gate. After the accused had come out of the flat of Ahuja, he got into his car and took a turn in the compound. He was stopped near the gate by Puransingh, P.W. 12, the watchman of the building. As Anjani had told him that the accused had killed Ahuja the watchman asked him why he had killed his master. The accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. The watchman told the accused that he should not go away from the place before the police arrived, but the accused told him that he was going to the police and that if he wanted he could also come with him in the car. At that time Anjani was standing in front of the car and Deepak was a few feet away. Nanavati says in his evidence that it was not true that he told Puransingh that he had killed the deceased as the latter had "connection" with his wife and that the whole idea was quite absurd. Puransingh is not shaken in his cross- examination. He is an independent witness; though he is a watchman of Jivan Jyot, he was not an employee of the deceased. After the accused left the place, this witness, at the instance of Miss Mammie, went to

Gamdevi Police Station and reported the incident to the police officer Phansalkar, who was in charge of the police- station at that time, at about 5- 5 P.M. and came along with the said police-officer in the jeep to Jivan Jyot at about 7 P.M. he went along with the police- officer to the police station where his statement was recorded by Inspector Mokashi late in the night. It is suggested that this witness had conspired with Deepak and Anjani and that he was giving false evidence. We do not see any force in this contention. His statement was regarded on the night of the incident itself. It is impossible to conceive that Miss Mammie, who must have had a shock, would have been in a position to coach him up to give a false statement. Indeed, her evidence discloses that she was drugged to sleep that night. Can it be said that these two illiterate witnesses, Anjani and Deepak, would have persuaded him to make false statement that night. Though both of them were present when Puransingh questioned the accused, they deposed that they were at a distance and therefore they did not hear what the accused told Puransingh. If they had all colluded together and were prepared to speak to a false case, they could have easily supported Puransingh by stating that they also heard what the accused told Puransingh. We also do not think that these two witnesses are so intelligent as to visualize the possible defence and beforehand coached Puransingh to make a false statement on the very night of the incident. Nor do we find any inherent improbability in his evidence if really Nanavati had committed the murder. Having shot Ahuja he was going to surrender himself to the police; he knew that he had committed a crime; he was not a hardened criminal and must have had a moral conviction that he was justified in doing what he did. It was quite natural, therefore, for him to confess his guilt and justify his act to the watchman who stopped him and asked him to wait there till the police came. In the mood in which Nanavati was soon after the shooting, artificial standards of status or position would not have weighed in his mind if he was going to confess and surrender to the police. We have gone through the evidence of Puransingh and we do not see any justification to reject his evidence.

80. Leaving Jivan Jyot the accused drove his car and came to Raj Bhavan Gate. There he met a police constable and asked him for the location of the nearest police station. The direction given by the police constable were not clear and, therefore, the accused requested him to go along with him to the police station, but the constable told him that as he was on duty, he could not follow him. This is a small incident in itself, but it only shows that the accused was anxious to surrender himself to the police. This would not have been the conduct of the accused, if he had shot another by accident, for in that event he would have approached a lawyer or a friend for advice before reporting the incident to the police. As the police constable was not able to give him clear directions in regard to the location of the nearest police station, the accused went to the house of Commander Samuel, the Naval Provost Marshal. What happened between the accused and Samuel is stated by Samuel in his evidence as P.W. 10. According to his evidence, on April 27, 1959, at about 4.45 P.M., he was standing at the window of his study in his flat on the ground floor at New Queen's Road. His window opens out on the road near the band stand. The accused came up to the window and he was in a dazed condition. The witness asked him what had happened, and the accused told him, "I do not quite know what happened, but I think I have shot a man." The witness asked him how it happened, and the accused told him that the man had seduced his wife and he would not stand it. When the witness asked him to come inside and explain everything calmly, the accused said "No, thank you, I must go", "please tell me where I should go and report." Though he asked him again to come in, the accused did not go inside and, therefore, this witness instructed him to go to the C.I.D. Office and report to the Deputy

Commissioner Lobo. The accused asked him to phone to Lobo and he telephoned to Lobo and told him that an officer by name Commander Nanavati was involved in an affair and that he was on the way to report to him. Nanavati in his evidence practically corroborates the evidence of Samuel. Nanavati's version in regard to this incident is as follows :

"I told him that something terrible had happened, that I did not know quite what had happened but I thought I had shot a man. He asked me where this had happened. I told him at Nepean Sea Road. He asked me why I had been there. I told him I went there because a fellow there had seduced my wife and I would not stand for it. He asked me many times to go inside his room. But I was not willing to do so. I was anxious to go to the police station. I told Commander Samuel that there had been a fight over a revolver. Commander Samuel asked to report to Deputy Commissioner Lobo."

81. The difference between the two versions lies in the fact that while Nanavati said that he told Samuel that something terrible had happened, Samuel did not say that; while Nanavati said that he told Samuel that there had been a fight over a revolver, Samuel did not say that. But substantially both of them say that though Samuel asked Nanavati more than once to get inside the house and explain to him everything calmly, Nanavati did not do so; both of them also deposed that the accused told Samuel, "I do not quite know what happened but I think I have shot a man." It may be mentioned that Samuel is a Provost Marshal of the Indian navy, and he and the accused are of the same rank though the accused is senior to Samuel as Commander. As Provost Marshal, Samuel discharges police duties in the navy. It is probable that if the deceased was shot by accident, the accused would not have stated that fact to this witness ? Is it likely that he would not have stepped into his house, particularly when he requested him more than once to come in and explain to him how the accident had taken place ? Would he not have taken his advice as a colleague before he proceeded to the police station to surrender himself ? The only explanation for this unusual conduct on the part of the accused is that, having committed the murder, he wanted to surrender himself to the police and to make a clean breast of everything. What is more, when he was asked directly what had happened he told him "I do not quite know what happened but I think I have shot a man". When he was further asked how it happened, that is, how he shot the man he said that the man had seduced his wife and that he would not stand for it. In the context his two answers read along with the questions put to him by Samuel only mean that, as the deceased had seduced his wife, the accused shot him as he would not stand for it. If really the accused shot the deceased by accident, why did he not say that fact to his colleague, particularly when it would not only be his defence, if prosecuted, but it would put a different complexion to his act in the eyes of his colleague. But strong reliance is placed on what this witness stated in the cross- examination viz., "I heard the word fight from the accused", "I heard some other words from the accused but I could not make out a sense out of these words". Learned counsel for the accused contends that this statement shows that the accused mentioned to Samuel that the shooting of the deceased was in a fight. It is not possible to build upon such slender foundation that the accused explained to Samuel that he shot the deceased by accident in a struggle. The statement in the cross- examination appears to us to be an attempt on the part of this witness to help his colleague by saying something which may fit in the scheme of his defence, though at the same time he is not willing to lie deliberately in the witness- box, for he clearly says that he could not make out the sense of the words spoken along with the word "fight". This vague

statement of this witness, without particulars, cannot detract from the clear evidence given by him in the examination- in- chief.

82. What Nanavati said to the question put by the Sessions Judge under s. 342 of the Code of Criminal Procedure supports Samuel's version. The following question was put to him by the learned Sessions Judge :

Q. - It is alleged against you that thereafter as aforesaid you went to Commander Samuel at about 4.45 P.M. and told him that something terrible had happened and that you did not quite know but you thought that you shot a man as he had seduced your wife which you could not stand and that on the advice of Commander Samuel you then went to Deputy Commissioner Lobo at the Head Crime Investigation Department Office. Do you wish to say anything about this ?

83. A. - This is correct.

84. Here Nanavati admits that he told Commander Samuel that he shot the man as he had seduced his wife. Learned counsel for the accused contends that the question framed was rather involved and, therefore, Nanavati might not have understood its implication. But it appears from the statement that, after the questions were answered, Nanavati read his answers and admitted that they were correctly recorded. The answer is also consistent with what Samuel said in his evidence as to what Nanavati told him. This corroborates the evidence of Samuel that Nanavati told him that, as the man had seduced his wife, he thought that he had shot him. Anyhow, the accused did not tell the Court that he told Samuel that he shot the deceased in a fight.

85. Then the accused, leaving Samuel, went to the office of the Deputy Commissioner Lobo. There, he made a statement to Lobo. At that time, Superintendent Korde and Inspector Mokashi were also present. On the information given by him, Lobo directed Inspector Mokashi to take the accused into custody and to take charge of the articles and to investigate the case.

86. Lobo says in his evidence that he received a telephone call from Commander Samuel to the effect that he had directed Commander Nanavati to surrender himself to him as he had stated that he had shot a man. This evidence obviously cannot be used to corroborate what Nanavati told Samuel, but it would only be a corroboration of the evidence of Samuel that he telephoned to Lobo to that effect. It is not denied that the accused set up the defence of accident for the first time in the Sessions Court. This conduct of the accused from the time of the shooting of Ahuja to the moment he surrendered himself to the police is inconsistent with the defence that the deceased was shot by accident. Though the accused had many opportunities to explain himself, he did not do so; and he exhibited the attitude of a man who wreaked out his vengeance in the manner planned by him and was only anxious to make a clean breast of everything to the police.

87. Now we will consider what had happened in the bed- room and bathroom of the deceased. But before considering the evidence on this question, we shall try to describe the scene of the incident and other relevant particulars regarding the things found therein.

88. The building "Jivan Jyot" is situate in Setalvad Road, Bombay. Ahuja was staying on the first floor of that building. As one goes up the stairs, there is a door leading into the hall; as one enters the hall and walks a few feet towards the north he reaches a door leading into the bed- room of Ahuja. In the bed- room, abutting the southern wall there is a radiogram; just after the radiogram there is a door on the southern wall leading to the bathroom, on the eastern side of the door abutting the wall there is a cupboard with a mirror thereon; in the bathroom, which is of the dimensions 9 feet x 6 feet, there is a commode in the front along the wall, above the commode there is a window with glass panes overlooking the chowk, on the east of the commode there is a bath- tub, on the western side of the bathroom there is a door leading into the hall; on the southern side of the said door there is a wash- basin adjacent to the wall.

89. After the incident the corpse of Ahuja was found in the bathroom; the head of the deceased was towards the bed- room and his legs were towards the commode. He was lying with his head on his right hand. This is the evidence of Miss Mammie, and she has not been cross- examined on it. It is also not contradicted by any witness. The top glass pane of the window in the bathroom was broken. Pieces of glass were found on the floor of the bathroom between the commode and the wash- basin. Between the bath- tub and the commode a pair of spectacles was lying on the floor and there were also two spent bullets. One chappal was found between the commode and the wash basin, and the other was found in the bedroom. A towel was found wrapped around the waist of the deceased. The floor of the bathroom was bloodstained. There was white handkerchief and bath- towel, which was bloodstained lying on the floor. The western wall was found to be bloodstained and drops of blood were trickling down. The handle of the door leading to the bathroom from the bed- room and a portion of the door adjacent to the handle were bloodstained from the inner side. The blood on the wall was little over three feet from the floor. On the floor of the bed- room there was an empty brown envelope with the words "Lt. Commander K.M. Nanavati" written on it. There was no mark showing that the bullets had hit any surface. (See the evidence of Rashmikant, P.W. 16)

90. On the dead- body the following injuries were found :

(1) A punctured would 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound.

(2) A lacerated punctured wound in the web between the ring finger and the little finger of the left hand 1/4" x 1/4" communicating with a punctured would 1/4" x 1/4" on the palmar aspect of the left hand at knuckle level between the left little and the ring finger. Both the wounds were communicating.

(3) A lacerated ellipsoid would oblique in the left parietal region with dimensions 1 1/8" x 1/4" x skull deep.

(4) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the distal end of the proximal interphalangeal joint of the left index finger dorsal aspect. That means at the first joint of the crease of the index finger on its dorsal aspect, i.e., back aspect.

(5) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the joint level of the left middle finger dorsal aspect.

(6) Vertical abrasion inside the right shoulder blade 3" x 1" just outside the spine.

91. On internal examination the following wounds were found by Dr. Jhala, who performed the autopsy on the dead- body. Under the first injury there was :

"A small ellipsoid wound oblique in the front of the piece of the breast bone (Sternum) upper portion right side center with dimensions 1/4" x 1/3" and at the back of the bone there was a lacerated wound accompanied by irregular chip fracture corresponding to external injury No. 1, i.e., the punctured wound chest cavity deep. Same wound continued in the contusion in area 3" x 1 1/4" in the right lung upper lobe front border middle portion front and back. Extensive clots were seen in the middle compartment upper and front part surrounding the laceration impregnated pieces of fractured bone. There was extensive echymosis and contusion around the root of the right lung in the diameter of 2 1/2" involving also the inner surface of the upper lobe. There were extensive clots of blood around the aorta. The left lung was markedly pale and showed a through and through wound in the lower lobe beginning at the inner surface just above the root opening out in the lacerated wound in the back region outer aspect at the level between 6th and 7th ribs left side not injuring the rib and injuring the space between the 6th and 7th rib left side 2" outside the junction of the spine obliquely downward and outward. Bullet was recovered from tissues behind the left shoulder blade. The wound was lacerated in the whole tract and was surrounded by contusion of softer tissues."

92. The doctor says that the bullet, after entering "the inner end, went backward, downward and then to the left" and therefore he describes the wound as "ellipsoid and oblique". He also points out that the abrasion collar was missing on the left side. Corresponding to the external injury No. 3, the doctor found on internal examination that the skull showed a haematoma under the scalp, i.e., on the left parietal region; the dimension was 2" x 2". The skull cap showed a gutter fracture of the outer table and a fracture of the inner table. The brain showed sub- arachnoid haemorrhage over the left parieto- occipital region accompanying the fracture of the vault of the skull.

93. A description of the revolver with which Ahuja was shot and the manner of its working would be necessary to appreciate the relevant evidence in that regard. Bhanagay, the Government Criminologist, who was examined as P.W. 4, describes the revolver and the manner of its working. The revolver is a semi- automatic one and it is six- chambered. To load the revolver one has to release the chamber; when the chamber is released, it comes out on the left side. Six cartridges can be inserted in the holes of the chamber and then the chamber is pressed to the revolver. After the revolver is thus loaded, for the purpose of firing one has to pull the trigger of the revolver; when the trigger is pulled the cartridge gets cocked and the revolver being semi-automatic the hammer strikes the percussion cap of the cartridge and the cartridge explodes and the bullet goes off. For firing the second shot, the trigger has to be pulled again and the same process will have to be repeated each time it is fired. As it is not an automatic revolver, each time it is fired, the trigger has to be pulled and released. If the trigger is pulled but not released, the second round will not come in its position of firing. Pulling of the trigger has a double action - one is the rotating of the chamber and cocking, and the other, releasing of the hammer. Because of this double action, the pull must be fairly strong. A pressure of about 20 pounds is required for pulling the trigger. There is controversy on the question of pressure, and we shall deal with this at the appropriate place.

94. Of the three bullets fired from the said revolver, two bullets were found in the bathroom, and the third was extracted from the back of the left shoulder blade. Exs. F- 2 and F- 2a are the bullets found in the bathroom. These two bullets are flattened and the copper jacket of one of the bullets, Ex. F- 2a, has been turn off. The third bullet is marked as Ex. F- 3.

95. With this background let us now consider the evidence to ascertain whether the shooting was intentional, as the prosecution avers, or only accidental, as the defence suggests. Excepting Nanavati, the accused, and Ahuja, the deceased, no other person was present in the latter's bed-room when the shooting took place. Hence the only person who can speak to the said incident is the accused Nanavati. The version of Nanavati, as given in his evidence may be stated thus : He walked into Ahuja's bed- room, shutting the door behind him. Ahuja was standing in front of the dressing- table. The accused walked towards Ahuja and said, "You are a filthy swine", and asked him, "Are you going to marry Sylvia and look after the kids ?" Ahuja became enraged and said in a nasty manner, "Do I have to marry every woman that I sleep with ?" Then the deceased said, "Get the hell out of here, otherwise, I will have you thrown out." The accused became angry, put the packet containing the revolver down on a cabinet which was near him and told him, "By God I am going to thrash you for this." The accused had his hands up to fight the deceased, but the latter made a sudden grab towards the packet containing the revolver. The accused grappled the revolver himself and prevented the deceased from getting it. He then whipped out the revolver and told the deceased to get back. The deceased was very close to him and suddenly caught with his right hand the right hand of the accused at the wrist and tried to twist it and take the revolver off it. The accused "banged" the deceased towards the door of the bathroom, but Ahuja would not let go of his grip and tried to kick the accused with his knee in the groin. The accused pushed Ahuja again into the bathroom, trying at the same time desperately to free his hand from the grip of the accused by jerking it around. The deceased had a very strong grip and he did not let go the grip. During the struggle, the accused thought that two shots went off : one went first and within a few seconds another. At the first shot the deceased just kept hanging on to the hand of the

accused, but suddenly he let go his hand and slumped down. When the deceased slumped down, the accused immediately came out of the bathroom and walked down to report to the police.

96. By this description the accused seeks to raise the image that he and the deceased were face to face struggling for the possession of the revolver, the accused trying to keep it and the deceased trying to snatch it, the deceased catching hold of the wrist of the right hand of the accused and twisting it, and the accused desperately trying to free his hand from his grip; and in the struggle two shots went off accidentally - he does not know about the third shot - and hit the deceased and caused his death. But in the cross- examination he gave negative answers to most of the relevant questions put to him to test the truthfulness of his version. The following answers illustrate his unhelpful attitude in the court :

(1) I do not remember whether the deceased had the towel on him till I left the place.

(2) I had no idea where the shots went because we were shuffling during the struggle in the tiny bathroom.

(3) I have no impression from where and how the shots were fired.

(4) I do not know anything about the rebound of shots or how the shots went off.

(5) I do not even know whether the spectacles of the deceased fell off.

(6) I do not know whether I heard the third shot. My impression is that I heard two shots.

(7) I do not remember the details of the struggle.

(8) I do not give any thought whether the shooting was an accident or not, because I wished to go to the police and report to the police.

(9) I gave no thought to this matter. I thought that something serious had happened.

(10) I cannot say how close we were to each other, we might be very close and we might be at arm's length during the struggle.

(11) I cannot say how the deceased had his grip on my wrist.

(12) I do not remember feeling any blows from the deceased by his free hand during the struggle; but he may have hit me.

97. He gives only a vague outline of the alleged struggle between him and the deceased. Broadly looked at, the version given by the accused appears to be highly improbable. Admittedly he had entered the bed- room of the deceased unceremoniously with a fully loaded revolver; within half a minute he cannot out of the room leaving Ahuja dead with bullet wounds. The story of his keeping the revolver on the cabinet is very unnatural. Even if he had kept it there, how did Ahuja come to know that it was a revolver for admittedly it was put in an envelope. Assuming that Ahuja had suspected that it might be a revolver, how could he have caught the wrist of Nanavati who had by that time the revolver in his hand with his finger on the trigger ? Even if he was able to do so, how did Nanavati accidentally pull the trigger three times and release it three times when already Ahuja was holding his wrist and when he was jerking his hand to release it from the grip of Ahuja ? It also appears to be rather curious that both the combatants did not use their left hands in the struggle. If, as he has said, there was a struggle between them and he pushed Ahuja into the bathroom, how was it that the towel wrapped around the waist of Ahuja was intact ? So too, if there was a struggle, why there was no bruise on the body of the accused ? Though Nanavati says that there were some "roughings" on his wrist, he had not mentioned that fact till he gave his evidence in the court, nor is there any evidence to indicate such "roughings". It is not suggested that the clothes worn by the accused were torn or even soiled. Though there was blood up to three feet on the wall of the bathroom, there was not a drop of blood on the clothes of the accused. Another improbability in the version of the accused is, while he say that in the struggle two shots went off, we find three spent bullets - two of them were found in the bathroom and the other in the body of the deceased. What is more, how could Ahuja have continued to struggle after he had received either the chest injury or the head injury, for both of them were serious ones. After the deceased received either the first or the third injury there was no possibility of further struggling or pulling of the trigger by reflex action. Dr. Jhala says that the injury on the head of the victim was such that the victim could not have been able to keep standing and would have dropped unconscious immediately and that injury No. 1 was also so serious that he could not stand for more than one or two minutes. Even Dr. Baliga admits that the deceased would have slumped down after the infliction of injury No. 1 or injury No. 3 and that either of them individually would be sufficient to cause the victim to slump down. It is, therefore, impossible that after either of the said two injuries was inflicted, the deceased could have still kept on struggling with the accused. Indeed, Nanavati says in his evidence that at the first shot the deceased just kept on hanging to his hand, but suddenly he let go his grip and slumped down.

98. The only circumstance that could be relied upon to indicate a struggle is that one of the chappals of the deceased was found in the bed- room while the other was in the bathroom. But that is consistent with both intentional and accidental shooting, for in his anxiety to escape from the line of firing the deceased might have in hurry left his one chappal in the bed- room and fled

with the other to the bathroom. The situation of the spectacles near the commode is more consistent with intentional shooting than with accidental shooting, for if there had been a struggle it was more likely that the spectacles would have fallen off and broken instead of their being intact by the side of the dead- body. The condition of the bed- room as well as of the bathroom, as described by Rashmikant, the police- officer who made the inquiry, does not show any indication of struggle or fight in that place. The version of the accused, therefore, is brimming with improbabilities and is not such that any court can reasonably accept it.

99. It is said that if the accused went to the bed- room of Ahuja to shoot him he would not have addressed him by his first name "Prem" as deposed by Deepak. But Nanavati says in his evidence that he would be the last person to address the deceased as Prem. This must have been as embellishment on the part of Deepak. Assuming he said it, it does not indicate any sentiment of affection or goodwill towards the deceased - admittedly he had none towards him - but only an involuntary and habitual expression.

100. It is argued that Nanavati is a good shot - Nanda, D.W. 6, a Commodore in the Indian Navy, certifies that he is a good shot in regard to both moving and stationary targets - and therefore if he had intended to shoot Ahuja, he would have shot him perpendicularly hitting the chest and not in a haphazard way as the injuries indicate. Assuming that accused is a good shot, this argument ignores that he was not shooting at an inanimate target for practice but was shooting to commit murder; and it also ignores the desperate attempts the deceased must have made to escape. The first shot might have been fired and aimed at the chest as soon as the accused entered the room, and the other two presumably when the deceased was trying to escape to or through the bathroom.

101. Now on the question whether three shots would have gone off the revolver accidentally, there is the evidence of Bhanagay, P.W. 4, who is a Government Criminologist. The Deputy Commissioner of Police, Bombay, through Inspector Rangnekar sent to him the revolver, three empty cartridge cases, three bullets and three live rounds for his inspection. He has examined the revolver and the bullets which are marked as Exs. F- 2, F- 2a and F- 3. He is of the opinion that the said three empties were fired from the said revolver. He speaks to the fact that for pulling the trigger a pressure of 28 pounds is required and that for each shot the trigger has to be pulled and for another shot to be fired it must be released and pulled again. He also says that the charring around the wound could occur with the weapon of the type we are now concerned within about 2 to 3 inches of the muzzle of the weapon and the blackening around the would described as carbonaceous tattooing could be caused from such a revolver up to about 6 to 8 inches from the muzzle. In the cross examination he says that the flattening of the two damaged bullets, Exs. F- 2 and F- 2a, could have been caused by their hitting a flat hard surface, and that the tearing of the copper jacket of one of the bullets could have been caused by a heavy impact, such as hitting against a hard surface; it may have also been caused, according to him, by a human bone of sufficient strength provided the bullet hits the bone tangently and passes of without obstruction. These answers, if accepted - we do not see any reason why we should not accept them - prove that the bullets, Exs. F- 2 and F- 2a, could have been damaged by their coming into contact with

some hard substance such as a bone. He says in the cross- examination that one 'struggling' will not cause three automatic firings and that even if the struggle continues he would not expect three rounds to go off, but he qualifies his statement by adding that this may happen if the person holding the revolver "co- operates so far as the reflex of his finger is concerned", to pull the trigger. He further elaborates the same idea by saying that a certain kind of reflex co- operation is required for pulling the trigger and that this reflex pull could be either conscious or unconscious. This answer is strongly relied upon by learned counsel for the accused in support of his contention of accidental firing. He argues that by unconscious reflex pull of the trigger three times by the accused three shots could have gone off the revolver. But the possibility of three rounds going off by three separate reflexes of the finger of the person holding the trigger is only a theoretical possibility, and that too only on the assumption of a fairly long struggle. Such unconscious reflex pull of the finger by the accused three times within a space of a few seconds during the struggle as described by the accused is highly improbable, if not impossible. We shall consider the evidence of this witness on the question of ricocheting of bullets when we deal with individual injuries found on the body of the deceased.

102. This witness is not a doctor but has received training in Forensic Ballistics (Identification of Fire Arms) amongst other things in London and possesses certificates of competency from his tutors in London duly endorsed by the covering letter from the Education Department, High Commissioner's Office, and he is a Government Criminologist and has been doing this work for the last 22 years; he says that he has also gained experience by conducting experiments by firing on mutton legs. He stood the test of cross- examination exceedingly well and there is no reason to reject his evidence. He makes the following points : (1) Three used bullets, Exs. F- 2, F- 2a, and F- 3, were shot from the revolver Ex. B. (2) The revolver can be fired only by pulling the trigger; and for shooting thrice, a person shooting will have to give a deep pull to the trigger thrice and release it thrice. (3) A pressure of 28 pounds is required to pull the trigger. (4) One "struggling" will not cause three automatic firings. (5) If the struggle continues and if the person who pulls the trigger co- operates by pulling the trigger three times, three shots may go off. (6) The bullet may be damaged by hitting a hard surface or a bone. As we have pointed out the fifth point is only a theoretical possibility based upon two hypothesis, namely, (i) the struggle continues for a considerable time, and (ii) the person holding the trigger co- operates by pulling it thrice by reflex action. This evidence, therefore, establishes that the bullets went off the revolver brought by the accused - indeed this is not disputed - and that in the course of the struggle of a few seconds as described by the accused, it is not possible that the trigger could have been accidentally pulled three times in quick succession so as to discharge three bullets.

103. As regards the pressure required to pull the trigger of Ex. B, Triloksing, who is the Master Armourer in the Army, deposing as D.W. 11, does not accept the figure given by the Bhanagay and he would put it at 11 to 14 pounds. He does not know the science of ballistics and he is only a mechanic who repairs the arms. He had not examined the revolver in question. He admits that a double- action revolver requires more pressure on the trigger than single- action one. While Major Burrard in his book on Identification of Fire- arms and Forensic Ballistics says that the normal trigger pull in double- action revolvers is about 20 pounds, this witness reduces it to 11 to 14 pounds; while Major Burrard says in his book that in all competitions no test other than a dead weight is accepted, this witness does not agree with him. His opinion is based on the

experiments performed with spring balance. We would prefer to accept the opinion of Bhanagay to that of this witness. But, on the basis of the opinion of Major Burrard, we shall assume for the purpose of this case that about 20 pounds of pressure would be required to pull the trigger of the revolver Ex. B.

104. Before considering the injuries in detail, it may be convenient to ascertain from the relevant text- books some of the indications that will be found in the case of injuries caused by shooting. The following passage from authoritative text- books may be consulted :

105. Snyder's Homicide Investigation, P. 117 :

Beyond the distance of about 18 inches or 24 at the most evidence of smudging and tattooing are seldom present.

106. Merkeley on Investigation of Death, P. 82 :

"At a distance of approximately over 18" the powder grains are no longer carried forward and therefore the only effect produced on the skin surface is that of the bullet."

107. Legal Medicine Pathology and Toxicology by Gonzales, 2nd Edn., 1956 :

The powder grains may travel 18 to 24 inches or more depending on the length of barrel, calibre and type of weapon and the type of ammunition.

108. Smith and Glaister, 1939 Edn., P. 17

"In general with all types of smokeless powder some traces of blackening are to be seen but it is not always possible to recognize unburnt grains of powder even at ranges of one and a half feet."

109. Glaister in his book on Medical Jurisprudence and Toxicology, 1957 Edn., makes a statement that at a range of about 12 inches and over as a rule there will not be marks of carbonaceous tattooing or powder marks. But the same author in an earlier book from which we have already quoted puts it at 18 inches. In the book "Recent Advances in Forensic Medicine" 2nd Edn., p. 11, it is stated :

At ranges beyond 2 to 3 feet little or no trace of the powder can be observed.

110. Dr. Taylor's book, Vol. 1, 11th edn., p. 373, contains the following statement :

In revolver and automatic pistol wounds nothing but the grace ring is likely to be found beyond about two feet.

111. Bhanagay, P.W. 4, says that charring around the would could occur with the weapon of the type Ex. B within about 2 to 3 inches from the muzzle of the weapon, and the blackening round about the wound could be caused from such a weapon up to about 6 to 8 inches from the muzzle. Dr. Jhala, P.W. 18, says that carbonaceous tattooing would not appear if the body was beyond 18 inches from the mouth of the muzzle.

112. Dr. Baliga, D.W. 2, accepts the correctness of the statement found in Glaister's book, namely, "when the range reaches about 6 inches there is usually an absence of burning although there will probably be some evidence of bruising and of powder mark, at a range of about 12 inches and over the skin around the wound does not as a rule show evidence of powder marks." In the cross-examination this witness says that he does not see any conflict in the authorities cited, and tries to reconcile the various authorities by stating that all the authorities show that there would not be powder marks beyond the range of 12 to 18 inches. He also says that in the matter of tattooing, there is no difference between that caused by smokeless powder used in the cartridge in question, and black powder used in other bullets, though in the case of the former there may be greater difficulty to find out whether the marks are present or not in a wound.

113. Having regard to the aforesaid impressive array of authorities on Medical Jurisprudence, we hold, agreeing with Dr. Jhala, that carbonaceous tattooing would not be found beyond range of 18 inches from the mouth of the muzzle of the weapon. We also hold that charring around the wound would occur when it is caused by a revolver like Ex. B within about 2 or 3 inches from the muzzle of the revolver.

114. The presence and nature of the abrasion collar around the injury indicates the direction and also the velocity of the bullet. Abrasion collar is formed by the gyration of the bullet caused by the rifling of the barrel. If a bullet hits the body perpendicularly, the wound would be circular and the abrasion collar would be all around. But if the hit is not perpendicular, the abrasion collar will not be around the entire wound (See the evidence of Dr. Jhala and Dr. Baliga).

115. As regards the injuries found on the dead- body, two doctors were examined, Dr. Jhala, P.W. 18, on the side of the prosecution, and Dr. Baliga, D.W. 2, on the side of the defence. Dr. Jhala is the Police Surgeon, Bombay, for the last three years. Prior to that he was a Police Surgeon in Ahmedabad for six years. He is M.R.C.P. (Edin.), D.T.M. and H. (Lond.). He conducted the postmortem on the dead- body of Ahuja and examined both external and internal injuries on the body. He is, therefore, competent to speak with authority on the wounds found on the dead- body not only by his qualifications and experience but also by reason of having performed the autopsy on the dead- body. Dr. Baliga is an F.R.C.S. (England) and has been practising as a medical surgeon since 1933. His qualifications and antecedents show that he is not only an experienced surgeon but also has been taking interest in extra- surgical activities, social, political and educational. He says that he has studied medical literature regarding bullet injuries and that he

is familiar with medico- legal aspect of wounds including bullet wounds. He was a Causality Medical Officer in the K.E.M. Hospital in 1928. He had seen bullet injuries both as Causality Medical Officer and later on as a surgeon. In the cross- examination he says :

I have never fired a revolver, nor any other fire- arm. I have not given evidence in a single case of bullet injuries prior to this occasion though I have treated and I am familiar with bullet injuries. The last that I gave evidence in Medico- legal case in a murder case was in 1949 or 1950 or thereabout. Prior to that I must have given evidence in a medico- legal case in about 1939. I cannot off hand tell how many cases of bullet injuries I have treated till now, must have been over a dozen. I have not treated any bullet injuries case for the last 7 or 8 years. It was over 8 or 9 years ago that I have treated bullet injuries on the chest and the head. Out of all these 12 bullet injuries cases which I have treated up to now there might be 4 or 5 which were bullet injuries on the head. Out of these 4 or 5 cases probably there were three cases in which there were injuries both on the chest as well as on the head..... I must have performed about half a dozen post- mortems in all my career.

116. He further says that he was consulted about a week before he gave evidence by Mr. Khandalawala and Mr. Rajani Patel on behalf of the accused and was shows the post- mortem report of the injuries; that he did not have before him either the bullets or the skull; that he gave his opinion in about 20 minutes on the basis of the post- mortem report of the injuries that the said injuries could have been caused in a struggle between the accused and the deceased. This witness has come to the Court to support his opinion based on scanty material. We are not required in this case to decide upon the comparative qualifications or merits of these two doctors of their relative competency as surgeons, but we must say that so far as the wounds on the dead-body of the deceased are concerned, Dr. Jhala, who has made the post- mortem examination, is in a better position to help us to ascertain whether shooting was by accident or by intention than Dr. Baliga, who gave his opinion on the basis of the post- mortem report.

117. Now we shall take injury No. 1. This injury is a punctured one of dimensions 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound. The internal examination showed that the bullet, after causing the punctured wound in the chest just below the inner end of the right collor bone, struck the sternum and after striking it, it slightly deflected in its course and came behind the shoulder bone. In the course of its journey the bullet entered the chest, impacted the soft tissues of the lung, the aorta and the left lung, and ultimately damaged the left lung and got lodged behind the scapula. Dr. Jhala describes the wound as ellipsoid and oblique and says that the abrasion collar is missing on the left side. On the injury there is neither charring nor carbonaceous tattooing. The prosecution version is that this wound was caused by intentional shooting, while the defence suggestion is that it was caused when the accused and the deceased were struggling for the possession of the revolver. Dr. Jhala, after describing injury No. 1, says that it could not have been received by the victim during a struggle in which both the victim and the assailant were in each other's grip. He gives reasons for his opinion, namely, as there was no carbonaceous tattooing on the injury, it must have been caused by the revolver being fired from a distance of over 18 inches from the tip of the mouth of the muzzle. We have earlier noticed that, on the basis of the authoritative text- books and the evidence, there would not be carbonaceous tattooing if the target

was beyond 18 inches from the mouth of the muzzle. It is suggested to him in the cross-examination that the absence of tattooing may be due to the fact that the bullet might have first hit the fingers of the left palm causing all or any of injuries Nos. 2, 4 and 5, presumably when the deceased placed his left palm against the line of the bullet causing carbonaceous tattooing on the said fingers and thereafter hitting the chest. Dr. Jhala does not admit the possibility of the suggestion. He rules out this possibility because if the bullet first had an impact on the fingers, it would get deflected, lose its direction and would not be able to cause later injury No. 1 with abrasion collar. He further explains that an impact with a solid substance like bones of fingers will make the bullet lose its gyratory movement and thereafter it could not cause any abrasion collar to the wound. He adds, "assuming that the bullet first hit and caused the injury to the web between the little finger and the ring finger, and further assuming that it had not lost its gyrating action, it would not have caused the injury No. 1, i.e., on the chest which is accompanied by internal damage and the depth to which it had gone."

118. Now let us see what Dr. Baliga, D.W. 2 says about injury No. 1. The opinion expressed by Dr. Jhala is put to this witness, namely, that injury No. 1 on the chest could not have been caused during the course of a struggle when the victim and the assailant were in each other's grip, and this witness does not agree with that opinion. He further says that it is possible that even if the bullet first caused injury in the web, that is, injury No. 2, and thereafter caused injury No. 1 in the chest, there would be an abrasion collar such as seen in injury No. 1. Excepting this of the suggestion possibility, he has not controverted the reasons given by Dr. Jhala why such an abrasion collar could not be caused if the bullet had hit the fingers before hitting the chest. We will presently show in considering injuries Nos. 2, 4 and 5 that the said injuries were due to the hit by one bullet. If that be so, a bullet, which had caused the said three injuries and then took a turn through the little and the ring finger, could not have retained sufficient velocity to cause the abrasion collar in the chest. Nor has Dr. Baliga controverted the reasons given by Dr. Jhala that even if after causing the injury in the web the bullet could cause injury No. 1, it could not have caused the internal damage discovered in the post- mortem examination. We have no hesitation, therefore, to accept the well reasoned view of Dr. Jhala in preference to the possibility envisaged by Dr. Baliga and hold that injury No. 1 could not have been caused when the accused and the deceased were in close grip, but only by a shot fired from a distance beyond 18 inches from the mouth of the muzzle.

119. The third injury is a lacerated ellipsoid wound oblique in the left parietal region with dimensions 1 1/8" x 1/4" and skull deep. Dr. Jhala in his evidence says that the skull had a gutter fracture of the outer table and a fracture of the inner table and the brain showed subarachnoid haemorrhage over the left parieto- occipital region accompanying the fracture of the vault of the skull. The injury was effected in a "glancing way", that is, at a tangent, and the injury went upward and to the front. He is of the opinion that the said injury to the head must have been caused by firing of a bullet from a distance of over 18 inches from the mouth of the muzzle and must have been caused with the back of the head of the victim towards the assailant. When it was suggested to him that the said wound could have been caused by a ricocheted bullet, he answered that though a ricocheted bullet coming from the same line of direction could have caused the said injury, it could not have caused the intracranial haemorrhage and also could not have caused the fracture of the inner table of the skull. He is definite that injury No. 3 could not have been inflicted

from "front to back" as the slope of the gutter fracture was from the back to the front in the direction of the "grazing" of the bullet. He gives a further reason that as a rule the fracture would be broader in the skull where the bullet has the first impact and narrower where it emerges out, which is the case in respect of injury No. 3. He also relies upon the depth of the fracture at the two points and its slope to indicate the direction in which the bullet grazed. He further says that it is common knowledge that the fracture of both the tables accompanied by haemorrhage in the skull requires great force and a ricocheted bullet cannot cause such an injury. He opines that, though a ricocheted bullet emanating from a powerful fire- arm from a close range can cause injury to a heavy bone, it cannot be caused by a revolver of the type Ex. B.

120. Another suggestion made to him is that the bullet might have hit the glass pane of the window in the bathroom first and then ricocheted causing the injury on the head. Dr. Jhala, in his evidence, says that if the bullet had hit the glass pane first, it would have caused a hole and fallen on the other side of the window, for ricocheting is not possible in the case of a bullet directly hitting the glass. But on the other hand, if the bullet first hit a hard substance and then the glass pane, it would act like a pebble and crack the glass and would not go to the other side. In the present case, the bullet must have hit the skull first and then the glass pane after having lost its velocity, and fallen down like a pebble inside the bathroom itself. If, as the defence suggests, the bullet had directly hit the glass pane, it would have passed through it to the other side, in which case four bullets must have been fired from the revolver Ex. B, which is nobody's case.

121. The evidence, of Dr. Jhala is corroborated by the evidence of the ballistics expert Bhanagay, P.W. 4, when he says that if a bullet hits a hard substance and gets flattened and damaged like the bullets Exs. F- 2 and F- 2a, it may not enter the body and that even if it enters the body, the penetration will be shallow and the injury caused thereby will be much less as compared to the injury caused by a direct hit of the bullet. Dr. Baliga, on the other hand, says that injury No. 3 could be caused both ways, that is, from "front backward" as well as from "back forward". He also contradicts Dr. Jhala and says "back that in the type of the gutter fracture caused in the present case the wound is likely to be narrower at the entry than at the exit. He further says that assuming that the gutter fracture wound was caused by a ricocheted bullet and assuming further that there was enough force left after rebound, a ricocheted bullet could cause a fracture of even the inner table and give rise to intra- cranial haemorrhage. He asserts that a bullet that can cause a gutter fracture of the outer table is capable of fracturing the inner table also. In short, he contradicts every statement of Dr. Jhala; to quote his own words, "I do not agree that injury No. 3, i.e., the gutter fracture, cannot be inflicted from front to back for the reason that the slope of the gutter fracture was behind forward direction of the grazing of the bullet; I also do not agree with the proposition that if it would have been from the front then the slope of the gutter wound would have been from the front backward; I have not heard of such a rule and that at the near end of the impact of a bullet the gutter fracture is deeper than where it files off; I do not agree that the depth of the fracture at two points is more important factor in arriving at the conclusion of the point of impact of the bullet." He also contradicts the opinion of Dr. Jhala that injury No. 3 could not be caused in a struggle between the victim and the assailant. Dr. Baliga has been cross- examined at great length. It is elicited from him that he is not a ballistics expert and that his experience in the matter of direction of bullet injuries is comparatively less than his experience in other fields. His opinion that the gutter fracture injury could be and was more likely to be caused from an injury

glancing front backwards is based upon a comparison of the photograph of the skull shown to him with the figure 15 in the book "Recent Advances in Forensic Medicine" by Smith and Glaister, p. 21. The said figure is marked as Ex. Z in the case. The witness says that the figure shows that the narrower part of the gutter is on the rear and the wider part is in front. In the cross-examination he further says that the widest part of the gutter in figure Ex. Z is neither at the front and nor at the rear end, but the rear end is pointed and tailed. It is put to this witness that figure Ex. Z does not support his evidence and that he deliberately refused to see at it correctly, but he denies it. The learned Judges of the High Court, after seeing the photograph Ex. Z with a magnifying glass, expressed the view that what Dr. Baliga called the pointed and tailed part of the gutter was a crack in the skull and not a part of the gutter. This observation has not been shown to us to be wrong. When asked on what scientific principle he would support his opinion, Dr. Baliga could not give any such principle, but only said that it was likely - he puts emphasis on the word "likely" - that the striking end was likely to be narrower and little broader at the far end. He agrees that when a conical bullet hits a hard bone it means that the hard bone is protruding in the path of the projectile and also agrees that after the initial impact the bullet adjusts itself in the new direction of flight and that the damage caused at the initial point of the impact would be more than at any subsequent point. Having agreed so far, he would not agree on the admitted hypothesis that at the initial point of contract the wound should be wider than at the exist. But he admits that he has no authority to support his submission. Finally, he admits that generally the breadth and the depth of the gutter wound would indicate the extensive nature of the damage. On this aspect of the case, therefore, the witness has broken down and his assertion is not based on any principle or on sufficient data.

122. The next statement he makes is that he does not agree that the fracture of the inner table shows that the initial impact was from behind; but he admits that the fracture of the inner table is exactly below the backside of the gutter, though he adds that there is a more extensive crack in front of the anterior end of the gutter. He admits that in the case of a gutter on the skull the bone material which dissociates from the rest of the skull is carried in the direction in which the bullet flies but says that he was not furnished with any information in that regard when he gave his opinion.

123. Coming to the question of the ricocheting, he says that a ricocheting bullet can produce depressed fracture of the skull. But when asked whether in his experience he has come across any bullet hitting a hard object like a wall and rebounding and causing a fracture of a hard bone or whether he has any text- book to support his statement, he says that he cannot quote any instance nor an authority. But he says that it is so mentioned in several books. Then he gives curious definitions of the expressions "likely to cause death", "necessarily fatal" etc. He would go to the extent of saying that in the case of injury No. 3, the chance of recovery is up to 80 per cent.; but finally he modifies that statement by saying that he made the statement on the assumption that the haemorrhage in the subarachnoid region is localised, but if the haemorrhage is extensive his answer does not hold good. Though he asserts that at a range of about 12 inches the wound does not show as a rule evidence of powder mark, he admits that he has no practical experience that beyond a distance of 12 inches no powder mark can be discovered as a rule. Though text- books and authorities are cited to the contrary, he still sticks to his opinion; but finally he admits that he is not a ballistics expert and has no experience in that line. When he is asked if after injury No. 3,

the victim could have continued the struggle, he says that he could have, though he adds that it was unlikely after the victim had received both injuries Nos. 1 and 3. He admits that the said injury can be caused both ways, that is, by a bullet hitting either on the front of the head or at the back of the head. But his reasons for saying that the bullet might have hit the victim on the front of the head are neither supported by principle nor by the nature of the gutter wound found in the skull. Ex. Z relied upon by him does not support him. His theory of a ricocheted bullet hitting the skull is highly imaginary and cannot be sustained on the material available to us : firstly, there is no mark found in the bathroom wall or elsewhere indicating that the bullet struck a hard substance before ricocheting and hitting the skull, and secondly, it does not appear to be likely that such a ricocheted bullet ejected from Ex. B could have caused such an extensive injury to the head of the deceased as found in this case.

124. Mr. Pathak finally argues that the bullet Ex. F- 2a has a "process", i.e., a projection which exactly fits in the denture found in the skull and, therefore, the projection could have been caused only by the bullet coming into contract with some hard substance before it hit the head of the deceased. This suggestion was not made to any of the experts. It is not possible for us to speculate as to the manner in which the said projection was caused.

125. We, therefore, accept, the evidence of the ballistics expert, P.W. 4, and that of Dr. Jhala, P.W. 18, in preference to that of Dr. Baliga.

126. Now coming to injuries Nos. 2, 4 and 5, injury No. 4 is found on the first joint of the crease of the index finger on the back side of the left palm and injury No. 5 at the joint level of the left middle finger dorsal aspect, and injury No. 2 is a punctured wound in the web between the ring finger and the little finger of the left hand communicating with a punctured wound on the palmer aspect of the left knukle level between the left little and the ring finger. Dr. Jhala says that all the said injuries are on the back of the left palm and all have corbonaceous tattooing and that the injuries should have been caused when his left hand was between 6 and 18 inches from the muzzle of the revolver. He further says that all the three injuries could have been caused by one bullet, for, as the postmortem discloses, the three injuries are in a straight line and therefore it can clearly be inferred that they were caused by one bullet which passed through the wound on the palmer aspect. His theory is that one bullet, after causing injuries Nos. 4 and 5 passed between the little and ring finger and caused the punctured wound on the palmar aspect of the left hand. He is also definitely of the view that these wounds could not have been received by the victim during a struggle in which both of them were in each other's grip. It is not disputed that injury No. 1 and injury No. 3 should have been caused by different bullets. If injuries Nos. 2, 4 and 5 were caused by different bullets, there should have been more than three bullets fired, which is not the case of either the prosecution or the defence. In the circumstances, the said wounds must have been caused only by one bullet, and there is nothing improbable in a bullet touching three fingers on the back of the palm and taking a turn and passing through the web between the little and ring finger. Dr. Baliga contradicts Dr. Jhala even in regard to these wounds. He says that these injuries, along with the others, indicate the probability of a struggle between the victim and the assailant over the weapon; but he does not give any reasons for his opinion. He asserts that

one single bullet cannot cause injuries Nos. 2, 4 and 5 on the left hand fingers, as it is a circuitous course for a bullet to take and it cannot do so without meeting with some severe resistance. He suggests that a bullet which had grazed and caused injuries Nos. 4 and 5 could then have inflicted injury No. 3 without causing carbonaceous tattooing on the head injury. We have already pointed out that the head injury was caused from the back, and we do not see any scope for one bullet hitting the fingers and thereafter causing the head injury. If the two theories, namely, that either injury No. 1 or injury No. 3 could have been caused by the same bullets that might have caused injury No. 2 and injuries Nos. 4 and 5 were to be rejected, for the aforesaid reasons, Dr. Baliga's view that injuries Nos. 2, 4 and 5 must have been caused by different bullets should also be rejected, for to accept it, we would require more than three bullets emanating from the revolver, whereas it is the common case that more than three bullets were not fired from the revolver. That apart in the cross- examination this witness accepts that the injury on the first phalangeal joint of the index finger and the injury in the knuckle of the middle finger and the injury in the web between the little and the ring finger, but not taking into account the injury on the palmar aspect would be in a straight line. The witness admits that there can be a deflection even against a soft tissue, but adds that the soft tissue being not of much thickness between the said two fingers, the amount of deflection is negligible. But he concludes by saying that he is not saying this as an expert in ballistics. If so, the bullet could have deflected after striking the web between the little and the ring finger. We, therefore, accept the evidence of Dr. Jhala that one bullet must have caused these three injuries.

127. Strong reliance is placed upon the nature of injury No. 6 found on the back of the deceased viz, a vertical abrasion in the right shoulder blade of dimensions 3" x 1" just outside the spine, and it is said that the injury must have been caused when the accused pushed the deceased towards the door of the bath room. Nanavati in his evidence says that he "banged" him towards the door of the bathroom, and after some struggle he again pushed the deceased into the bathroom. It is suggested that when the accused "banged" the deceased towards the door of the bathroom or when he pushed him again into the bathroom, this injury might have been caused by his back having come into contract with the frame of the door. It is suggested to Dr. Jhala that injury No. 6 could be caused by the man's back brushing against a hard substance like the edge of the door, and he admits that it could be so. But the suggestion of the prosecution case is that the injury must have been caused when Ahuja fell down in the bathroom in front of the commode and, when falling, his back may have caught the edge of the commode or the bath- tub or the edge of the door of the bathroom which opens inside the bathroom to the left of the bath- tub. Shelat, J., says in his judgment :

If the abrasion was caused when the deceased was said to have been banged against the bathroom door or its frame, it would seem that the injury would be more likely to be caused, as the deceased would be in a standing position, on the shoulder blade and not inside the right shoulder. It is thus more probable that the injury was caused when the deceased's back came into contact either with the edge of the door or the edge of the bath- tub or the commode when he slumped.

128. It is not possible to say definitely how this injury was caused, but it could have been caused when the deceased fell down in the bathroom.

129. The injuries found on the dead- body of Ahuja are certainly consistent with the accused intentionally shooting him after entering the bed- room of the deceased; but injuries Nos. 1 and 3 are wholly inconsistent with the accused accidentally shooting him in the course of their struggle for the revolver.

130. From the consideration of the entire evidence the following facts emerge : The deceased seduced the wife of the accused. She had confessed to him of her illicit intimacy with the deceased. It was natural that the accused was enraged at the conduct of the deceased and had, therefore, sufficient motive to do away with the deceased. He deliberately secured the revolver on a false pretext from the ship, drove to the flat of Ahuja, entered his bed- room unceremoniously with a loaded revolver in hand and in about a few seconds thereafter came out with the revolver in his hand. The deceased was found dead in his bathroom with bullet injuries on his body. It is not disputed that the bullets that caused injuries to Ahuja emanated from the revolver that was in the hand of the accused. After the shooting, till his trial in the Sessions Court, he did not tell anybody that he shot the deceased by accident. Indeed, he confessed his guilt to the Chowkidar Puransingh and practically admitted the same to his colleague Samuel. His description of the struggle in the bathroom is highly artificial and is devoid of all necessary particulars. The injuries found on the body of the deceased are consistent with the intentional shooting and the main injuries are wholly inconsistent with accidental shooting when the victim and the assailant were in close grips. The other circumstances brought out in the evidence also establish that there could not have been any fight or struggle between the accused and the deceased.

131. We, therefore, unhesitatingly hold, agreeing with the High Court, that the prosecution has proved beyond any reasonable doubt that the accused has intentionally shot the deceased and killed him.

132. In this view it is not necessary to consider the question whether the accused had discharged the burden laid on him under s. 80 of the Indian Penal Code, especially as learned counsel appearing for the accused here and in the High Court did not rely upon the defence based upon that section.

133. That apart, we agree with the High Court that, on the evidence adduced in this case, no reasonable body of persons could have come to the conclusion which the jury reached in this case. For that reason also the verdict of the jury cannot stand.

134. Even so, it is contended by Mr. Pathak that the accused shot the deceased while deprived of the power of self- control by sudden and grave provocation and, therefore, the offence would fall under Exception 1 to s. 300 of the Indian Penal Code. The said Exception reads :

Culpable homicide is not murder if the offender, whilst deprived of the power of self- control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

135. Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with : (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self- control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self- control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

136. The first question raised is whether Ahuja gave provocation to Nanawati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.

137. Learned Attorney- General argues, that though a confession of adultery by a wife may in certain circumstances be provocation by the paramour himself, under different circumstances it has to be considered from the standpoint of the person who conveys it rather than from the standpoint of the person who gives it. He further contends that even if the provocation was deemed to have been given by Ahuja, and though the said provocation might have been grave, it could not be sudden, for the provocation given by Ahuja was only in the past.

138. On the other hand, Mr. Pathak contends that the act of Ahuja, namely, the seduction of Sylvia, gave provocation though the fact of seduction was communicated to the accused by Sylvia and that for the ascertainment of the suddenness of the provocation it is not the mind of the person who provokes that matters but that of the person provoked that is decisive. It is not necessary to express our opinion on the said question, for we are satisfied that, for other reasons, the case is not covered by Exception 1 to s. 300 of the Indian Penal Code.

139. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In Mancini v. Director of Public Prosecutions L.R. (1942) A.C. 1, Viscount Simon, L.C., states the scope of the doctrine of provocation thus :

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death..... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini [1914] 3 K.B. 1116, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider

whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

140. Viscount Simon again in Holmes v. Director of Public Prosecutions L.R. (1946) A.C. 588 elaborates further on this theme. There, the appellant had entertained some suspicious of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it will ease your mind, I have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't - at Mrs. X.'s". With this appellant lost his temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to Mancini's case L.R. (1942) A.C. 1, proceeded to state thus :

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self- control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.

141. Goddard, C.J., Duffy's case [[1949] 1 All. E.R. 932] defines provocation thus :

Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind..... What matters is whether this girl (the accused) had the time to say : 'Whatever I have suffered, whatever I have endured, I know that Thou shall not kill.' That is what matters. Similarly,.....circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden temporary loss of self- control which is of the essence of provocation. Provocation being,.....as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is, whether there was what is sometimes called time for cooling, that is, for passing to cool and for reason to regain dominion over the mind..... Secondly in considering whether provocation has or has not been made out, you must consider the retaliation in provocation - that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given.

142. A passage from the address of Baron Parke to the jury in R. v. Thomas (1837) 7 C. & P. 817 extracted in Russell on Crime, 11th ed., Vol. I at p. 593, may usefully be quoted :

But the law requires two things : first that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.

143. The passages extracted above lay down the following principles : (1) Except in circumstances of most extreme and exceptional character, a mere confession of adultery is not enough to reduce the offence of murder to manslaughter. (2) The act of provocation which reduced the offence of murder to manslaughter must be such as to cause a sudden and temporary loss of self- control; and it must be distinguished from a provocation which inspires an actual intention to kill. (3) The act should have been done during the continuance of that state of mind, that is, before there was time for passion to cool and for reason to regain dominion over the mind. (4) The fatal blow should be clearly traced to the influence of passion arising from the provocation.

144. On the other hand, in India, the first principle has never been followed. That principle has had its origin in the English doctrine that mere words and gestures would not be in point of law sufficient to reduce murder to manslaughter. But the authors of the Indian Penal Code did not accept the distinction. They observed :

It is an indisputable fact, that gross insults by word or gesture have as great tendency to move many persons to violem passion as dangerous or painful bodily in juries; nor does it appear to us that passio- excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart.

145. Indian courts have not maintained the distinction between words and acts in the application of the doctrine of provocation in a given case. The Indian law on the subject may be considered from two aspects, namely, (1) whether words or gestures unaccompanied by acts can amount to provocation and (2) what is the effect of the time lag between the act of provocation and the commission of the offence. In Empress v. Khogayi I.L.R (1879) . 2 Mad. 122, a division bench of the Madras High Court held, in the circumstances of that case, that abusive language used would be a provocation sufficient to deprive the accused of self- control. The learned Judges observed :

What is required is that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind and was addressed to man already enraged by the conduct of deceased's son.

146. It will be seen in this case that abusive language of the foulest kind was held to be sufficient in the case of man who was already enraged by the conduct of deceased's son. The same learned Judge in a later decision in Boya Munigadu v. The Queen I.L.R(1881) . 3 Mad. 33 upheld plea of grave and sudden provocation in the following circumstances : The accused saw the deceased when she had cohabitation with his bitter enemy; that night he had no meals; next morning he went to the ryots to get his wages from them, and at that time he saw his wife eating food along with her paramour; he killed the paramour with a bill- hook. The learned Judges held that the

accused had sufficient provocation to bring the case within the first exception to s. 300 of the Indian Penal Code. The learned Judges observed :

..... If having witnessed the act of adultery, he connected this subsequent conduct as he could not fail to connect it, with that act, it would be conduct of a character highly exasperating to him, implying as it must, that all concealment of their criminal relations and all regard for his feelings were abandoned and that they purposed continuing their course of misconduct in his house. This, we think, amounted to provocation, grave enough and sudden enough to deprive him of his self- control, and reduced the offence from murder to culpable homicide not amounting to murder.

147. The case illustrates that the state of mind of the accused, having regard to the earlier conduct of the deceased, may be taken into consideration in considering whether the subsequent act would be a sufficient provocation to bring the case within the exception. Another division bench of the Madras High Court in In re Murugian [I.L.R. [1957] Mad. 805] held that, where the deceased not only committed adultery but later on swore openly in the face of the husband that she would persist in such adultery and also abused the husband for remonstrating against such conduct, the case was covered by the first exception to s. 300 of the Indian Penal Code. The judgment of the Andhra Pradesh High Court in In re C. Narayan [A.I.R. 1958 A.P. 235] adopted the same reasoning in a case where the accused, a young man, who had a lurking suspicion of the conduct of his wife, who newly joined him, was confronted with the confession of illicit intimacy with, and consequent pregnancy by another, strangled his wife to death, and held that the case was covered by Exception 1 to s. 300 of the Indian Penal Code. These two decisions indicate that the mental state created by an earlier act may be taken into consideration in ascertaining whether a subsequent act was sufficient to make the assailant to lose his self- control.

148. Where the deceased led an immoral life and her husband, the accused, upbraided her and the deceased instead of being repentant said that she would again do such acts, and the accused, being enraged struck her and, when she struggled and beat him, killed her, the Court held the immediate provocation coming on top of all that had gone before was sufficient to bring the case within the first exception to s. 300 of the Indian Penal Code. So too, where a woman was leading a notoriously immoral life, and on the previous night mysteriously disappeared from the bedside of her husband and the husband protested against her conduct, she vulgarly abused him, whereupon the husband lost his self- control, picked up a rough stick, which happened to be close by and struck her resulting in her death, the Labour High Court, in Jan Muhammad v. Emperor I.L.R. [1929] Lah 861, held that the case was governed by the said exception. The following observations of the court were relied upon in the present case :

In the present case my view is that, in judgment the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman..... As stated above, the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.

149. A division bench of the Allahabad High Court in Emperor v. Balku I.L.R. [1938] All. 789 invoked the exception in a case where the accused and the deceased, who was his wife's sister's husband, were sleeping on the same cot, and in the night the accused saw the deceased getting up from the cot and going to another room and having sexual intercourse with his (accused's) wife, and the accused allowed the deceased to return to the cot, but after the deceased fell asleep, he stabbed him to death. The learned Judges held :

When Budhu (the deceased) came into intimate contact with the accused by lying beside him on the charpai this must have worked further on the mind of the accused and he must have reflected that 'this man now lying beside me had been dishonouring me a few minutes ago'. Under these circumstances we think that the provocation would be both grave and sudden.

150. The Allahabad High Court in a recent decision, viz., Babu Lal v. State MANU/UP/0047/1960 : AIR1960All223 applied the exception to a case where the husband who saw his wife in a compromising position with the deceased killed the latter subsequently when the deceased came, in his absence, to his house in another village to which he had moved. The learned Judges observed :

The appellant when he came to reside in the Government House Orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was absent. This could certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden.

151. All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery of the wife's infidelity and the subsequent act of her operated as a grave and sudden provocation on his disturbed mind.

152. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation ? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self- control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self- control and killed Ahuja deliberately.

153. The Indian law, relevant to the present enquiry, may be stated thus : (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self- control. (2) In India, words and gestures may also, under certain circumstances, cause

grave and sudden provocation to an accused so as to bring his act within the first Exception to s. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

154. Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self- control. But if his version is true - for the purpose of this argument we shall accept that what he has said is true - it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self- control, but on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bed- room of Ahuja and shot him dead. Between 1- 30 P.M., when he left his house, and 4- 20 P.M., when the murder took place, three hours had elapsed, and therefore there was sufficient time for him to regain his self- control, even if he had not regained it earlier. On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. Even if any conversation took place between the accused and the deceased in the manner described by the accused - though we do not believe that - it does not affect the question, for the accused entered the bed- room of the deceased to shoot him. The mere fact that before the shooting the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder. We, therefore, hold that the facts of the case do not attract the provisions of Exception 1 to s. 300 of the Indian Penal Code.

155. In the result, conviction of the accused under s. 302 of the Indian Penal Code and sentence of imprisonment for life passed on him by the High Court are correct, and there are absolutely no grounds for interference. The appeal stands dismissed.

156. Appeal dismissed.

MANU/SC/0344/1995

Back to Section 313 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 266 of 1985

Decided On: 01.03.1995

Balwant Singh and Ors. Vs. State of Punjab

Hon'ble Judges/Coram:

Dr. A.S. Anand and Faizanuddin, JJ.

JUDGMENT

1. Balwant Singh, who was working as an Assistant in the office of D.P.I. Punjab in Chandigarh and Bhupinder Singh serving as a Senior Clerk in the Punjab School Education Board, Chandigarh, at the relevant time, were on 31st October, 1984 at about 5.45 p.m. arrested from near Neelam Cinema, Chandigarh and after completion of the investigation, tried for offences under Section 124A and 153A IPC. They were each sentenced to suffer one year rigorous imprisonment and a fine of Rs. 500 on each of the two counts. In default of payment of fine, they had to undergo three months further R.I. on each count. The substantive sentences were to run concurrently. Through this appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984 both of them have challenged their conviction and sentence as recorded by the learned Judge of the Special Court, Chandigarh on 2.3.1985.

2. The prosecution case against the appellants is that in a crowded in front of the Neelam Cinema, on 31st October 1984, the day Smt. Indira Gandhi, the then Prime Minister of India was assassinated, after coming out from their respective offices after the duty hours, raised the following slogans:

1. Khalistan Zindabad

2. Raj Karega Khalsa, and

3. Hinduan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da.

The prosecution examined Constable Som Nath, PW2 and ASI Labh Singh PW3, in support of its case besides PW1, who proved the order of sanction for prosecution.

3. According to the testimony of Som Nath PW2 and Labh Singh PW3, they had left the police station at about 5 p.m. or 5.15 p.m. and while they were patrolling in the area of the main market of Sector 17, Chandigarh, they noticed both the appellants raising slogans, as noticed above. Both the witnesses conceded that when slogans were being raised, the people in general were going bout doing their jobs and they did not gather on hearing the slogans but stated that some people went away out of 'fear'. In cross- examination, Som Nath PW2 admitted that he could not name anyone or even suggest whether any one out of the passer- by got afraid on hearing the slogans and fled away from the place. According to the witnesses, both the appellants had raised the slogans together. Though PW2 could not state as to how many times each of the three slogans was raised by the appellants, PW3 ASI Labh Singh admitted in the cross examination that the slogans "Khalistan Zindabad" was raised about five or six times while the second slogan "Raj Karega Khalsa" was raised two or four times and that the third slogan was raised only once or twice. ASI Labh Singh PW also admitted that the slogans had been raised by the appellants before they were arrested and that they did not raise any slogans afterwards. ASI Labh Singh PW, however, added that the appellants raised slogans while they were being apprehended once or twice and to the same effect is the statement made by PW2 Som Nath, who, however, was confronted with his police statement recorded under Section 161 Cr.P.C., wherein he had not mentioned that the appellants raised any slogan while being apprehended. The appellants in their statement recorded under Section 313 Cr.P.C., denied the prosecution allegations against them. According to Balwant Singh, Bhupinder Singh, appellant came to his office at about 4.30 p.m. and they left together after he finished his day's duty at about 5 p.m. That while they were proceedings towards the bus stand, in order to take a bus to go to Mohali where they reside, they met Mewa Singh DW2 and Surender Pal Singh DW3 near the fountain with whom they exchanged 'Sat Siri Akal'. Being an Amritdhari Sikh, he was wearing a kirpan. That near Neelam Cinema Dy. S.P. Sudhir Mohan and Inspector Baldev Singh caught hold of them, presumably because he was wearing a kirpan and both of them had not tied their beards. That the police officials took them to the police station in Sector 17 in their jeep. ASI Labh Singh was present at the police station attending to the telephone. On their enquiry, as to why they had been brought to the police station and why they were being detained, ASI Labh Singh told him that only the senior officers who had brought them to the police station could give them an answer to their question. Bhupinder Singh, appellant made a substantially similar statement.

4. Both Mewa Singh DW2, a Draftsman working in the Punjab Housing Board and Surender Pal Singh DW3, a Junior Accountant working with the Punjab Housing Board, corroborated the statement made by the appellants and stated that they had met the appellants after the office hours near the Neelam Cinema and had exchanged 'Sat Sri Akal' with them. They stated that in their presence, the Dy. S.P. and Inspector Baldev Singh arrested the appellants and took them to the police station in their jeep. That later on they followed them to the police station but when they could not get any information as to why the appellants had been taken to the police station, they informed the family members of the appellants. Both the defence witnesses stated that the appellants were not raising any slogans either before or at the time of their arrest and this part of their testimony was not challenged in the cross examination at all.

5. At the time of arrest of the appellants, the personal search of the appellants was taken and the personal search memos were prepared. In the personal search memo of Balwant Singh, the only

two articles which are shown to have been recovered are: one watch HMT and one gold ring. There is no mention of any kirpan having been seized. After the arrest of the appellants, the police produced them before the Ilaqa Magistrate when they were remanded to judicial custody. DW1 Shitla Prashad, Munshi, District Jail, Burail deposed that on November 1, 1984, Balwant Singh appellant was admitted to the District Jail and that;

At that time he was wearing a kirpan on his person which was taken off and kept in safe custody at the time of his admission into jail and that kirpan is still lying deposited with us. I have brought that kirpan.

Both PW2 and PW3, had however, stated in their statements that they did not see Balwant Singh wearing any kirpan and that no kirpan was taken into possession from him.

6. Mr. V.M. Tarkunde, the learned senior counsel appearing for the appellants submitted that the prosecution has not been able to establish the case against the appellants beyond a reasonable doubt. learned Counsel argued that though admittedly the occurrence had taken place in a busy place, where number of independent persons were available, prosecution had not associated any independent person at the time of arrest of the appellants and that was a serious infirmity in the case. Mr. Tarkunde then submitted that the very fact that both the police witnesses, Constable Som Nath and ASI Labh Singh made unsuccessful effort to conceals that Balwant Singh was carrying a kirpan, which fact stands established from the evidence of DW1 Munshi of the District Jail at Burail, it could be safely inferred that the entire case against the appellants, was a made up affair and not based on facts. The prosecution witnesses were guilty of giving false statements. learned Counsel then, in the alternative, went on the submit that even if the prosecution case to the effect that the appellants had raised the three slogans was accepted, no offence under Section 124A IPC or 153A IPC could be said to have been made out.

7. learned Counsel for the State, on the other hand, submitted that keeping in view the tension which had been generated on the date of the assassination of the former Prime Minister - Smt. Indira Gandhi, the raising of the three slogans by the appellants attracted the provisions of Section 124A IPC and 153A IPC and the mere fact that no independent witness was associated, could not detract from the reliability of the evidence of ASI Labh Singh and Constable Som Nath. In this context, learned Counsel referred to the statement of PW3 Labh Singh who deposed that he was unable to associate any of the independent persons from the public inspite of his making efforts because none was willing to associate himself. learned Counsel urged that nothing has been brought out on the record to show that either PW2 and PW3 had any animosity or reason to falsely implicate the appellants and that their testimony inspired confidence.

Section 124A IPC reads thus:

124A. Sedition - whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

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

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

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

A plain reading of the above Section would show that its application would be attracted only when the accused brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, by words either written or spoken or visible signs or representations etc. Keeping in view the prosecution evidence that the slogans as noticed above were raised a couple of times only by the appellant and that neither the slogans evoked a response from any other person of the Sikh community or reaction from people of other communities, we find it difficult to hold that upon the raising of such casual slogans, a couple of times without any other act whatsoever the charge of sedition can be founded. It is not the prosecution case that the appellants were either leading a procession or were otherwise raising the slogans with the intention to incite people to create disorder or that the slogans in fact created any law and order problem. It does not appear to us that the police should have attached much significance to the casual slogans raised by two appellants, a couple of times and read to much into them. The prosecution has admitted that no disturbance, whatsoever, was caused by the raising of the slogans by the appellants and that inspite of the fact that the appellants raised the slogans a couple of tunes, the people, in general, were un- affected and carried on with their normal activities. The casual raising of the slogans, once or twice by two individuals alone cannot be said to be aimed at exciting or attempt to excite hatred or disaffection towards the Government as established by law in India. Section 124A IPC, would in the facts and circumstances of the case have no application whatsoever and would not be attracted to the facts and circumstances of the case.

8. In so far as the offence under Section 153A IPC is concerned, it provides for punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever or brings about disharmony or feeling of hatred or ill- will between different religious, racial, language or regional groups or

castes or communities. In our opinion only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and order or effect public tranquility, that the law needs to step in to prevent such an activity. The facts and circumstances of this case unmistakably show that there was no disturbance or semblance of disturbance of law and order or of public order or peace and tranquillity in the area from where the appellants were apprehended while raising slogans on account of the activities of the appellants. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153A IPC and the prosecution has to prove the existence of mens rea in order to succeed. In this case, the prosecution has not been able to establish any mens rea on the part of the appellants, as envisaged by the provisions of Section 153A IPC, by their raising causally the three slogans a couple of times. The offence under Section 153A IPC is, therefore, not made out.

9. On facts, we find that the prosecution witnesses PW2 and PW3 have not spoken the whole truth. Both the prosecution witnesses PW2 and PW3 made a deliberate attempt to conceal the existence of kirpan on the person of Balwant Singh at the time of his arrest, which fact stands amply proved from the evidence of DW1. The trial court while dealing with this aspect of the case observed :

On 1.11.1984 the accused were produced before the Magistrate. No order of the Magistrate has been produced to show that Balwant Singh accused was wearing a kirpan when he appeared before him. It was only thereafter that the accused were sent to jail. It, therefore, appears that the kirpan was supplied to Balwant Singh after he had been remanded by the Magistrate and was on his way to the jail.

(Emphasis ours)

10. We are unable to appreciate this reasoning. The trial court appears to have made out a case which was neither spoken to nor relied upon either by the prosecution or the defence. It is nobody's case that Balwant Singh and been supplied with the kirpan when he was on his way to the jail. It defies logic to think that some one from the public would have such as easy access to a person in custody of the police so as to be able to arm him with as kirpan, without the police escort knowing about it. It is not permissible for the trial court to make such an inference on assumptions without any evidence on the record. The Court must confine itself to the evidence to decide the case and not base its opinion on surmises and conjectures. We also regret to note that the trial court while recording the conviction observed:

To conclude, therefore, the accused shouted slogans 'khalistan zindabad', Hindustan Murdabad', Hinduan Nun Punjab Chon Kadh Ke Chhadange Hun Mauka Aya Hai Raj Kayam Karan Da', in the piazza of Sector 17 market which is frequented by people of both the principle communities i.e. Hindus and Sikhs at about 5.45 p.m. on the day when the beloved Prime Minister of India Smt. Indira Gandhi was riddled with bullets.

11. It is not the prosecution case that either of the appellants had shouted the slogan 'Hindustan Murdabad'. On what material did the learned Judge find that the appellants had shouted that particular slogan belies our comprehensions. Obviously, for convicting the appellants, the trial Judge also pressed into aid the allegation that the appellants had shouted 'Hindustan Murdabad', which is nobody's case. The learned trial Judge, to say the least, seems to have drawn upon his imagination a course not permissible for a Court of Law.

12. It appears to us that the raising some slogan only a couple of times by the two lonesome appellants, which neither evoked any response nor any reaction from any one in the public can neither attract the provisions of Section 124A or Section 153A IPC. Some more overt act was required to bring home the charge to the two appellants, who are Government servants. The police officials exhibited lack of maturity and more of sensitivity in arresting the appellants for raising the slogans - which arrest - and not the casual raising of one or two slogans - could have created a law and order situation, keeping in view the tense situation prevailing on the date of the assassination of Smt. Indira Gandhi. In situations like that, over sensitiveness some times is counter productive and can result in inviting trouble. Raising of some lonesome slogans, a couple of times by two individuals, without anything more, did not constitute any threat to the Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religious or other groups.

13. In our opinion, for what we have stated above, the prosecution has not succeeded in establishing the case against the appellants beyond a reasonable doubt. Their conviction and sentence for the offences under Section 124A and 153A IPC, cannot be sustained. This appeal accordingly succeeds and is allowed. The conviction and sentence of the appellants is set aside. The appellants are on bail. Their bail bonds shall stand discharged.

MANU/SC/0689/2015

Neutral Citation: 2015/INSC/458

Back to Section 320 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 231 of 2015 (Arising out of SLP (Crl.) No. 5273 of 2012)

Decided On: 01.07.2015

State of M.P. Vs. Madanlal

Hon'ble Judges/Coram:

Dipak Misra and Prafulla C. Pant, JJ.

JUDGMENT

Dipak Misra, J.

1. In this appeal, by special leave, the State of M.P. calls in question the legal acceptability of the judgment and order passed by the learned Single Judge of the High Court of M.P. in Criminal Appeal No. 808 of 2009 whereby he has set aside the conviction Under Section 376(2)(f) read with Section 511 of the Indian Penal Code (Indian Penal Code) and the sentence imposed on that score, that is, rigorous imprisonment of five years by the learned Sessions Judge, Guna in ST No. 134/2009 and convicted the Respondent- accused herein Under Section 354 of the Indian Penal Code and restricted the sentence to the period already undergone which is slightly more than one year.

2. The factual narration for disposal of the present appeal lies in a narrow compass. The Respondent as accused was sent up for trial for the offence punishable Under Section 376(2)(f) Indian Penal Code before the learned Sessions Judge. The case of the prosecution before the Court below was that on 27.12.2008, the victim, aged about 7 years, PW1, was proceeding towards Haar from her home and on the way the accused, Madan Lal, met her and came to know that she was going in search of her mother who had gone to graze the goats. The accused told her that her mother had gone towards the river and accordingly took her near the river Parvati, removed her undergarment and made her sit on his lap, and at that time the prosecutrix shouted. As the prosecution story proceeds, he discharged on her private parts as well as on the stomach and washed the same. Upon hearing the cry of the prosecutrix, her mother, Ramnali Bai, PW2, reached the spot, and then accused took to his heels. The prosecutrix narrated the entire incident to her mother which led to lodging of an FIR by the mother of the prosecutrix. On the basis of the FIR lodged, criminal law was set in motion, and thereafter the investigating agency examined number of witnesses, seized the clothes of the Respondent- accused, sent certain articles for examination to the forensic laboratory and eventually after completing the examination, laid the chargesheet before the concerned court, which in turn, committed the matter to the Court of Session.

3. The accused abjured his guilt and pleaded false implication. The learned trial Judge, regard being had to the material brought on record, framed the charge Under Section 376(2)(f) read with Section 511 of Indian Penal Code. The prosecution, in order to bring home the charge leveled against the accused examined the prosecutrix, PW1, Ramnali Bai, PW2, Dr. Smt. Sharda Bhola, PW3, Head Constable Babu Singh, PW4, ASI B.R.S. Raghuwanshi, PW5, and Dr. Milind Bhagat, PW6, and also got marked nine documents as exhibits. The defence chose not to adduce any evidence.

4. The learned trial Judge on the basis of the material brought on record came to hold that the prosecution had been able to establish the charge against the accused and accordingly found him guilty and sentenced him as has been stated hereinbefore.

5. The said judgment of conviction and order of sentence was in assail before the High Court; and it was contended by the learned Counsel for the Appellant therein that the trial court had failed to appreciate the evidence in proper perspective and had not considered the material contradictions in the testimony of prosecution witnesses and, therefore, the judgment of conviction and sentence, being vulnerable, deserved to be annulled. The learned Judge also noted the alternative submission which was to the effect that the parties had entered into a compromise and a petition seeking leave to compromise though was filed before the learned trial Judge, it did not find favour with him on the ground that the offence in question was non- compoundable and, therefore, regard being had to the said factum the sentence should be reduced to the period already undergone, which was slightly more than one year.

6. The High Court, as is manifest, has converted the offence to one under 354 Indian Penal Code and confined the sentence to the period of custody already undergone.

7. We have heard Mr. C.D. Singh, learned Counsel for the Appellant- State and Ms. Asha Jain Madan, learned Counsel who was engaged by the Court to represent the Respondent. Be it stated, this Court had appointed a counsel to argue on behalf of the Respondent, as despite service of notice, the Respondent chose not to appear.

8. It is contended by the learned Counsel for the State that the High Court has not kept in mind the jurisdiction of the appellate court and dislodged the conviction and converted the conviction to one Under Section 354 Indian Penal Code in an extremely laconic manner and, therefore, the judgment deserves to be dislodged. It is urged by him that it is the bounden duty of the appellate court to reappreciate the evidence in proper perspective and thereafter arrive at appropriate conclusion and that exercise having not been done, the impugned judgment does not commend acceptation. He has also seriously criticized the quantum of sentence imposed by the High Court.

9. Ms. Asha Jain Madan, learned Counsel appearing for the Respondent, per contra, would contend that the learned Single Judge, regard being had to the evidence on record, has come to hold that the prosecution had failed to prove the offence Under Section 376(2)(f) read with Section 511 Indian Penal Code, and hence, the impugned judgment is absolutely impeccable. She would contend with immense vehemence that when the prosecutrix was a seven year old girl and the ingredients of the offence had not been established the conversion of the offence to one Under Section 354 Indian Penal Code by the High Court cannot be found fault with. It is urged by her that once the view of the High Court is found defensible, the imposition of sentence Under Section 354 Indian Penal Code cannot be regarded as perverse.

10. To appreciate the rivalised submissions advanced at the Bar, we have anxiously perused the judgment of the learned trial Judge as well as that of the High Court. As we notice, the trial court has scanned the evidence and arrived at the conclusion that the prosecution had been able to bring home the charge on the base of credible evidence. The High Court, as is demonstrable, has noted the submissions of the learned Counsel for the Appellant therein to the effect that the trial court had failed to appreciate the evidence in proper perspective, and had totally ignored the material contradictions in the testimony of the prosecution witnesses, and thereafter abruptly referred to the decisions in Ashok @ Pappu v. State of M.P. 2005 Cr.L.J. (M.P.) 471., Phulki @ Santosh @ Makhan v. State of M.P. 2006 Cr.L.J. (M.P.) 157 and Jeevan v. State of M.P. 2008 Cr.L.J. (M.P.) 1498 and the factual matrix in the said cases, and concluded thus:

Keeping in view the aforesaid position of law and the statement of prosecutrix who was aged 7 years only at the time of incident and the medical evidence on record, this Court is of the opinion that the learned Court below committed error in convicting the Appellant Under Section 376 of Indian Penal Code. After going through the evidence, it can be said that at the most Appellant can be held guilty of the offence punishable Under Section 354 of Indian Penal Code. In view of this, the appeal filed by the Appellant is allowed in part and the conviction of Appellant Under Section 376 is set aside and Appellant is convicted Under Section 354 of Indian Penal Code. So far as sentence is concerned, keeping in view the aforesaid position of law and also the fact that Appellant is in jail since last more than one year the purpose would be served in case the jail sentence is reduced to the period already undergone. Thus, the same is reduced to the period already undergone. Respondent/State is directed to release the Appellant forthwith, if not required in any other case.

11. In the instant appeal, as a reminder, though repetitive, first we shall dwell upon, in a painful manner, how some of the appellate Judges, contrary to the precedents and against the normative mandate of law, assuming a presumptuous role have paved the path of unbelievable laconicity to deal with criminal appeals which, if we permit ourselves to say, ruptures the sense of justice and punctures the criminal justice dispensation system.

12. In this regard, reference to certain authorities of this Court would be apposite. In Amar Singh v. Balwinder Singh and Ors. MANU/SC/0065/2003 : (2003) 2 SCC 518 while dealing with the role of the appellate Court, a two- Judge Bench has observed thus:

The learned Sessions Judge after placing reliance on the testimony of the eyewitnesses and the medical evidence on record was of the opinion that the case of the prosecution was fully established. Surprisingly, the High Court did not at all consider the testimony of the eyewitnesses and completely ignored the same. Section 384 Code of Criminal Procedure empowers the appellate court to dismiss the appeal summarily if it considers that there is no sufficient ground for interference. Section 385 Code of Criminal Procedure lays down the procedure for hearing appeal not dismissed summarily and Sub- section (2) thereof casts an obligation to send for the records of the case and to hear the parties. Section 386 Code of Criminal Procedure lays down that after perusing such record and hearing the Appellant or his pleader and the Public Prosecutor, the appellate court may, in an appeal from conviction, reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction. It is, therefore, mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 Code of Criminal Procedure. In Biswanath Ghosh v. State of W.B. MANU/SC/0208/1987 : (1987) 2 SCC 55 it was held that where the High Court acquitted the accused in appeal against conviction without waiting for arrival of records from the Sessions Court and without perusing evidence adduced by the prosecution, there was a flagrant miscarriage of justice and the order of acquittal was liable to be set aside. It was further held that the fact that the Public Prosecutor conceded that there was no evidence, was not enough and the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused. In State of U.P. v. Sahai MANU/SC/0258/1981 : (1982) 1 SCC 352 it was observed that where the High Court has not cared to examine the details of the intrinsic merits of the evidence of the eyewitnesses and has rejected their evidence on general grounds, the order of acquittal passed by the High Court resulted in a gross and substantial miscarriage of justice so as to invoke extraordinary jurisdiction of the Supreme Court Under Article 136 of the Constitution.

The said view was reiterated by a three- Judge Bench in the State of Madhya Pradesh v. Bhura Kunjda MANU/SC/1332/2005 : (2009) 17 SCC 346.

13. Recently, in K. Anbazhagan v. State of Karnataka and Ors. 1, a three- Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal has ruled that:

The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care

and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind - sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.

14. In the case at hand, the learned Single Judge has not at all referred to the evidence that has been adduced during the trial. We have, in fact, reproduced the entire analysis made by the learned Single Judge. Prior to that, as is manifest, he has referred to some authorities which are based on their own facts. The said pronouncements, in fact, lay down no proposition of law. As is noticeable, the learned Single Judge in his judgment has only stated that the prosecution has examined so many witnesses and filed nine documents. The said approach, we are afraid to say, does not satisfy the requirement of exercise of the appellate jurisdiction. That being the obtaining situation, we are inclined to set aside the judgment of the High Court and remit the matter to it for appropriate adjudication.

15. Having stated the aforesaid, ordinarily we would have proceeded to record our formal conclusion, but, an extremely pertinent and pregnant one, another aspect in the context of this case warrants to be addressed. As it seems to us the learned Single Judge has been influenced by the compromise that has been entered into between the accused and the parents of the victim as the victim was a minor. The learned trial Judge had rejected the said application on the ground that the offence was not compoundable. In this context, it is profitable to reproduce a passage from Shimbhu and Anr. v. State of Haryana (2014) 13 SCC 318 wherein, a three- Judge Bench has ruled thus:

Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non- compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurise her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) Indian Penal Code.

16. The aforesaid view was expressed while dealing with the imposition of sentence. We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non- perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error.

Or to put it differently, it would be in the realm of a sanctuary of error. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility. It has to be kept in mind, as has been held in Shyam Narain v. State (NCT of Delhi) MANU/SC/0543/2013 : (2013) 7 SCC 77 that:

Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men.

17. At this juncture, we are obliged to refer to two authorities, namely, Baldev Singh v. State of Punjab MANU/SC/1445/2011 : (2011) 13 SCC 705 and Ravindra v. State of Madhya Pradesh MANU/SC/0198/2015 : (2015) 4 SCC 491. Baldev Singh (supra) was considered by the three-Judge Bench in Shimbhu (supra) and in that case it has been stated that:

18.1. In Baldev Singh v. State of Punjab, though the courts below awarded a sentence of ten years, taking note of the facts that the occurrence was 14 years old, the Appellants therein had undergone about 3 1/2 years of imprisonment, the prosecutrix and the Appellants married (not to each other) and entered into a compromise, this Court, while considering peculiar circumstances, reduced the sentence to the period already undergone, but enhanced the fine from Rs. 1000 to Rs. 50,000. In the light of series of decisions, taking contrary view, we hold that the

said decision in Baldev Singh v. State of Punjab cannot be cited as a precedent and it should be confined to that case.

18. Recently, in Ravindra (supra), a two- Judge Bench taking note of the fact that there was a compromise has opined thus:

17. This Court has in Baldev Singh v. State of Punjab, invoked the proviso to Section 376(2) Indian Penal Code on the consideration that the case was an old one. The facts of the above case also state that there was compromise entered into between the parties.

18. In the light of the discussion in the foregoing paragraphs, we are of the opinion that the case of the Appellant is a fit case for invoking the proviso to Section 376(2) Indian Penal Code for awarding lesser sentence, as the incident is 20 years old and the fact that the parties are married and have entered into a compromise, are the adequate and special reasons. Therefore, although we uphold the conviction of the Appellant but reduce the sentence to the period already undergone by the Appellant. The appeal is disposed of accordingly.

19. Placing reliance on Shimbhu (supra), we also say that the judgments in Baldev Singh (supra) and Ravindra (supra) have to be confined to the facts of the said cases and are not to be regarded as binding precedents.

20. We have already opined that matter has to be remitted to the High Court for a reappraisal of the evidence and for a fresh decision and, therefore, we have not referred to the evidence of any of the witnesses. The consequence of such remand is that the order of the High Court stands lancinated and as the Respondent was in custody at the time of the pronouncement of the judgment by the trial Court, he shall be taken into custody forthwith by the concerned Superintendent of Police and thereafter the appeal before the High Court be heard afresh. A copy of judgment be sent to the High Court of Madhya Pradesh, Bench at Gwalior.

21. The appeal stands allowed to the extent indicated hereinabove.

MANU/SC/0089/1975

Back to Section 321 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 272 of 1975

Decided On: 05.12.1975

Bansi Lal Vs. Chandan Lal And Ors.

Hon'ble Judges/Coram:

A.C. Gupta and Y.V. Chandrachud, JJ.

JUDGMENT

A.C. Gupta, J.

1. By his order dated November 19, 1974 the First Additional Sessions Judge, Etawah, allowed the application of the Public Prosecutor, Etawah, to withdraw the prosecution against respondents Chandan Lal and Baldeo Prasad. A revisional application directed against the order was dismissed in limine by the Allahabad High Court. In this appeal by special leave the propriety of the order allowing withdrawal of the prosecution is in question.

2. The facts of the case, relevant for the present purpose, are as follows. On the morning of May 27, 1970 two reports concerning the same incident were lodged in quick succession by two persons, the first report was made by one Ram Narayan at 6.15 A.M., and the next at 6.30 A.M. by the appellant Bansilal at Etawah police station. The reports said that respondent Chandan Lal and several others had forcibly caught hold of Bansi Lal's sister's husband Mawa Ram and dragged him inside Chandan Lal's house and when attracted by his screams several persons attempted to rescue him, Mawa Ram, the other respondent Baldeo Prasad and one Sukh Lal closed the door from inside. Bansi Lal's report added that one of the inmates of the house standing on the roof was threatening the crowd outside with a gun. On receipt of this information, sub-Inspector, K.K. Sharma accompanied by some constables hastened to Chandan Lal's house which they found closed from inside and surrounded by a crowd. Some one from the roof of the house started firing at the crowd and the police party. This man who was latter identified as one Rameshwar was killed when the police returned fire. Entering Chandan Lal's house the police party found Mawa Ram lying seriously injured in a room where Chandan Lal, Baldeo Prasad and Sukh Lal were present. Chandan Lal, Baldeo and three other persons found inside the house, Sukh Lal, Gay a Prasad Damodar and Sitaram were all arrested and Mewa Ram was sent to the District Hospital for treatment. Mewa Ram died the same evening without gaining consciousness.

3. On the report of Sub- Inspector K.K. Sharma, a case under Sections 147, 148, 302, 342 and 149 of the Indian Penal Code was registered against the said five persons. Deputy Superintendent of

Police, R.B. Malik who was deputed to investigate the case submitted charge- sheet against the accused in the court of Additional District Magistrate (Judicial) on July 7, 1970. On May 22, 1974 the Additional District Magistrate (Judicial) Committed the case to the Court of Sessions. On July 7, 1974 the Additional Sessions Judge Etawah, on the application of the Public Prosecutor, allowed the case against Sukh Lal to be withdrawn. On the next day. July 8, charges were framed against the remaining accused persons including the respondent under Sections 147, 342 and 302/149 of the Indian Penal Code on November 18, 1974 the Public Prosecutor made an application "before the Additional Sessions Judge, Etawah, praying for permission to withdraw the case against respondents Chandan Lal and Baldeo Prasad. The material part of the application reads:

The prosecution does not want to produce evidence and continue the criminal matter against these accused (Chandan Lal and Baldeo Prasad).

On the next, day, November 19, the Additional Sessions Judge allowed this application and acquitted Chandan Lal and Baldeo Prasad of the Charges framed against them. Referring to certain facts which the described as the 'define case', the Additional Sessions Judge held that the case against Chandan Lal and Baldeo Prasad should be allowed to be withdrawn "because the prosecution is reluctant to prove its case against the said two accused persons" and it appeared "futile to refuse permission to the State to withdraw the prosecution." The correctness of this order is the only question for determination in this appeal.

4. Section 321 of the CrPC, 1973 which corresponds to Section 494 of the earlier Code of 1898 and is in identical terms empowers the Public Prosecutor to withdraw with the consent of the Court from the prosecution of any person either generally or in respect of any one or more of the offences for which he is being tried.... Section 494 of the Code of 1898 has been construed by tine different High Courts in a number of cases. this Court in M.N. Sankarayaryanan Nair v. P.V. Balakrishnan and Ors. (1), explaining the well- established legal position as to the scope and ambit of the powers granted by Section 494 has observed that though the section "does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution, the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice...." Though it is not possible to catalogue all the circumstances in which this power can be exercised, by way of illustration MNS. Nair's case (supra) mentions a few instances where the Public Prosecutor would be apparently justified in seeking such permission, as in a case where the prosecution "will not be able to produce sufficient evidence to sustain the charge of that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances." It is added that the request to grant permission under Section 494 should not be accepted '- as a necessary formality", "for the mere asking", but the court must be satisfied "on the materials placed before it" that the grant of permission would serve the administration of justice and that "permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain.

5. In the case before us the prosecution has only reached the stage of framing charges against the accused and no occasion for the defence to make out a case has yet arisen. It is not clear where the Additional Sessions Judge found the case made which he calls the defence case it is not to be found in the material that was before him. Counsel for the respondent, State of U.P. drew our attention to an order dated October 18, 1973 passed by the Allahabad High Court on a revision petition filed by the State seeking to stay further proceedings of this case when it was pending before the Additional District Magistrate (Judicial), Etawah., It appears from this judgment that an application for stay of the proceedings was made before the Additional District Magistrate (Judicial) on the ground that the case required to be investigated further. The Additional District Magistrate rejected the application and the Sessions Judge, Etawah, confirmed that order. The High Court on October 18, 1973 dismissed the revision petition made against the order refusing the prayer for stay and directed the Additional District Magistrate to dispose of the proceedings before him expeditiously and in accordance with law. As stated already, the case was committed to the Court of Sessions on May 22, 1974. Therefore when the Addl. Sessions Judge made the impugned order, there was no material before him to warrant the conclusion that sufficient evidence would not be forthcoming to sustain the charges or that there was any reliable subsequent information falsifying the prosecution case or any other circumstance justifying withdrawal of the cast against the respondents. Consenting to the withdrawal of the case on the view that the attitude displayed by the Prosecution made it "futile" to refuse permission does not certainly serve the administration of justice. If the material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not possible to say that there was no evidence in support of the Prosecution case. The application for stay of the proceeding made before the committing magistrate cannot also be said to falsify the prosecution case. If the prosecuting agency brings before the court sufficient material to indicate that the prosecution was based on false evidence, the court would be justified in consenting to the withdrawal of the prosecution, but on the record of the case, as it is, we do not find any such justification. In our opinion the High Court was in error in dismissing in limine the revisional application made against the order of the Additional Sessions Judge.

6. The appeal is accordingly allowed and the order of the Additional Sessions Judge permitting the withdrawal of the case against the respondents is set aside. The Additional Sessions Judge will proceed with the trial in accordance with law.

MANU/SC/0398/1978

Back to Section 325 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 95 of 1977

Decided On: 28.09.1978

Ratilal Bhanji Mithani Vs. State of Maharashtra and Ors.

Hon'ble Judges/Coram:

A.P. Sen, O. Chinnappa Reddy and R.S. Sarkaria, JJ.

JUDGMENT

R.S. Sarkaria, J.

1. This appeal by special leave is directed against a judgment, dated January 21, 1976, of the High Court of Judicature at Bombay in Criminal Revision Application No. 565 of 1969, whereby it set aside an order, dated February 26, 1969, of the Chief Presidency Magistrate and directed the latter to restore Case No. 244/C.W. of 1968 against the accused persons, excepting accused No. 7 (who is since dead) for being dealt with in the light of the observations made therein.

2. The case was originally instituted on April 1, 1961 on the basis of a criminal complaint filed by the Assistant Collector (Customs) in the Court of the Chief Presidency Magistrate, Esplanade, Bombay. It is alleged in the complaint that between August 1957 and March 1960, offences under Section 120B, I.P.S., read with Section 167(81) of the Sea Customs Act, 1978, and Section 5 of the Imports and Exports Act, 1947, were committed by one Ramlal Laxmidutta Nanda and seven others, including the appellant, who is accused No. 2 in the Trial Court. Ramlal Laxmidutta Nanda was alleged to be the principal culprit. He died on September 15, 1960. As a result of a conspiracy, twenty- for consignments of goods came from abroad and were received in Bombay. The conspiracy was carried out in this manner. By steamer, two consignments bearing similar marks would arrive such as M.T.S. M.I.S. marked in triangle. The first consignment would contain the genuine goods and the second consignment would contain less number of cases than the first consignment. The documents would arrive for the first consignment. With the help of the documents for the genuine goods, the Customs examination would be carried out, and then at the time of removing the real consignment, contraband consignment plus one case of the genuine consignment would be removed. Remaining goods of the genuine consignments with their marks tampered, would be left unattended in the docks. Out of the 24 consignments brought into India, the last four were seized by the Customs. The appellant Mithani was not linked with any of those four. But with regard to the remaining 8 out of the twenty consignments, the prosecution alleges that it has in its possession 10 Verladescheins (called as 'mate sheets or receipts') which give the description of the contraband goods. Out of these 10 Verladescheins. 2 relate to consignments in the name of Suresh Trading Co. and Dee Deepak & Co. From the proprietors of these two firms, the appellant Mithani held Powers of Attorney.

3. Mithani was arrested and bailed out on May 11, 1960. Between March 1962 and December 1962, the prosecution examined about 200 witnesses before the Magistrate, but had not yet examined any witness in regard to any of the 10 Verladescheins.

4. The complainant made an application to the trial magistrate, requesting him to get on record a number of documents falling into these categories, viz. (1) Verladescheins (Mate's receipts), (2) the correspondence that passed between Shaw Wallace & Co. and their principals and agents abroad and also the correspondence that passed between the other shipping agents in Bombay with their principals, and (3) the documents concerning the Company known as C.C.E.I. at Zurich.

5. By an order, dated August 24, 1962, the Magistrate held that 10 out of the 20 Verladescheins were inadmissible either under the Evidence Act or under the Commercial Documents Evidence Act. 1939. By another order, dated December 6, 1962, the Magistrate held that 9 out of the 10 Verladescheins were admissible under Section 10 of the Evidence Act. Some other letters and correspondence were also excluded on the ground that they could not be said to have been written in furtherance of the conspiracy.

6. On December 12, 1962, the Magistrate found that no other witness for the prosecution was present. He, therefore, passed this order:

None of the witnesses are present. The case is very old. There is enough evidence for the purpose of charge and about 200 witnesses are examined. Prosecution may examine all witnesses as they deem proper after the charge. Prosecution closes its case. Accused statement recorded. Adjourned for arguments for charge to 13.12.1962.

7. The Magistrate then heard the arguments and thereafter on December 21, 1962, on the basis of the evidence already recorded, framed charges against Mithani and his 6 co- accused. Under the first charge, Mithani (accused No. 2) was jointly charged with Accused 1, 3, 4, 5, 6 and 7 with criminal conspiracy between September 1957 and February 1, 1960 or thereabout, with intent to defraud the Government of India of the duty payable on various contraband goods and to evade the prohibition and restrictions imposed relating thereto for acquiring possession of large quantity of contraband goods etc. It was specifically recited in the charge that accused No. 2 was, at the relevant time, partner of Shanti Lal and Chagan Lal & Co., Bombay, and also constituted Attorney of Suresh Trading Co., Dee Deepak & Co., New Delhi, and also of Eastern Trading Corporation, Bombay and had an interest in all these three concerns.

8. On February 19, 1963, the State filed Criminal Revisions Application No. 107 of 1963 in the High Court against the orders dated August 24, 1962 and December 6, 1962 of the Magistrate, whereby the latter had refused to admit 11 Verladescheins out of 20 in evidence. The State, also, made a grievance against the failure of the Magistrate to frame charges in respect of certain alleged acts of the accused. It was contended that the Magistrate had unduly curtailed the period of conspiracy, while the evidence brought on the record by the Prosecution showed that this period was longer than what the Magistrate had taken into account.

9. On July 17, 1964, Mithani, also, filed Criminal Revision No. 574 of 1964 in the High Court, challenging the Magistrate's Order, dated December 6, 1962, whereby he had admitted 9 Verladescheins, Bills of Lading, Invoices etc., into evidence. It was further alleged in the Revision Petition : "It ought to have been appreciated that all the Verladescheins, Invoices and Bills of Lading being inadmissible, there is no evidence left on record to make even a prima facie

case against the petitioner." The Revision petitioner, inter alia, prayed "that the order of the learned Magistrate dated December 6, 1962, in so far as it is against the petitioner, and the charges framed by the learned Magistrate against the petitioner, be set aside and he be discharged from the case."

10. Revision Application No. 107 by the State was heard by Mr. Justice H.R. Gokhale (as he then was) on August 19, 1964. It was contended there, on behalf of the prosecution that all the Verladescheins were straightway admissible under Sub- section (2) of Section 32, Evidence Act. Gokhale, J. Held that since the preliminary condition set out in the prefatory part of Section 32, (Viz., that the persons whose statements are sought to be admitted under Section 32 are such that their attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, may appear to the Court to be unreasonable, had not been satisfied these Verladescheins (Mates receipts) would not be admissible under Section 32. In view of this, finding the learned Judge felt that "it really does not be come necessary to consider that these Verladescheins were not prepared in the ordinary course of business". The learned Judge was careful enough to caution: "I am not suggesting that for the reasons all these documents are false." Indeed, he conceded that they may be relevant to the facts in issue, and added: "If the prosecution desires to rely upon the evidence of these documents the prosecution certainly will be entitled to prove them or to prove the correctness of the description of the document in the ordinary way without having resort to the exception contained in Section 32."

11. As regards the question whether these Verladescheins were admissible under Section 10, the learned Judge held that "before considering this question, it would be wrong to look at these very documents the admissibility of which is in dispute", and that "such a conclusion can be reached from evidence, documentary, oral or circumstantial, but apart from the disputed document itself. It does not appear from the order of the learned Magistrate that there was any independent material from which he had formed the opinion that two or more persons had conspired together to commit an offence." The learned Judge significantly added : "If there is any such material or if the prosecution leads further evidence and if such material is brought on record, the learned Magistrate will, at the appropriate stage, be entitled to take this material into consideration and decide whether these documents can be admitted under Section 10 of the Evidence Act." The learned Judge pointed out that this could include an attempt to take out the goods. In this connection he observed: "If apart from the question of the period during which the conspiracy extended they are not admissible in evidence, because other conditions required to be satisfied under Section 10 are not satisfied, then it is another matter. But I cannot accept his conclusion that they would not be so admissible, because they do not fall within the period of conspiracy." The learned Judge concluded : "I have no doubt that the learned Magistrate will have to consider afresh whether the documents, which he has admitted under Section 32 or Section 10 are admissible or not. In any case, the order which he has made admitting certain documents under Section 10 or Section 32 was an interlocutory order and the learned Magistrate will be entitled to reconsider the position in the light of the observations in this judgment.... The learned Magistrate in the light of the view which I have taken, will also consider whether it is necessary to frame additional charges and to pass an appropriate order."

12. The Revision Application No. 574 of 1964, filed by Mithani, was rejected by a separate order, dated August 21, 1964 on the ground that in the view which the learned Judge had taken in Criminal Revision No. 107 of 1963, it was not necessary to admit this Revision Application. It was, however, observed that the Magistrate will take the observations in that judgment into

consideration and consider "whether the interlocutory order, against which the present Revision Application is filed, needs to be reviewed."

13. The prosecution filed Special Leave Petitions (965 and 966 of 1965) in this Court against the judgment, dated August 19/20, 1964 of Mr. Justice Gokhale, and against the High Court's order refusing to grant certificate of fitness. this Court on January 27, 1966, summarily dismissed both these petitions. The prosecution then made an application to the Magistrate to take some photostat copies of certain documents. The Magistrate granted this application. Accused 1 challenged this order of the Magistrate in the High Court. By its order, dated October 4, 1966, the High Court restricted the time to prosecution by three months for calling the Foreign Witnesses. After expiration of this period, the prosecution on January 11, 1967 filed an application in the High Court for cancellation of Mithani's bail on the ground that he was tampering with the witnesses and abusing the liberty granted to him. The High Court cancelled Mithani's bail and Mithani surrendered and was committed to jail custody on January 13, 1967. Mithani came by special leave against the order cancelling his bail, to this Court. By order dated May 4, 1967, this Court dismissed Mithani's appeal, but restricted the time for examining the German Witnesses cited by the prosecution upto June 26, 1967. Since there was delay in procuring the attendance of German Witnesses within the time granted, Mithani was released on bail by an order dated July 26, 1967 of this Court. Thereafter, the prosecution applied to the Magistrate to proceed with the case without the Foreign Witnesses.

14. On July 10, 1967, the prosecution applied to the Magistrate for issue of commission for examination of the German Witnesses at Hamburg or Berlin or London. The Magistrate rejected this application by his order dated August 8, 1967. Against the Magistrate's order, the prosecution, again, went in revision to the High Court, which rejected the same by an order in September, 1967. Another revision petition filed in the High Court by the prosecution was dismissed by the High Court (V.S. Desai & Wagle JJ) by an order dated August 9, 1968.

15. On December 2, 1968, the prosecution made an application for examining a number of witnesses to establish the preliminary facts for admission of the Verladasheins and other documents under Sections 32(2)(3) and 10 of the Evidence Act and under the Commercial Documents Act. The Magistrate rejected that application by his order dated January 9, 1969.

16. By an order dated February 26, 1969, the Additional Chief Presidency Magistrate, deleted charges 2 to 9 against Accused 2 (Mithani), 3 and 7, and 'discharged' them. The following extract from the Magistrate's order will be useful to appreciate its true nature:

I therefore hold that with regard to overt acts in charges Nos. 2 to 9 no charges can be framed against any of the accused and therefore charges Nos. 2 to 9 will stand deleted.

Accused Nos. 2, 3 and 7 are concerned only in some of the charges Nos. 2 to 9. They are not concerned in charges Nos. 10, 11, 12 and 13.

Therefore as no overt act is held proved against them no conspiracy can be inferred as against them and therefore charge No. 1 of conspiracy as against them must go.

Therefore with regard to accused Nos. 2, 3 and 7 I hold that no case is made out against them and I therefore hold them not guilty Under Section 167 read with 81 of the Customs Act for

contravention of Import & Export Control Act 1947 and 1955 and for conspiracy and order them to be discharged.

17. Against the Magistrate's order, dated February 26, 1969, the prosecution filed Criminal Revision Application No. 565 of 1969 in the High Court.

18. By its judgment dated December 16/17, 1969, a Bench of the High Court (consisting of Vaidya and Rege JJ.) allowed Criminal Revision 565 of 1969 mainly on the ground that the Magistrate after framing the charge, had no legal power to discharge the accused persons. It was observed that "the entire complexion of the cases changed on account of the retirement of the Magistrate. The new Magistrate who will hear the matter, will have to find out whether he must alter or vary the charge and for that purpose to issue a fresh process to the two living deleted accused, after taking into consideration the evidence already recorded by the former Magistrate...and such other evidence he may have to record hereafter." The High Court concluded: "We are setting aside the order of discharge on the ground that it is open to the new Magistrate to frame a charge against the deleted accused on considering the material; and also on the ground that the former Magistrate had no power to discharge the accused after framing the charge." The High Court further observed that, "whatever submissions the accused want to make with regard to not framing the charge are also open to them." At that stage, they did not want and could not consider the evidence before the Magistrate. In the result, the order dated February 26, 1969 of the Magistrate was set aside and the case was restored to the file of the Magistrate, except with regard to the deceased accused No. 7 for being dealt with as early as possible, in accordance with law and in the light of the observations made by the High Court.

19. Against this order, dated January 21, 1976, of the High Court setting aside the order dated February 26, 1969 of the Magistrate discharging the accused, the accused 2 (Mithani) has come in appeal before us.

20. The points canvassed by Shri I.N. Shroff, learned Counsel for the appellant, may be summarised as under :

(i) In passing the then impugned order, the Magistrate was simply acting in consonance with the observation and implied directions contained in the judgment, dated August 19/20, 1964, of Mr. Justice H.R. Gokhale in Cr. R.A. No. 107 of 1964. On the contrary, the Bench of the High Court (consisting of Vaidya and Rege JJ) has failed in its duty to uphold the aforesaid judgment of Mr. Justice Gokhale- which judgment had been upheld by this Court while dismissing prosecution's Special Leave Petitions 965 and 966 of 1975. Mr. Justice. Gokhale- so proceeds the argument- had held "that 10 Verladasheins were inadmissible under Section 32 and/or Section 10 of the Evidence Act." The legal consequence of this finding was that the charges framed by the Magistrate on December 21, 1962, on the basis of the said Verladescheins, were unsustainable in law and the Magistrate had to examine the matter de novo by ignoring the said charges or by amending, altering the same- as may be justified on the remaining admissible evidence on record.

(ii) In reviewing and deleting the charges and discharging the appellant (Mithani) and two other accused, the Magistrate was acting in accordance with the observation of Gokhale J. in Cr. R.A. 574 of 1974, which was to the effect, that it would be open to the Magistrate to consider whether the interlocutory order against which that revision application was filed, needs to be reviewed.

(iii) Since the Magistrate had under the CrPC, no power to delete the charges framed against the appellant and two others, it will be deemed that in the eye of law those charges still existed when

the Magistrate by his order dated February 26, 1969, discharged the accused Mithani and two others. This being the case, this order of "discharge" ought to have been treated as an order of 'acquittal'.

(iv) (a) In revision, the High Court was not competent to set aside this order of 'acquittal' and direct, as it were, a retrial of the accused.

(b) Since the appellant had, in reality, been acquitted by the Magistrate, he could not be retried on the same charges because of the double jeopardy or autrefois acquit.

(v) There has been gross laxity and delay on the part of the prosecution in prosecuting their case and in producing all their evidence, which is nothing short of abuse of the process of the Court. The complaint was filed on April 1, 1961. The order of "discharge" was passed by the Magistrate on February 26, 1969, and the aforesaid order came up for consideration in revision before the High Court in January 1976. The High Court's order dated January 21, 1976, directing de novo proceedings against the appellant after a lapse of several years would be unjust and unfair, particularly when this delay was attributable to the prosecution which had, indeed, closed its evidence before the framing of the charge and its request to examine the German Witnesses on commission stands declined.

21. As against this, Shri Soli Sorabji, learned Additional Solicitor- General submits that the appellant (Mithani), in fact, had never filed any revision against the order of the Magistrate, framing charges against him and others. It is pointed out that in Cr.R.A. No. 574 of 1964 filed by Mithani on July 17, 1964 in the High Court, the challenge was, in terms, confined to the Magistrate's order, dated December 6, 1962, whereby he had admitted 9 Verladescheins, Bills of Lading, invoices etc. into evidence; and that the order dated December 21, 1962, framing the charges was not specifically challenged. In any case, Gokhale J. had summarily rejected Mithani's Criminal Revision by an order, dated August 21, 1964. According to Shri Sorabji, the further observation in that order of Gokhale J. to the effect that it was open to the Magistrate to consider, "whether the interlocutory order against which the present revision application is filed, needs to be reviewed", was made only in respect of the Magistrate's order dated December 6, 1962 and not the order whereby the charges were framed. It is further submitted that Gokhale J.'s observations and directions in his judgment dated August 19/20, 1964 in Cr.R.A. No. 107 of 1964, could not, by any stretch of imagination, be construed as authorising the Magistrate to reconsider and delete the charges, and discharge the accused. On the contrary, the learned Judge had directed amendment of the charge so that the period of the conspiracy was not restricted to the period mentioned in the charges. It is further submitted that the Magistrate's order arbitrarily deleting the charges and "discharging" the accused, was patently illegal and the High Court was fully competent and justified to set it aside in the exercise of its revisional powers under Section 439 of the Code.

22. As regards delay in the proceedings, Shri Sorabji submits, it was mostly due to circumstances beyond the control of the prosecution; that the charge against the appellant was a grave one and the direction given by the High Court to take further proceedings, inter alia, against the appellant was not unjust and unfair.

23. We are unable to accept any of the contentions advanced by Shri Shroff.

24. At the outset, let us have a look at the relevant provisions of the CrPC, 1898, which admittedly governed the pending proceedings in this case. The procedure for trial of warrant cases by

Magistrates is given in Chapter XXI of that Code. The present case was instituted on a criminal complaint. Section 252 provides that in such a case, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence, as may be produced, in support of the prosecution. Sub- section (2) of that Section casts a duty on the Magistrate to ascertain the names of persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and to summon all such persons for evidence. Section 253 indicates when and in what circumstances ah accused may be discharged: It says:

253(1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Section 254 indicates when and in what circumstances a charge should be framed. It reads:

254. If when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

Section 255 enjoins that the charge shall then be read over and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record that plea, and may convict him thereon.

25. Section 256 provides that if the accused refuses to plead or does not plead, or claims to be tried, he shall be required to state at the next hearing whether he wishes to cross- examine any of the witnesses for the prosecution whose evidence has been taken, and if he says he so wants to cross- examine, the witnesses named by him shall be recalled and he will be allowed to further cross- examine them. "The evidence of any remaining witnesses for the prosecution shall next be taken" and thereafter the accused shall be called upon to enter upon and produce his defence.

26. Section 257 is not material. Section 258(1) provides that if in any case "in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. Sub- section (2) requires, where in any case under this chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence on him in accordance with law.

27. From the scheme of the provisions noticed above, it is clear that in a warrant case instituted otherwise on a police report, 'discharge' or 'acquittal' of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of 'discharge' and 'acquittal' are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253(1) shows that as a general rule there an be no order of discharge unless the evidence of all the prosecution witnesses has been taken and he considers for reasons to be recorded, in the light of the evidence that no case has been made out. Sub- section (2) which authorises the Magistrate

to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under Section 254 and frame charge against the accused. Section 254 shows that a charge can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 353 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of charges if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Section 254 to 258, to a logical end.

Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1892 (which correspond to Sections 325 and 360 of the Code of 1973).

28. Excepting where the prosecution must fail for want of a fundamental defect, such as want of sanction, an order of acquittal must be based upon a 'finding of not guilty' turning on the merits of the case and the appreciation of evidence at the conclusion of the trial.

29. If after framing charges the Magistrate whimsically, without appraising the evidence and without permitting the prosecution to produce all its evidence, 'discharges' the accused, such an acquittal, without trial, even if clothed as 'discharge', will be illegal. This is precisely what has happened in the instant case. Here, the Magistrate, by his order dated December 12, 1962 framed charges against Mithani and two others. Subsequently, when on the disposal of the Revision applications by Gokhale, J. the records were received back, he arbitrarily deleted those charges and discharged the accused, without examining the "remaining witnesses" of the prosecution which he had in the order of framing charges, said, "will be examined after the charge".

30. It is not correct as has been contended on behalf of Mithani, that in adopting this course the Magistrate was only acting in accordance with the observations/directions of Gokhale J. in the judgments disposing of Criminal Revisions 107/63 and 514 of 1964. A perusal of Gokhale J's orders in these two Revision Applications- material portions of which have been quoted earlier- will show that there is nothing in those orders which expressly or by implication required the Magistrate to delete the charges and 'discharge' or acquit the accused. On the contrary, the learned High Court Judge (Gokhale J.) had accepted the Revision filed by the prosecution and directed the Magistrate to amend the charges in so far as they appear to restrict the period of conspiracy to the one between the dates mentioned in the charges. Gokhale J. had further directed the Magistrate to consider the circumstantial and other evidence of the prosecution with a view to frame additional charges as claimed by the prosecution.

31. Gokhale J's judgment in Cr.R.A. 107 shows that the learned Judge did not hold that the verladesheins or the other documents in question tendered by the prosecution, were not relevant at all, under any provision of the Evidence Act. All that was held by him was that before these documents could be admitted under Section 32(2) or Section 10 of the Evidence Act, some preliminary facts had to be established by the prosecution. For instance, one of the conditions precedent for the admissibility of a previous statement of a party under Section 32(2) is

that the attendance of the witness who made that statement, could not be procured without an amount of delay and expense which in the circumstances of the case, appeared to the Court to be unreasonable. Similarly, with regard to the invocation of Section 10, Evidence Act, it was observed that before the documents concerned could be admitted under Section 10, Evidence Act, prima facie proof, aliunde should be given about the existence of the conspiracy. On the contrary, Gokhale J. clearly held that the documents, in question, were relevant to the facts in issue, but they had to be proved in any of the ways recognised by the Evidence Act, Gokhale J. never quashed the charges already framed by the Magistrate. It is true that the prosecution in its Special Leave Petitions 965 and 966 contended that the observations made by Gokhale J. with regard to the admissibility of Verladasheins and other documents are of "far reaching importance and are likely to prejudice the prosecution" and will affect the future course of the proceedings adversely to the prosecution. However, apart from these Verladasheins there was other circumstantial and oral evidence on the record and more evidence was yet to be produced by the prosecution after the charge. The prosecution were doing their best to secure the evidence of German witnesses in Europe. They want to produce other evidence also, apart from the Verladasheins, to show a prima facie case of conspiracy so that in accordance with the guidelines laid down in Gokhale J's judgment, they could make out a case for the admissibility of the Verladasheins under Section 10, Evidence Act.

32. A perusal of the copy of the Revision Application No 574/64 filed by Mithani in the High Court, will show that the only order specifically challenged therein was one dated December 6, 1962 whereby the Magistrate had held that 9 Verladasheins were admissible under Section 10, Evidence Act, although, incidentally, it was mentioned that the charges framed as a consequence of the impugned order dated December 6, 1962, should also be quashed. Even so, Mithani's Revision Application (No. 574/64) was summarily rejected by the learned Judge with the observation that the Magistrate could, in the light of the observations in the Judgment in Cr.Rev. A. 107 of 1963, "consider, whether the interlocutory order against which the present Revision Application is filed needs to be reviewed." The crucial part of the observation is that which has been underlined. It shows that this observation has reference only to the order dated December 6, 1962 whereby the Magistrate had held 9 Verladasheins admissible under Section 10. In this observation, the word "order" is used in singular. It shows that the learned Judge, also, construed the Revision- petition of Mithani as one directed against the Magistrate's order dated December 6, 1962, only. Only that order of the Magistrate has been exhaustively considered in the Revision Application 107 of 1964.

33. It is thus manifest that in abruptly deleting the charges and 'discharging' the accused, the Magistrate was acting neither in accordance with the observation or directions of Gokhale J., nor in accordance with law.

34. Equally meritless, albeit ingenious is the argument that since the Magistrate had no legal power to delete the charge the order of 'discharge' must be construed as an order of "acquittal" so that the High Court could not interfere with it in revision and direct a retrial. Assuming arguendo, the Magistrate's order of discharge was an order of 'acquittal', then also, it does not alter the fact that this 'acquittal' was manifestly illegal. It was not passed on merits, but without any trial, with consequent failure of justice. The High Court has undoubtedly the power to interfere with such a patently illegal order of acquittal in the exercise of its revisional jurisdiction under Section 439, and direct a retrial. The High Court's order under appeal, directing the Magistrate to take de novo proceedings against the accused was not barred by the provisions of Section 403, (of the

Code of 1898), the earlier proceedings taken by the Magistrate being no trial at all and the order passed therein being neither a valid "discharge" of the accused nor their acquittal as contemplated by Section 405(1). The Magistrate's order (to use the words of Mudholkar J. in Mohd. Safi v. State of West Bengal MANU/SC/0076/1965:1966CriLJ75 was merely "an order putting a stop to these proceedings" since the proceedings, ended with that order. The other contentions of the appellant, have been stated only to be rejected.

35. For all the reasons aforesaid, we have no hesitation in upholding the High Court's order under appeal, and in dismissing the appeal.

36. Since the case is very old, the Magistrate shall proceed with the case with utmost despatch, if feasible, by holding day to day hearings within six months from today.

MANU/MH/0015/1983

Back to Section 335 of Code of Criminal Procedure, 1973

IN THE HIGH COURT OF BOMBAY

Criminal Appeal No. 649 of 1980

Decided On: 28.04.1983

Balu Ganpat Koshire Vs. State of Maharashtra

Hon'ble Judges/Coram:

H.H. Kantharia and S.C. Pratap, JJ.

JUDGMENT

S.C. Pratap, J.

1. This appeal by the original accused questions the legality and validity of the order of conviction and sentence recorded against him by the learned Additional Sessions Judge, Nasik, in sessions Case No. 150 of 1979, the conviction being for an offence of murder punishable under S. 302. Penal Code, with a sentence of imprisonment for life imposed in that behalf.

2. The accused Balu Ganpat Koshire was married to Mira some time in 1973. Of the said marriage, the couple had a son Sandip who was four years' old at the time of the incident. The incident constituting of subject matter of the present prosecution occurred in the evening at about 7 O'clock on 26- 9- 1979 in the house of the accused. In the early part of the very day, the accused, his wife Mira and their son Sandip had returned from about a month's residence at Vani at the house of Hirabai, the sister of the accused. Just prior to the occurrence in question, wife Mira and son Sandip were sitting in their field near their house in the company of one Devki Dalvi and others, when the accused went there, took his wife Mira to their house with Sandip following them. Within a short time devki heard cries of Mira. She went to the house of the accused knocked at the door but there was no response. In the meanwhile, some young boys, who were going by the way, climbed the roof of the house at the request of devki and effected on entry and opened the door from inside. The accused went out with only a bloodstained pyjama. In the meanwhile, Nanyabai, mother of the accused, also came there. Devki and Nanyabai were shocked to find Mira and Sandip lying inside the house in a pool of blood with injuries on their persons. Dr. Pawar, a relation of the family, also came there. He conveyed the information telephonically to the police station. An offence of murder was registered against the accused. He was arrested and, after completion of investigation, charge- sheeted and committed to stand his trial before the Sessions Court, Nasik, for the offence of murder.

3. The accused admitted the incident but pleaded insanity and claimed protection of Section 84, Penal Code. The learned trial ledge held that the deaths of Mira and Sandip were homicidal. This

fact and finding is not disputed in this appeal. It was further held that the accused had committed the murders. His plea of insanity was negatived and he was convicted under S. 302, Penal Code, and sentenced to suffer imprisonment for life. Hence this appeal.

4. In support of the appeal, we have heard Mr. C. A. Phadkar, learned counsel for the appellant-accused. The State is represented by the learned Public Prosecutor Mr. M. D. Gangakhedkar.

5. Learned counsel Mr. Phadkar took us through the record of the case including the evidence of the prosecution witnesses as also defence witnesses who in this case are as many as seven and contended that the impugned conviction cannot, for more than one reason, be sustained. The trial itself was, according to the learned counsel, not legal and valid. assuming the same to be valid, the accused even so was entitled to the protection of Section 84, Penal Code. His submission in this context was that more than sufficient reliable and cogent evidence had been placed before the Court on the basis whereof fair and reasonable inference would be that the accused had discharged the burden that lay on him thus creating a dent in the prosecution case which consequently cannot be said to have been established and proved beyond reasonable doubt. The learned Public Prosecutor Mr. M. D. Gangakhedkar sought to repel these contentions.

6. Now, on 18- 1- 1980 when the charge was framed against the accused, he was not represented by any advocate, not even a State advocate. Only subsequently, an advocate was appointed at State expense. Some days thereafter the accused engaged his own advocate who filed an application (Exhibit 5) under Section 325, Cr.P.C. inter alia to the effect that the accused was unable to give proper instructions in order to enable the advocate to defend him; that the accused appears to be of unsound mind; that he was not capable of making his defence; and that he was previously treated in a mental hospital and was being treated till his arrest; and it is necessary, therefore, that he should be examined and treated medically and mentally and further proceedings in the case should be postponed till he became capable of making his defence. The State had no objection to this examination. The trial Court directed that the accused be sent for medical examination. Pursuant thereto, he was admitted to the Mental Hospital at Thane and was kept under observation for more than three weeks. Certificate was then sent to the trial Court that the accused was "un- certifiable" indicating that he cannot be said to be of unsound mind. On receipt of this certificate, the trial Court straightway resumed and concluded the trial.

7. Under Section 329, Cr.P.C., if at the trial of any person, it appears to the Court that such person is of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, "..... try the fact of such 'unsoundness and incapacity'. Record here does not indicate compliance with this mandatory provision. All that happened was that the trial Court did take a prima facie view in favour of the accused and did postpone the trial pending his medical examination. But after medical examination, the trial Court did not try the fact of the purported unsoundness and incapacity of the accused, did not record finding as to his mental condition and defending capacity and without fulfilling this initial obligation forthwith resumed and concluded the trial on the main charge itself. The resulting lacuna was not innocuous but

vital. Under sub- section 92) of S. 329, Criminal P.C., the trial of the fact of unsoundness of mind and incapacity of the accused "..... shall be deemed to be a part of his trial before the Court". Sequitur follows that the requisite trial under S. 329, Cr.P.C. was in this case not held at all. All that happened, if one may say so, was mere collection or receipt of evidence or material. But pursuant thereto no trial took place on the basic fact of unsoundness and incapacity of the accused. This vital lacuna would vitiate the trial. The doubt regarding the unsoundness and incapacity of the accused to defend himself at the main trial must per force continue to linger on, in the process rendering the validity of the further proceeding in the trial also doubtful. Taking this to its logical conclusion, the instant trial would be no trial in the eyes of law or, putting it differently, a void trial. It is, however, not necessary to go to that extent in the instant appeal because even on the assumption that the trial was valid, the accused here, on merits, established his claim to protection under Section 84, Penal Code, and consequently to an order of acquittal.

8. Coming then to the second aspect viz., the claim of the accused for protection under Section 84 Penal Code, we may in the first instance go through the relevant testimony not only of the prosecution witnesses but also witnesses examined by the defence and who were as many as seven in number. We may in this behalf take a chronological route regarding the condition of the accused from time to time so as to find out whether in terms of S. 84, Penal Code, it could or could not be said .... not beyond reasonable doubt but in all probability ..... that at the time of the offence in question the accused, by reason of unsoundness of mind, was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. Before proceeding further, it may be safely accepted as an undisputed fact emerging from the totality of evidence both on the side of the prosecution as also defence that the accused was a normal person and that his mental condition cannot be said to be that of a normal man. Indeed, even Dr. Vasant Pawar, a close relation of the accused and examined by the prosecution as one of its own witnesses, testifies to the fact of the accused not being a normal man and to the further circumstances that he was in fact being medically treated in that behalf. One has, therefore, to proceed on the undisputed aforesaid basis in this behalf. The evidence of Yeshwant Kale (D.W. 1), Murlidhar Shinde (D. W. 2) and Keshav Bhadane (D.W. 3), shows that the accused had once jumped from the Victoria Bridge (at Nasik) into the river below. A mere jump into a river may not be abnormal but the evidence of the aforesaid witnesses shows that the accused jumped from the Victoria Bridge into the river at about 11 O'clock in the night. This surely would be rather unusual if not abnormal. Their evidence further shows that members of the public collected, Ramesh, brother of the accused, was contacted, he came near the bridge, the accused was rescued from the river and taken by Ramesh to his house. This was an incident seen not only by the three witnesses examined by the defence but by many other members of the public. Indeed, evidence shows that police had also arrived.

9. Soon after this incident, the accused was taken to Bombay for medical consultation and treatment relating to his mental condition. At that time, Dr. Vasant Pawar, relation of the accused and prosecution witness in this case, was in Bombay. He testifies that the accused was brought to him at Bombay because there was mental disorder with him. He took the accused to an expert psychiatrist viz., Dr. Wahiya, who is yet another defence witness in this case. Dr. Wahiya examined the accused. The accused was admitted to a hospital and kept there as an indoor patient. He remained there for several weeks. He was also given shocks. This being soon after the

virtual midnight occurrence at the Victoria Bridge, Nasik, it would be reasonable to infer that the behaviour of the accused was not normal and that his mental condition was also not normal. Indeed, as Dr. Vasant Pawar himself admits, he was brought to Bombay because of his mental disorder.

10. In this context one may now turn to the evidence of Dr. N. S. Wahiya (D.W. 6). There can be no dispute that he is an acknowledged expert in the field of psychiatry. He has been an M.D. of the Bombay University and a Fellow of the Royal College of Psychiatry, England. At the time of his evidence he had completed 32 years of practice in psychiatry. After his M. D. He had also gone to the United states for training and had stayed there for a period of one and a half years. For several years he was the Held of the Department of Psychiatry at the K.E.M. Hospital, Bombay. Indeed, even at the time of his evidence he was Professor Emiritus in G.S. Medical College, Bombay, and held an Honorary Post for postgraduate students. The credentials of this expert are thus beyond doubt. He testifies that the accused had been brought to him, that he had examined the accused, that the accused had been admitted to a hospital, that he was being treated for his mental disorder, that he was given electric shocks and that he was also administered anti-psychotic drugs. This was in the year 1974. He further testifies that the accused was a psychiatric patient, that electric shocks are given in the treatment of schizophrenia and other mental sickness and when drugs do not react. This treatment has to control psychotic .He further states that exact causes of Schizophrenia are not yet known but here are very many causes in that behalf. He also states that there is no fixed time for this disease in the life of a man. It can come in early stages of life or even later. He also states that by mere appearance one cannot say if any individual is schizophrenic or not. There are various symptoms and nothing is rigid about it. Suicidal or homicidal tendency or attempts may be present in schizophrenic patients. One may recall the midnight jump of the accused from the Victoria Bridge. The patient appears normal but may become aggressive at any moment. He expressed his approval of the observation of Keith Simpson in his book 'Forensic Medicines' to the effect that, "Schizophrenia (dementia praecox) is the commonest of all psychoses to be associated with homicidal assaults". Dr. Wahiya also expressed his agreement with the view of Robert A. Woodroff and two others to the effect that "A common fear about deluded schizophrenic patients is that they are likely to act on their delusions and commit crime". Dr. Wahiya then testifies that the patient may improve and may also relapse and that it is difficult to say if the subsequent attacks are more acute. According to him, as the causes are not known, there is no final drug or remedy. Significantly enough, we do not find any cross- examination worth the name of this expert in the filed. He states that discharge of the accused from the hospital may indicate improvement. This, however, does not help the prosecution firstly because improvement does not mean cure and secondly because Dr. Wahiya categorically states more than once that a patient may improve and may also relapse. In this context further evidence in this case establishes that the patient here viz., the accused had in fact relapsed into the same mental condition and mental disorder as before and perhaps, indeed, in a mere acute form. This possibility also, according to Dr. Wahiya, cannot be ruled out.

11. We then have the testimony of yet another expert in the field viz., Dr. S. M. Sule (D.W. 7). He is an M.D. (Psychiatrist) of the University of Bombay. He is a member of the Indian Psychiatric Society. He also holds a Fellowship in Psychological Medicines. He has been practising as a psychiatrist at Nasik. He examined the accused in June, 1977. He was referred to him by Dr.

Vasant Pawar himself (P.W. 2) in this case. History of the patient viz., the accused was to the effect that he behaved suspiciously; that he was psychiatric and rowdy; that he had paranoid delusions; that he had attacks that he had jumped into the river; and that he was previously treated at Bombay both in drugs as also electric convulsive treatment. He then states that the patient was better for some time but relapsed after some months. He gave drugs and electric convulsive treatment to the patient but there was no follow up afterwards and the treatment was stopped abruptly. His own diagnosis was that the patient was suffering from paranoid schizophrenia. His testimony shows that the patient had not recovered when he abruptly stopped treatment. His evidence further shows that there was possibility of relapse. Even here, we do not find any serious cross- examination of Dr. Sule. Merely that the symptoms were not noted in the history paper and that after 1977 he did not have occasion to see the accused. Thus, as at this stage, one finds that the accused was a mental patient for the last several years till at least the year 1977 when he was under treatment of Dr. Sule and that he was treated for that purpose not only by an expert Dr. Wahiya in Bombay but also subsequently by another expert Dr. Sule in Nasik.

12. Apart from medical testimony, we have in this case the testimony of yet another important defence witness viz., Hirabai Gulabrao Khune, the sister of the accused. Here evidence assumes important because it relates to a period of one month immediately before the date of the occurrence and during which period the accused was sent to her residence at Vani presumably for a change and with a hope of a turn for the better in his mental condition. Hirabai herself is a school teacher at Vani. She categorically states that the accused was sent to her because he was a lunatic. She then relates several instances showing the mental disorder of the accused and his inability to know what was right and what was wrong or to distinguish the proper from the improper. The accused was required to be sent to answer call of nature; he was not brushing his teeth; Hirabai herself had to at times clean his teeth; even while going for bath, the accused used to remain in the bathroom without doing anything; while wearing clothes, he put his pyjama far below his under- pant; he was urinating in the house and sometimes in the presence of women; his speech was irrelevant; he used to pick up and eat anything found on the ground; he was unable to read anything; and there was hardly anything that remained to be done to improve him. She then states that medicines also did not improve him. She then states that his wife Mira alone could undergo such hardships but the devoted Mira nevertheless hoped that one day he will improve and that she did not like others talking about her husband. Hirabai then states that after a stay of one month or so, she personally brought back the accused along with his wife and child to his residence at Nasik, for she was not sure whether he could go on his own because he was a lunatic. It is significant that most of the important incidents as also the evidence in the main of this witness relating to the behaviour and conduct of the accused has gone virtually unchallenged in her cross- examination. Indeed, as in the case of other defence witnesses so also in the case of Hirabai (D.W. 5), there is no cross- examination worth the name. Inference, therefore, is irresistible that during the period immediately prior to the occurrence in question, which is the subject matter of the instance prosecution, the accused was found behaving in the most abnormal manner and in a manner strongly indicating an abnormal mental state and condition. It is obvious from the testimony of Hirabai that the accused was unable to distinguish the proper from the improper or unable to know what is right and what is wrong. Urinating in front of women, picking up anything from the ground and eating the same, not even able to brush his own teeth and laving that task to his sister, going to the bathroom apparently for a bath but without taking both remaining there for a long time, wearing clothes in a most peculiar manner

viz., pyjama below underpant, are all indications, particularly in the case of a married man like the accused over thirty years at the relevant time, of an unusual mental set up and inability to behave like a normal man with a normal mind.

13. Though it is true that Hirabai is a sister and thus a close relation of the accused, in a case such as this that can be no ground for discrediting her testimony. Indeed, in a matter such as this, it is the testimony of relations that is of considerable assistance in reaching a fair and just finding one way or the other, because it is relations who, by virtue of their close and frequent contact with the accused, are in a much better position to give evidence relating to the mental condition of the accused. See in this context Ratanlal v. State of Madhya Pradesh MANU/SC/0180/1970 : 1971CriLJ654 , wherein it is observed (at page 657 of Cri LJ) :-

"..... We hold that the appellant has discharged the burden. There is no reason why the evidence of Shyam Lal, D.W. 1, and than Singh, D.W. 2, should not be believed. It is true that they are relation of the appellant, but it is the relations who are likely to remain in intimate contact. The behaviour of the appellant on the day of occurrence, failure of the police to lead evidence as to his condition when the appellant was in custody, and the medical evidence indicate that the appellant was insane within the meaning of S. 84, I.P.C."

Thus, considering the evidence of Hirabai along with the testimony of experts Dr. Wahiya and Dr. Sule, it would be reasonable to hold that the accused was a case of a mental patient and one with an unsound mind, incapable of any improvement, undergoing one relapse after another and of whom hopes had virtually been given up. Even the prosecution witness Devki admitted that the accused was sent to his sister Hirabai's place because he was mentally deranged and with a hope that he may improve. The behaviour of the accused at the time of the occurrence and soon thereafter further corroborates his mental condition. Evidence shows that while his wife and son were in the company of Devki and others in the field located near their house, the accused went there, brought back his wife with son following to his house and entering the home brutally killed both of them. Thereafter when the door was opened he just walked out with only a pyjama on his person, when to a field and sat there in a pensive mood. Yet another indication of his mental condition emerges from the admitted fact (vide evidence of the police officer P.W. 12) that soon after his arrest, which was soon after the occurrence, he was sent for medical examination. Unfortunately, the prosecution has not led evidence of the doctor who then examined the accused. However, the very fact that the accused was immediately sent for medical examination is yet one more indication that even at that stage, which was soon after the occurrence, he was suspected to be of an unsound mind.

14. Mr. Phadkar, learned counsel for the accused, emphasised one more circumstance in favour of the accused. He took us through the evidence of Narayan Laxman Telge (P.W. 8), the learned Judicial Magistrate, who recorded the confession of the accused. The accused was produced before the learned Magistrate on 27- 9- 1979 the very next day of the occurrence. The testimony of the learned Magistrate, however, shows that he adjourned the recording of confession for as many as seven times. On 27- 9- 1979 the matter was adjourned to 7- 10- 1979, then to 11- 10- 1079, then to 15- 10- 1979, then to 22- 10- 1979, then to 29- 10- 1979 and then again to 3- 11- 1979. Reason

given by the learned Magistrate for this extensive delay viz., he was busy with administrative work, hardly justifies the gross delay. Recording of confession is an important matter and can in a given case constitute a very important circumstance in a trial, nay, the very foundation of a conviction. The learned Magistrate does not appear to have realised the seriousness and importance. Besides, we are not satisfied that he could be so extremely busy or pre- occupied with administrative work that he had to postpone this important function from time to time and for as nearly as seven times. Submission of the learned counsel Mr. Phadkar that these several postponements were not because of the purported administrative work but because the learned Magistrate was not satisfied that the accused was in a fit state of mind to make confession, cannot be said to be unfounded. In the entire context, the considerable lapse and delay in the aforesaid behalf becomes significant and constitutes yet one more circumstances corroborating the other evidence in this case on the mental condition of the accused.

15. Cumulative effect of all this evidence of experts and laymen and both direct and circumstantial together with the facts and circumstances - which are not slender or insignificant but substantial - emerging therefrom takes the case and defence of the accused nearer home under Section 84, Penal Code. Though in terms of this section, it is for the accused to show that by reason of unsoundness of mind he was incapable of knowing the nature of the act or incapable of knowing the nature of the act or incapable of knowing that what he was doing was wrong or contrary to law, the Court, while considering this defence, would have to look at and consider the totality of the emerging situation and position in the light of facts and circumstances relating to the mental condition of the accused preceding the occurrence, at about the time of the occurrence as also after the occurrence. As observed by the Supreme Court in Dahyabhai Chhaganbhai Thakkar v. State of Gujarat MANU/SC/0068/1964 : 1964CriLJ472 :

"When a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84, Penal Code, can only be established from the circumstances which preceded, attended and followed the crime".

In yet another ruling of the Supreme Court in Jai Lal v. Delhi Administration, MANU/SC/0353/1968 : 1969CriLJ259 , it is observed :

"To establish that the acts done are not offences under S. 84, it must be proved clearly that at the time of the commission of the act the appellant by reason of unsoundness of mind was incapable of knowing that the acts were either morally wrong or contrary to law. The question is whether the appellant was suffering from such incapacity at the time of the commission of the acts. On this question, the state of his mind before and after the crucial time is relevant".

And further still :

"If a person by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law he cannot be guilty of any criminal intent. Such a person lacks the requisite mens rea and is entitled to an acquittal".

16. Though the learned Public Prosecutor Mr. Gangakhedkar is right in contending that there is a presumption that the accused was not insane, it is well to remember that it is a rebuttable presumption. And it is, therefore, open to the accused to rebut it by placing before the Court all the relevant evidence, oral, documentary and/or circumstantial. The accused here has done that in a very good measure in this case. Relevant evidence is led not only of his relations but also of disinterested persons in the city as also medical evidence including evidence of experts in the field. That apart, the testimony of the prosecution witnesses also points in the same direction. Even Dr. Vasant Pawar, who is the complainant in the instant case, testifies to the mental disorder of the accused. Indeed, the mental condition of the accused is writ large on the record of this case. It is, of course, true that it is for the accused to discharge the burden that lies on him for rebutting the presumption of sanity and bringing his case within the ambit of Section 84, Penal Code. Equally settled, however, is the legal position that this burden or onus on the accused is not as heavy as that on the prosecution but equivalent to that which lies on a party in a civil proceeding. As authoritatively laid down by the Supreme Court in 's case MANU/SC/0068/1964 : 1964CriLJ472 supra) :

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions : (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84, I.P.C.; the accused may rebut it by placing before the Court all the relevant evidence, oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged".

17. All in all, therefore, and all things considered, the accused here must be held to have more than satisfactorily rebutted the initial presumption against his insanity and to have discharged the onus to the extent it lay on him. The facts and circumstances, the evidence of the prosecution witnesses, the testimony of the defence witnesses, the testimony of the experts in the field, the failure of the prosecution to examine the doctor to whom the accused was sent immediately after the occurrence in question and the uninspiring nature of the judicial confession which ultimately came into existence after as many as seven adjournments in the matter thereof, considered together and cumulatively, brings the instant case within the four- corners of Section 84, Penal Code. In any event, the totality of evidence before the Court and the cogent facts and circumstances emerging therefrom raise, qua the charge against the accused, more than reasonable doubt in the mind of the Court. The prosecution must hence be held to have failed to bring home to the accused the impugned charge beyond reasonable doubt. The general burden of proof that "always rests on the prosecution from the beginning to the end of the trial" has not

stood discharged. The inevitable end result would, therefore, be an order of acquittal. The impugned conviction is, therefore, liable to be set aside and replaced by an order of acquittal in favour of the accused. However, in the context of section 334, Cr.P.C., a finding is here recorded to the effect that the accused had, in fact, committed the act of resulting in the death of his wife Mira and his son Sandip. That this is so is admitted by the accused in his examination under S. 313 of Cr.P.C. His only defence was based on Sec. 84, Penal Code and, as seen, he has succeeded in getting protection thereof.

18. In the result, this appeal succeeds and is allowed. The impugned order of conviction and sentence recorded against the accused by the learned Additional Sessions Judge, Nasik, in Sessions Case No. 150 of 1979 is set aside. And the accused is acquitted of the charge levelled against him.

19. This, however, is not a case where the accused can be set free but one wherein an order under Section 335, Cr.P.C. requires to be made. Mr. Phadkar, learned counsel for the accused, has filed in this Court an affidavit of one Rambhau Ganpat Koshire (who is present in Court today), the eldest brother of the accused. In the said affidavit, this Court is requested to pass an order directing the accused to be delivered into his i.e. Rambhau's custody under the provisions of Section 335(1)(a) of Cr.P.C. The said affidavit contains an undertaking to this Court - and which undertaking this Court accepts - that the accused, if so delivered, shall be properly taken care of and prevented from doing injury to himself or to any other person and that the accused shall be produced for inspection of such officer and at such times and places as the State Government may direct. In his affidavit Rambhau has also expressed his willingness to give, if so necessary, security to the satisfaction of this Court for the aforesaid purpose. In our view, this is a fit case where instead of otherwise detaining the accused in safe custody as per Section 335(1)(a), Cr.P.C. he should be delivered to his eldest brother Rambhau Ganpat Koshire who has filed an affidavit complying with the terms and conditions of Section 335(3) of the said Code. Hence order :

The accused be delivered over to Rambhau Ganpat Koshire of Koshire House, Malaviya Chowk, Panchavati, Nasik, on his (the said Rambhau Ganpat Koshire) giving in favour of the Sessions Court, Nasik, his personal bond in the sum of Rs. 5,000/- to the effect that the accused will be properly taken care of and will be prevented from doing injury to himself or to any other person and that the accused will be produced for the inspection of such officer and at such times and places as the State Government may direct.

20. The office shall make a report to the State Government in terms of S. 335(1), Cr.P.C. It shall also forward to the State Government a copy of this judgment.

21. Order accordingly.

MANU/SC/0098/1977

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 272 of 1977

Decided On: 16.11.1977

K. Karunakaran Vs. T.V. Eachara Warrier and Ors.

Back to Section 344 of Code of Criminal Procedure, 1973

Back to Section 476 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

P.K. Goswami and V.D. Tulzapurkar, JJ.

JUDGMENT

P.K. Goswami,J.

1. This appeal by special leave is directed against the judgment and order of the High Court of Kerala of June 13, 1977, sanctioning a complaint against the appellant along with two others, who are not before us, for an offence under Section 193 I.P.C. after making an enquiry under Section 340(1) CrPC, 1973. At the time of granting special leave this Court ordered for impleading the State of Kerala and the State is represented before us by its Advocate General who adopts the arguments of the appellant's counsel, Mr. Debabrata Mookerjee, and also addressed us in support of the appeal.

2. This particular proceeding is an off- shoot out of a habeas corpus application instituted on March 25, 1977, in the High Court of Kerala by T. V. Eachara Warrier who is a retired Professor of Hindi of the Government Arts and Science College, Calicut. His son Rajan who was a final year student in the Regional Engineering College, Calicut, was a resident of the College Hostel. Shri Warrier received a registered letter from the Principal of the College informing him that his son, Rajan, was arrested and taken into police custody on March 1, 1976.

3. This was a time when the proclamation of emergency had been in force in the country since June 25, 1975. Nothing, therefore, could be done in the courts in view of the majority decision of the Constitution Bench of this Court (Khanna, J. dissenting) that challenge of even mala fide orders of detention could not be entertained under Article 226 of the Constitution (see Additional District Magistrate, Jabalpur v. S.S. Shukla etc. etc. [1976] Suppl. S.C.R. 172.

4. The heart- broken father had to make numerous efforts and entreaties in appropriate quarters, high, and low, to anyhow ascertain the whereabouts of his son. The point that is, relevant is that Shri Warrier also saw and met the appellant (Shri Karunakaran) who was then the Home Minister

of Kerala, on March 10, 1976, after nine days of the arrest. We are referring to this fact since it will assume some importance as will appear hereinafter on account of omission by Shri Warrier to mention about this interview with Shri Karunakaran in the original writ application. Shri Warrier also met the then Chief Minister Shri V. Achutha Menon, several times and on the last occasion when he had met him "he expressed his helplessness in the matter and said that the same was being dealt with by Shri Karunakaran, Minister for Home Affairs". There was also a written representation by Shri Warrier to the Home Minister, Government of India, on August 24, 1976, with copy to all Members of Parliament from Kerala. There was a reminder to him on October 22, 1976. Certain Members of Parliament also took the matter up with. Shri Karunakaran in November, 1976. It is sufficient to state that Shri Warrier did not receive any answer to his piteous queries about the whereabouts of his son. This is how the matter had been dragging keeping the parents in great suspense, misery and distress which can only be imagined.

5. It so happened that the Lok Sabha was dissolved on January 18, 1977, and elections to Parliament and the Kerala State Assembly were to take place on March 19, 1977. Emergency was also necessarily relaxed. Finding all his efforts to trace the whereabouts of his son unavailing, the appellant ultimately printed out a leaflet inviting attention of the general public in Kerala about his utter distress at the time when the people were about to go to the polls. In the leaflet Shri Warrier had detailed that his son was kept in illegal custody without even informing him and the members of his family his whereabouts. It was mentioned in his original habeas corpus application that during the election Shri Karunakaran, then, Home Minister, had addressed several public meetings in various constituencies of the State and that he had stated during his speeches that Rajan was involved as an accused in a murder case and that was why he was kept in detention. Shri Karunakaran and his party won in the State Assembly elections and Shri Karunakaran became the Chief Minister in March 1977.

6. On March 25, 1977, which was a Friday, Shri Warrier filed in the High Court the habeas corpus application for production of his son, impleading the Home Secretary, Kerala, the Inspector General of Police, Kerala, and the Deputy Inspector General of Police, Crime Branch, Kerala, as the first three respondents. The application was moved on the next working day, namely, March 28, 1977, and the learned Advocate General took notice on behalf of the respondents in the petition and, the case was posted to March 30, 1977, for stowing cause as to why the application should not be granted.

7. Meanwhile Shri Karunakaran, who was by then the Chief Minister, stated on the floor of the State Assembly that Shri Rajan had never been arrested, and that was published in all the papers. That led to the application by Shri Warrier on March 30, 1977, to implead Shri Karunakaran and the District Superintendent of Police, Kozhikode, as additional respondents to his petition. The learned Additional Advocate General took notice of this petition and the same was allowed by the High Court on that very day.

8. Counter affidavits by the respondents, including Shri karunakaran's, were sworn on March 31, 1977 and filed on April 4, 1977, and the case was posted to April 6, 1977. On April 6, 1977, Shri Warrier filed a reply affidavit. Along with it affidavits of 12 persons were also filed in support of his case that Rajan had been taken into police custody on March 1, 1976.

9. Shri Warrier as well as most of the deponents of the affidavits offered themselves for cross-examination and although some of them were cross- examined, the Additional Advocate General declined to cross- examine Shri Warrier. However, the Principal of the Engineering College, who had informed Shri Warrier about Rajan's arrest, was also examined as a witness. The learned Additional Advocate General was candid enough not to question his veracity except to point out that he had no direct knowledge about the arrest of Rajan which he came to know from the warden and the students. After a full hearing of the matter the High Court delivered its Judgment in the habeas corpus application on April 13, 1977, but in the nature of things the proceedings were not closed: The High Court, faced with a unique situation, ordered as follows :-

We hereby issue a writ of Habeas Corpus to the respondents directing them to produce Sri Rajan in this Court on the 21st of April, 1977.

If, for any reason the respondents think that the) will not be able to produce the said Sri Rajan on that day their counsel may file a Memo submitting this information before the Registrar of the High Court on 19th April, 1977, in which case the case will stand posted to 23- 5- 1977, the date of reopening of the Courts after the, midsummer recess, ' On that day the respondents may furnish to the Court detailed information as to the steps taken by the respondents to comply with the order of this Court, and particularly to locate Sri Rajan. Thereupon it will be open to this Court to pass further orders on this petition and to that extent this order need not be taken to/ have closed the case.

10. The Advocate General filed a Memorandum as ordered by the High Court on April 19, 1977, on behalf of respondents, 1, 2 and - 4, the Home Secretary, Inspector General of Police and Shri Karunakaran respectively, stating that these respondents were not able to produce Rajan "since the said Rajan is not in the illegal detention or in the custody or control of the respondents anywhere in the State or outside". It was also stated that police sources in Kerala as well as outside were alerted to locate the said Rajan. It was further mentioned in the Memo that certain police officers were placed under suspension by the Government and the Deputy Inspector General of Police was relieved from the Crime Branch on transfer. It was also disclosed that Criminal Case No. 304/77 under Sections 342, 323, 324 read with Section 34 IPC has been registered in the Crime Branch C.I.D. based on the observations in the judgment of the High Court in the above habeas corpus petition, The Memo closed as follows :-

From the efforts so far made the said Rajan remains untraced. The efforts to locate him continue unabated and no efforts will be spared to trace him.

11. The above Memo was filed in the High Court on April 19, 1977, as stated earlier. It also appears that the petition for leave to appeal to the Supreme Court against the judgment was rejected by the High Court on April 23, 1977. Later, the petition for special leave to appeal against the judgment and order in the habeas corpus application was also rejected by this Court on April 25, 1977.

12. It appears that Shri Karunakaran resigned as Chief Minister after the judgment of the High Court in the habeas corpus petition on April 26, 1977. On May 22, 1977, Shri Karunakaran filed his second affidavit before the High Court, this time describing himself as a Member of the Legislative Assembly, Kerala State. In para 5 of this affidavit he stated as follows :-

To the best of my knowledge and information now available, Sri Rajan after he was taken into custody by the police was belaboured by the police and there is every reason to think that he met with his death while in police custody. It is humbly submitted that in the circumstances stated above, I am not able to comply with the writ of Habeas Corpus issued to me since compliance with the writ has become impossible on account of Sri Rajan having died as a result of police torture at the Kakkayam Investigation Camp on 2- 3- 1976, while in unlawful custody of the police as disclosed in the report dated 17- 5- 1977 of the investigating Officer.

13. It will be of relevance now, as indicated at the outset, to refer to the affidavit of Shri Warrier of March 30, 1977, in support of his application for impleading Shri Karunakaran and it may be appropriate to quote paragraph 2 therefrom :

I met the present Chief Minister Sri K. Karunakaran on the 10th of March, 1976 at the Man Mohan Palace at Trivandrum (His Official residence then) and Sri Karunakaran told me) then that my son Rajan had been arrested from his college for involvement in some serious case and he will do his level best to look into the matter and help the petitioner.

Shri Karunakaran as Chief Minister made his first affidavit on March; 31, 1977, and in reply to the above quoted paragraph 1 he stated- in that affidavit as follows :-

The allegation made in paragraph 2 of the additional affidavit that I told the petitioner on 10th March, 1976, that his son Rajan had been arrested from his College for involvement in some serious cases and he will do his level best to look into the matter and help the petitioner is absolutely incorrect. I have never told the petitioner that his son Rajan was in police custody at any time and so far, I have no knowledge that the said Rajan has been in Police custody at any time.

He also denied as false in this affidavit about any reference to Rajan's arrest in his speeches during the election campaign. In his second affidavit of May 22, 1977, referred to above, he made reference to the interview with Shri Warrier of 10th March, 1976, and stated- as follows in para 8 therein :

Shri T. V. Eachara Warrier, the petitioner in the Original Petition had met me on or about 10th March, 1976 and told me that he suspected that his son is involved in the criminal case registered in connection with the attack by some persons on Kakkayam Police Station on 29- 2- 1976 and that he wanted me to use my good offices to exclude his son from that case. I told him this was a crime under investigation by the police and that it would not be proper for me as the Home Minister to interfere with the investigation by the police by issuing directions to them.

He also stated in paragraph 9 as under :-

I had stated in the Legislative Assembly that Sri Rajan had not been in police custody on the basis of the report of the Inspector General of Police dated 7- 1- 1977. Apart from this report I had no other source of information on this matter. I had no means whatever to doubt the correctness of the facts stated in the report of the Inspector General of Police.

He added in paragraph 10 as follows :-

It is a matter of intense agony and anguish for me., as the Minister for Home, Government of Kerala, at that time, that Sri Rajan, the son of the petitioner who was taken into custody by the police on 1- 3- 1976 happened to be tortured while in police custody at the Kakkayam camp as a result of which he breathed his last while in such custody at the camp on the evening of 2- 3- 1976 as it has now, been revealed by the investigation of Crime No. 304/77 of Crime Branch CID I may be permitted to say in retrospect that the judgment of this Hon'ble Court dated 13- 4- 1977 had helped me as Chief Minister to apply my pointed attention to this matter and take certain expeditious steps to bring to light the true facts.

14. In the above backdrop, Shri Warrier filed an application under Section 340(1) Cr.P.C. before the High Court for taking action against Shri Karunakaran and others for perjury.

15. Lie tends to become almost a style of life. Lies are resorted to by the high and the low being faced with inconvenient situations which require a Mahatma Gandhi to own up Himalayan blunders and unfold unpleasant truths truthfully. But when principles are sacrificed at the altar of individuals, selfishness of man, desire to continue in position and power, lining up with the high and mighty, lead to lies, euphemistically prevarication. But all lies made, here and there, ignored by the people or exposed on their own to nudity, are not subject matters for the Court to take action. When the Court takes action it is a species of falsehood clearly defined under Section 191 IPC and punishable under Section 193 IPC.

16. The High Court after hearing the said application has come to the conclusion that a prima facie case has been made out under Section 193 IPC and that it is expedient in the interest of justice to lay a complaint against Shri Karunakaran under that section before the appropriate court. The High Court also passed similar orders against the Deputy Inspector General of Police, Crime Branch and the Superintendent of Police, respondents 3 and 5 respectively in the original

application. The High Court, however, declined to take action against the Home Secretary and the Inspector General of Police for certain reasons recorded by it.

17. It is submitted by Mr. Debabrata Mookerjee, on behalf of the appellant, that the High Court had no legal justification to make a distinction between Shri Karunakaran on the one hand and the Home Secretary and the Inspector General of Police on the other. All the three had no direct knowledge of Rajan's arrest, says counsel. Counsel submits that Shri Karunakaran as Chief Minister could only rely on the official channel of information and he submitted before the Court all the information and he truly derived from the report of the Inspector General of Police of January 7, 1977. Mr. Mookerjee strenuously contends that no prima facie case has been made out against Shri Karunakaran, nor is it expedient in the interest of justice to lay a complaint for perjury against him.

18. On the other hand Mr. Niren De, on behalf of Shri Warrier. submits that in an appeal by special leave under Article 136 of the Constitution it will be most inappropriate in a case of this nature to interfere with the discretion exercised by the High Court in laying a complaint under Section 193 IPC after a regular enquiry carefully made under Section 340 Cr. P.C. According to Mr. De a prima facie case has been made out and it is expedient in the interest of justice that Shri Karunakaran should face a trial in accordance with law.

19. Chapter XXVI of the CrPC 1973 makes provisions as to offences affecting the administration of justice. Section 340 Cr.P.C. with which the chapter opens is the equivalent of the old Section 476, Criminal Procedure Code, 1898. The chapter has undergone one significant change with regard to the [provision of appeal which was there under the old Section 476B CrP.C. Under Section 476B Cr.P.C. (old) there was a right of appeal from the order of a subordinate Court to the superior Court to which appeals ordinarily lay from an appealable decree or sentence of such former Court Under Section 476B (old) there would have ordinarily [been a right of appeal against the order of the High Court to this Court. There is, however, a distinct departure from that position under Section 341 Cr.P.C. (new) with regard to an appeal against the order of a High Court under Section 340 to this Court. An order of the High Court made under Sub- section (1) or Sub- section (2) of Section 340 is specifically excluded for the purpose of appeal to the superior court under Section 341(1) Cr.P.C. (new). This is, therefore, a new restriction in the way of the appellant when he approaches this Court under Article 136 of the Constitution.

20. Whether, suo moto, or on an application by a party under Section 340(1) Cr. P.C., a Court having been already seized of a matter may be tentatively of opinion that further action against some party or witness may be necessary in the interest of justice. In a proceeding under Section 340(1) Cr.P.C. the reasons recorded in the principal case, in which a false statement has been made, have a great bearing and indeed action is taken having regard to the overall opinion formed by the Court in the earlier proceedings.

21. At an enquiry held by the court under Section 340(1) Cr.P.C, irrespective of the result of the main case, the only question, is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interest of justice to take such action.

22. The party may choose to place all its materials before the court at that stage, but if it does not, it will not be estopped from doing so later in the trial, in case prosecution is sanctioned by the court.

23. In this case the High Court came to the conclusion in the enquiry that Shri Karunakaran's first affidavit of 31st March, 1977 filed on 4th April, 1977, contained a false statement to the effect that he had no knowledge that Rajan was in police custody at any time and that "he could not have believed it to be true". It is only on that basis that the High Court held that an offence under Section 193 IPC was prima facie made out. Having regard to the second affidavit of 22nd May, 1977 and for any other reasons recorded by it the aforesaid statement in that behalf was considered by the High Court as "deliberately" made.

24. We should make it clear that when the trial of the appellant commences under Section 193 IPC the reasons given in the main judgment of the High Court or those in the order passed under Section 340(1) Cr.P.C, should not weigh with the criminal] court in coming to its independent conclusion whether the offence under Section 193 IPC has been fully established (against the appellant beyond reasonable doubt It will be for the Prosecution to establish all the ingredients of the offence under Section 193 IPC against the appellant and the decision will be based only on the evidence and the materials produced before the criminal court during the trial and the conclusion of the court will be independent of opinions formed by the High Court in the habeas corpus proceeding and also in the enquiry under Section 340(1) Cr.P.C.

25. An enquiry, when made, under Section 340(1) Cr.P.C. is really in the nature of affording a locus poenitentiae to a person and if at that stage the court chooses to take action, it does not mean that he will not have full and adequate opportunity in due course of the process of justice to establish his innocence.

26. It is well- settled that this Court under Article 136 of the Constitution would come to the aid of a party when any gross injustice is manifestly committed by a court whose order gives rise to the cause for grievance before this Court. Even when two views are possible in the matter it will not be expedient in the interest of justice to interfere with the order of the High Court unless we are absolutely certain that the two pre- conditions which are necessary for laying a complaint after an enquiry under Section 340 are completely absent. The two pre- conditions are that the materials produced before the High Court make put a prima facie case for a complaint and secondly that it is expedient in the interest of justice to permit the prosecution under Section 193 IPC.

27. We should bear in mind an important aspect. We are not dealing with a case of conviction of an accused under Section 193 IPC. The appellant is still to be tried. We are invited to quash the complaint made by the High Court prior to its regular trial. That can, be only on the basis that the order of the High Court's prima facie view that a complaint should be laid under Section 193 IPC is so manifestly perverse, so grossly erroneous and so palpably unjust that this Court must interfere in the interest of justice and fair play.

28. There is another anxiety on our part not to speak more than what is absolutely necessary in this appeal as any expression or observation on any facet of the case may prejudice either party in the trial which must be free and impartial wherein no party should have any feeling of misgiving, suspicion or embarrassment.

29. We have seen in the judgment of the High Court that it has taken good care not to express on the merits of certain aspects which it has expressly enumerated. We will only add that even in those aspects where the High Court may be said to have even remotely expressed some views, these shall not certainly weigh with the trial court. We read in the judgment of the High Court their natural anxiety on this score and we are only clarifying the true position so that there need be no embarrassment or apprehension in any quarters about the trial. It is for this very reason that although arguments were heard at length of both sides on every conceivable aspect of the case, we deliberately refrain ourselves from making any observation thereon. We feel that any observation one way or the other in respect of certain submissions made before us may have unintended likelihood of prejudicing some party or the other at the trial. Even a remote possibility of this nature must be avoided at all costs.

30. The fact that a prima facie case has been made out for laying a complaint does not mean that the charge has been established against a person beyond reasonable doubt. That will be thrashed out in the trial itself where the parties will have opportunity to produce evidence and controvert each other's case exhaustively without any reservation. There may be often a constraint on the part of a. person sought to be proceeded against under Section 340 Cr.P.C. to come out with all materials in the preliminary enquiry. That constraint will not be there in a regular trial where he will have ample opportunity to defend himself and produce all materials to show that an offence under Section 193 IPC has not been made out. That section contemplates that making of a false statement is not enough. It has to be made intentionally. The accused in a trial under Section 193 will be able to place all circumstances bearing upon the ingredient of the intention attributed to him.

31. After giving our anxious consideration to all the submissions made by counsel of both sides we do not feel justified in interfering with the order of the High Court to scotch the complaint against the appellant at the threshold.

32. It is true, we are dealing with the former Chief Minister of a State who happened to be the Home Minister at the time of the incident. Even the time was singularly unique when the occurrence took place and such cases give rise to emotions and feelings of bitterness. It is also true that a person cannot swear a falsehood in the court as a minister with impunity and come out with the truth only as a commoner. When, however, the court is called upon to ultimately try an offence we do not have any doubt that the matters germane to the offence under Section 193 IPC alone will be taken into consideration on the materials produced by the parties and justice will be done in accordance with law.

33. Where a Chief Minister, for reasons best known to him, relying entirely on the official channel of information denied knowledge of an event, people were humming about, it is a matter which must go forward for a trial in public interest. Truth does not lie between two lights.

34. Whether the appellant made a false statement before the High Court and intentionally did so will be an issue at large for trial in the criminal court. We decline to put the lid on the controversy, out of hand, since that way does not point to justice according to law. We close by saying ne quid nimis.

35. The appeal is dismissed.

MANU/SC/0192/1981

Back to Section 362 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 197 and 198 of 1981

Decided On: 24.04.1981

Naresh and Ors. Vs. State of Uttar Pradesh

Hon'ble Judges/Coram:

A.N. Sen, Baharul Islam and O. Chinnappa Reddy, JJ.

JUDGMENT

1. We are afraid we have to voice our grave concern and express our serious displeasure at the course of events in the High Court in the present case. We consider it our duty to do so. We are not a little disturbed by what has been done in the High Court. The High Court, some weeks after pronouncing its judgment in a Criminal appeal, altered a conviction under Section 302 Indian Penal Code which it had confirmed to one under Section 304 Indian Penal Code, ostensibly exercising its power to correct clerical errors but ignoring Section 362 of the CrPC 1973 which expressly provides "Save as otherwise provided by this Cede 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."

2. Naresh, one of the appellants, was convicted by the Trial Court of an offence under Section 302 Indian Penal Code and the rest of the appellants were convicted under Section 302 read with. Section 149 Indian Penal Code. All of them were sentenced to imprisonment for life. The accused preferred appeals to the High Court. J.P. Chaturvedi and R.C. Srivastava JJ who heard the appeals, while discussing the question of the culpability of the appellant Naresh observed as follows : "It may be pointed out that Bahadur (deceased) had a single injury on his head. This blow was inflicted by Naresh appellant and it resulted in fractures of frontal and parietal bones into eight pieces. The blow was very effective and powerful and as such, so far as Naresh appellant is concerned, we have no doubt that he intended to kill Bahadur and therefore, committed an offence punishable under Section 302 Indian Penal Code." After recording this categoric finding about the culpability of Naresh, the High Court proceeded to discuss the case against the rest of the accused. Then, in the ultimate paragraph of the judgment, which we may call the operative part of the judgement, the High Court again said about Naresh : "His conviction under Section 302 Indian Penal Code and sentence of imprisonment for life awarded thereunder are affirmed." The judgment of the High Court was pronounced on February 25, 1980. Thereafter on an application filed by the" appellant Naresh, the High Court made the following order on April 14, 1980 :

The application is allowed as there is a clerical mistake in the operative part of the judgment in Criminal Appeal No. 674 of 1975 regarding the conviction and sentence of appellant Naresh. The sentence, 'but his conviction under Section 302 I.P.C. and sentence of imprisonment for life awarded thereunder are affirmed' be substituted by the sentence 'He is convicted under Section 304(Part I) I.P.C. instead of Section 302 I.P.C. and sentenced to undergo rigorous imprisonment for seven years.

We are entirely at a loss to understand the order dated April 14, 1980. In their judgment dated February 25, 1980 while discussing the case against Naresh the learned Judges had given a specific and express finding that he intended to kill the deceased Bahadur and, therefore, had committed an offence punishable under Section 302 Indian Penal Code. The operative part of the judgment also said the same thing. We do not understand what the learned Judges mean when they state in their order dated April 14, 1980, "there is a clerical mistake in the operative part of the judgment." The High Court was wholly wrong in altering the judgment pronounced by them disposing of the Criminal Appeals. That was clearly in contravention of the provisions of Section 362 CrPC. What was worse, the High Court acted in purported exercise of the power to correct clerical mistakes when in fact there was none. The conviction under Section 302 Indian Penal Code was perfectly correct and the conviction had been rightly affirmed by the High Court in the first instance. There was no occasion at all for the purported exercise of power to correct a clerical mistake and alter the conviction under Section 302 to one under Section 304 Indian Penal Code. We are greatly concerned that the High Court should have committed this grievous error. There is, however, nothing that we can do about it at this juncture as the State has not chosen to file any appeal against the order dated April 14, 1980.

3. Shri S.P. Singh has taken us through the relevant evidence. We are unable to find any reason to reject the evidence of the four eye witnesses. Their evidence has been accepted by both the Trial Court and the High Court. The questions raised relate to appreciation of evidence and we find no ground for interference under Article 136 of the Constitution. Criminal Appeal No. 197 and 198 of 1981 are accordingly dismissed.

MANU/SC/0331/1975

Back to Section 367 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 301 of 1975

Decided On: 11.11.1975

Balwant Singh Vs. State of Punjab

Hon'ble Judges/Coram:

N.L. Untwalia and P.K. Goswami, JJ.

JUDGMENT

N.L. Untwalia, J.

1. Balwant Singh, the sole appellant in this appeal was convicted under Section 302 of the Penal Code and sentenced to death by the Trial Court. He conviction and sentence have been confirmed by the High Court of Punjab and Haryana. Special leave to appeal was granted by this Court limited to the question of sentence only. We have, therefore, to see whether on the facts of this case the High Court was right in confirming the death sentence imposed upon the appellant or was it a case where the lessor sentence of life imprisonment ought to have been awarded.

2. The appellant was aged about 60 years at the lime of the occurrence. He was working as a Granthi of a Gurudwara in village Salihna District Faridkot. Mohan Singh the deceased was a member of the Managing Committee of the Gurudwara. He made certain complaints against the appellant to the President of the Managing Committee and asked, for the removal from the post of the Granthi. The appellant, therefore, bore a grudge against the deceased. In the early hours of April 13, 1974 the appellant gave Karan Parshad of Granthi Sahib to Mohan Singh mixing opium in it. As soon as Mohan Singh took the Parshad he felt sick and his heart began to sink. Inspite of the medical aid he could not survive and died about 4 hours after the administering of the poison to him by the appellant. On the facts found by the learned Sessions Judge and as affirmed by the High Court, the appellant was convicted under Section 302 of the Penal Cole. The question for consideration is whether the sentence of death was rightly passed. It may be noticed that the occurrence took place on April 13, 1974 after coming into force of the Criminal Procedure Code, 1973 on and from April 1, 1974. Provisions of Section 354(3) of the new Code, as noticed by the High Court, governed this case. Yet the High Court confirmed the sentence of death relying upon two decisions of this Court which were not concerned with the application of law engrafted in Section 354(3) of the CrPC, 1973 but were given with reference to the CrPC Code, 1898 as it stood at the relevant time.

3. It is well- known that in many parts of the world an agitation has been going on against the imposition of death penalty even in murder cases. And in many countries or States death penalty has been abolished. In India the Legislature in this wisdom has not thought it fit and proper to abolish the death penalty altogether but there has been a gradual swing against the imposition of such penalty. Under the CrPC, 1898 as it stood before the amendment by Act 26 of 1955, Sub-section (5) of Section 367 required:

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed:

Under the provision aforesaid if an accused was convicted for an offence punishable with death then imposition of death sentence was the rule and awarding of a lesser sentence was an exception and the Court had to state the reasons for not passing the sentence of death. By the Amending Act 26 of 1955 the said provision was deleted. Thereafter it was left to the direction of the Court, on the facts of each case, to pass the sentence of death or to award the lesser sentence. In the context of the changed law if in a given case the passing of the death sentence was not called for or there were extenuating circumstances to justify the passing of the lesser sentence then the lesser sentence was awarded and not the death sentence.

4. Section 354(3) of the new Criminal Procedure Code says:

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.

Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in the given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case.

But we may indicate just a few, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless child or a woman or the like. On the facts of this case, it is true that the appellant had a motive to commit the murder and he did it with an intention to kill the deceased. His conviction under Section 302 of the Penal Code was justified but the facts found were not such as to enable the Court to say that there were special reasons for passing the sentence of death in this case.

5. The High Court has referred to the two decisions of this Court namely in Mangal Singh v. State of U.P. MANU/SC/0166/1974 : 1975CriLJ36 and in Perumal v. The State of Kerala MANU/SC/0183/1974 : AIR1975SC95 and has then said "There are no extenuating circumstances in this case and the death sentence awarded to Balwant Singh appellant by the Sessions Judge is confirmed...." As we have said above, even after noticing the provisions of Section 354(3) of the new Criminal Procedure Code the High Court committed an error in relying upon the two decisions of this Court in which the trials were held under the old Code. It wrongly relied upon the principle of extenuating circumstances a principle which was applicable after the amendment of the old Code from January 1, 1956 until the Coming into force of the new Code from April 1, 1974. In our judgment there is no special reason nor any has been recorded by the High Court for confirming the death sentence in this case. We accordingly allow the appeal on the question of sentence and commute the death sentence imposed upon the appellant to one for imprisonment for life.

MANU/SC/0120/1980

Back to Section 378 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 97 of 1974

Decided On: 18.01.1980

Dinanath Singh and Ors. Vs. State of Bihar

Hon'ble Judges/Coram:

A.D. Koshal and S. Murtaza Fazal Ali, JJ.

JUDGMENT

S. Murtaza Fazal Ali, J.

1. This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act is directed against a judgment of the Patna High Court convicting all the five appellants under Section 302/34 and sentencing them to imprisonment for life. The Sessions Judge acquitted all the accused of the charges framed against them. The State filed an appeal before the High Court in which the High Court reversed the order of acquittal passed by the Sessions Judge and convicted the appellants as indicated above. To have been taken through the judgment of the High Court, Sessions Judge and also the relevant evidence in the case We are clearly of the opinion after perusing the evidence that this was not a fit case in which the High Court ought to have interfered with the order of acquittal passed by the Sessions Judge. It is now well settled by long course of decisions of this Court that where the view taken by the trial Court in acquitting the accused is reasonably possible, even if the High Court were to take a different view on the evidence, that is no ground for reversing the order of acquittal. In the instant case after going through the evidence we feel that the view taken by the Sessions Judge was not only a reasonably possible view but the only reasonable view which could be taken on the evidence produced by the prosecution.

2. According to the prosecution on 12th December, 1968 at about 11.30 A.M. the accused persons had a scuffle with the deceased in Lallam Hotel and at the exhortation of accused 3 and 4, Bhagwati Pandey gave a knife injury to the deceased which resulted in his death. Immediately thereafter some of the accused were found running away but could not be apprehended. The solitary eye witness, who has been examined by the prosecution to prove the actual assault, is PW 10 Bhagwan Singh. To begin with, the evidence of this witness suffers from several infirmities In the first place the witness was examined by the police as late on the 25th December, 1955 i.e. to say 13 days after the occurrence. Far from giving any reasonable explanation for the delay in his examination by the police, the witness admits that although the Investigating Officers or other police constables were scorching for him, he kept himself concealed due to fear for 12 days. The witness does cot at all state in his evidence that either at the time of occurrence of sometime later

any of the accused gave any threat to the witness not to depose against them. Thus the theory of fear appears to be clearly an after- thought. Other witnesses were declared hostile as they appeared to have been gained over as alleged by the prosecution, as a result of which the sheet anchor of the prosecution was the solitary testimony of PW 10.

3. Mr. Shambhu Prasad Singh, Sr. Advocate for the respondent submitted that the evidence of PW 10 though belated stands corroborated by the evidence of PW 3, PW 4 and PW 13. PW 3 undoubtedly says that is found some persons running away and same of Raj Nath and Bhagwati Pandey was taken. He, however, admits in Para 10 of his evidence that Shri Bhagwan Singh PW 10 had told him at Mahadeva Mor i.e. the place of occurrence, that the scuffle took place between Rajnath and Vidyadhar Chaubey and Rajnath caught Vidyadhar Chaubey from the front. Thereafter Bhagwati Pandey took out a CHHURA from his waist and stabbed the deceased. Bhagwan Singh PW 10 however has made no such statement in his evidence. He never claims to have made any such statement to PW 3. Thus PW 3 seems to be more loyal than the King is attributing a statement to Bhagwan Singh which in fact were never made to him, and thus if PW 10 is to be believed then evidence of PW 3 is hearsay and therefore, inadmissible. Similarly PW 4 in his evidence, has admitted that he did not know the deceased but he knew Rabindra Bihari Pandey. He merely says that Shri Bhagwan Singh told him at the place of occurrence that Bhagwati Pandey stabbed Vidyadhar Chaubey and Rajnath was holding the deceased while Bhagwati Pandey stabbed him. This also is a false statement because PW 10 does not say that he mentioned this fact to PW 4. On the other hand it appears from the evidence of PW 10 that in spite of the fact that a number of persons assembled at the spot, including an Advocate, the supposed eye witness PW 10 did not disclose the names of the assailants of the deceased to any one of them. In view of this infirmity the trial Court was fully justified in not placing reliance on the solitary eye witness who concealed himself for 12 days after the occurrence. Reliance was placed by Mr. Singh on the fact that there was some defect in investigation as a result of which PW 10 could not have been examined earlier. Even if there was any defect or jacuna in the investigation, the prosecution cannot get any benefit of the same. Moreover PW 10 himself clearly admits that there was no lapse on the part of the police at all because the police were trying to search him but he concealed himself and did not allow himself to be examined by the police. Taking the totality of the circumstances we are not impressed with the evidence of PW 10. If the evidence of PW 10, the solitary eye witness is excluded from consideration then the evidence of other witnesses showing that some of the accused were running away, by itself does not prove participation of the accused in the murderous assault on the deceased. The High Court seems to have reappraised the evidence and accepted the evidence of PW 10 but has not tried to consider the effect of the infirmities indicated above.

4. For these reasons, therefore, we are satisfied that the learned Sessions Judge in acquitting the appellants took a very reasonable view and the High Court was in error in disturbing the judgment of the trial Court. The appeal is accordingly allowed the conviction and sentence passed on the appellants are set aside and they are acquitted of the charges framed against them. The appellants shall now be discharged from their bail bonds.

MANU/SC/0068/1977

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 124 of 1977

Decided On: 29.07.1977

Amar Nath and Ors. Vs. State of Haryana and Ors.

Back to Section 397 of Code of Criminal Procedure, 1973

Back to Section 482 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

N.L. Untwalia and S. Murtaza Fazal Ali, JJ.

JUDGMENT

S. Murtaza Fazal Ali, J.

1. This appeal by special leave involves an important question as to the interpretation scope, ambit and connotation word "interlocutory order" as appearing in Sub- section (2) of Section 397 of the CrPC 1973. For the purpose of brevity, we shall refer to the CrPC, 1898 as "the 1898 Code", to the CrPC, 1898 as amended in 1955 as "the 1955 Amendment" and to, the CrPC, 1973 as "the 1973 Code". The appeal arises in the following circumstances.

2. An incident took place in village Amin on April 23, 1976 in the course of which three persons died and, F. I. R. No. 139 dated April 23, 1976 was filed at police station Butana, District Kamal at about 5- 30 P. M. The F. I. R. mentioned a number of accused persons including the appellants as having participated in the occurrence which resulted in the death of the deceased. The police, after holding investigations, submitted a charge- sheet against the other accused persons except the appellants against whom the police opined that no case at all was made out as no weapon was recovered nor was there any clear evidence about the participation of the appellants. The police thus submitted its final report under Section 173 of the 1973 Code in so far as the appellants were concerned. The report was placed before Mr. B.K. Gupta the Judicial Magistrate 1st Class, Karnal, who after perusing the same set the appellants at liberty after having accepted the report. It appears that the complainant filed a revision petition, before the Additional Sessions Judge, karnal against the order of the Judicial Magistrate, 1st Class, Karnal releasing the appellants, but the same was dismissed on July 3, 1976. The informant filed a regular complaint before the Judicial Magistrate, 1st Class, on July 1, 1976 against all the 11 accused including the appellants. The learned Magistrate, after having examined the complainant and going through the record, dismissed the complaint as he was satisfied that no case was made out against the appellants. Thereafter the complainant took up the matter in revision before the Sessions Judge, Karnal, who this time accepted the revision petition and remanded the case to the Judicial Magistrate for further enquiry. On November 15, 1976, the learned Judicial Magistrate, on receiving the order of the Sessions Judge, issued summons to the appellants straightway. The appellants then moved the High Court under Section 482 and Section 397 of the 1973 Code for quashing the order of the

Judicial Magistrate mainly on the ground that the Magistrate had issued the summons in a mechanical manner without applying his judicial mind to the facts of the case. The High Court dismissed the petition in limine and refused to entertain it on the ground that as the order of the Judicial Magistrate dated November 15, 1976 summoning the appellants was an interlocutory order, a revision to the High Court was barred by virtue of Sub- section (2) of Section 397 of the 1973 Code. The learned Judge further held that as the revision was barred, the Court could not take up the case under Section 482 in order to quash the very order of the Judicial Magistrate under Section 397(1) of the 1973 Code otherwise, the very object of Section 397(2) would be defeated.

3. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under Sub- section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject- matter. Where there is an express, provision, barring a particular remedy, the Court cannot (sic) to the exercise of inherent powers.

4. So far as the second plank of the view of the learned Judge that the order of the Judicial Magistrate in the instant case was an interlocutory order is concerned, it is a matter which merits serious consideration. A history of the criminal legislation in India would manifestly reveal that so far the CrPC is concerned both in the 1898 Code and 1955 amendment the widest possible powers of revision had been given to the High Court under Sections 435 and 439 of those Codes. The High Court could examine the propriety of any order - - whether final or interlocutory- - passed by any Subordinate Court in a criminal matter. No limitation and restriction on the powers of the High Court were placed. But this Court as also the various High Courts in India, by a long course of decisions, confined the exercise of revisional powers only to cases where the impugned order suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse. These restrictions were placed by the case law, merely as a rule of prudence rather than a rule of law and in suitable cases the High Courts had the undoubted power to interfere with the impugned order even on facts. Sections 435 and 439 being identical in the 1898 Code and 1955 insofar as they are relevant run thus:

435 (1) The High Court or any Sessions Judge or District Magistrate, or any Sub- divisional Magistrate empowered by the State Govt. in this behalf, may call for and examine the record of any proceeding before any inferior criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety

of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court....

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance, the sentence; and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence." In fact the only rider that was put under Section 439 was that where the Court enhanced the sentence the accused had to be given an opportunity of being heard.

5. The concept of an interlocutory order qua the revisional jurisdiction of the High Court, therefore, was completely foreign to the earlier Code. Subsequently it appeals that there had been large number of arrears and the High Courts were flooded with revisions of all kinds against interim or interlocutory orders which led to enormous delay in the disposal of cases and exploitation of the poor accused by the affluent prosecutors. Sometimes interlocutory orders caused harassment to the accused by unnecessarily protracting the trials. It was in the background of these facts that the Law Commission dwelt on this aspect of the matter and in the 14th and 41st reports submitted by the commission which formed the basis of the 1973 Code the said commission suggested revolutionary changes to be made in the powers of the High Courts. The recommendations of the commission were examined carefully by the Government, keeping in view, the following basic considerations:

(i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.

This is clearly mentioned in the Statement of Objects and Reasons accompanying the 1973 Code. Clause (d) of Paragraph 5 of the Statement of Objects and Reasons runs thus:

the powers of revision against interlocutory orders are being taken away, as it has been found to be one of the main contributing factors in the delay of disposal of criminal cases.

Similarly, replying to the debate in the Lok Sabha on Sub- clause (2) of Clause 397, Shri Ram Niwas Mirdha, the Minister concerned, observed as follows:

It was stated before the Select Committee that a large number of appeals against interlocutory orders are filed with the result that the appeals got delayed considerably. Some of the more notorious cases concern big business persons. So, this new provision was also welcomed by most of the witnesses as well as the Select Committee.... This was a well- thought out measure so we do not want to delete it.

Thus it would appear that Section 397(2) was incorporated in the 1973 Code with the avowed purpose of cutting out delays and ensuring that the accused persons got a fair trial without much delay and the procedure was not made complicated. Thus the paramount object in inserting this new provision of Sub- section (2) of Section 397 was to safeguard the interest of the accused.

6. Let us now proceed to interpret the provisions of Section 397 against the historical background of these facts. Sub- section (2) of Section 397 of the 1973 Code may be extracted thus:

The powers of revision conferred by Sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in Sub- section (2) of Section 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the CPC, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code.

Thus, for instance, orders summoning witnesses adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code.

But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the re- visional jurisdiction of the High Court.

7. In Central Bank of India v. Gokal Chand MANU/SC/0053/1966 : [1967]1SCR310 this Court while describing the incidents of an interlocutory order, observed as follows:

In the context of Section 38(1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties. In a pending proceeding, the Controller, may pass many interlocutory orders under Sections 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties." The aforesaid decision clearly illustrates the nature and incidents of an interlocutory order and the incidents given by this Court constitute sufficient guidelines to interpret the connotation of the word "interlocutory order" as appearing in Sub- section (2) of Section 397 of the 1973 Code.

8. Similarly in a later case in Mohan Lal Magan Lal Thacker v. State of Gujarat MANU/SC/0071/1967 : 1968CriLJ876 this Court pointed out that the finality of an order could not be judged by correlating that order with the controversy in the complaint. The fact that the controversy still remained alive was irrelevant. In that case this Court held that even though it was an interlocutory order, the order was a final order.

9. Similarly in Baldevdas v. Filmistan Distributors (India) Pvt. Ltd. MANU/SC/0489/1969 : [1970]1SCR435 while interpreting the import of the words "case decided" appearing in Section 115 of the CPC, this Court observed as follows:

A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy." Apart from this it would appear that under the various provisions of the Letters Patent of the High Courts in India, an appeal lies to a Division Bench from an order passed by a single Judge and some High Courts have held that even though the order may appear to be an interlocutory one where it does decide one of the aspect of the rights of the parties it is, appealable. For instance, an order of a single Judge granting a temporary injunction was held by a Full Bench of Allahabad High Court in Standard Class Beads Factory v. Shri Dhar MANU/UP/0198/1960 : AIR1960All692 as not being an interlocutory order having decided some rights of the parties and was, therefore, appealable. To the same effect are the decisions of the Calcutta High Court in Union of India v. Khetra Mohan Banerjee MANU/WB/0050/1960 : AIR1960Cal190 of the Lahore High Court in Gokal Chand v. Sanwal Das AIR 1920 Lah 326 of the Delhi High Court in Begum Aftab Zamani v. Shri Lal Chand Khanna

AIR 1969 Del 85 and of the Jammu & Kashmir High Court in Har Parshad Wali v. Naranjan Nath Matoo AIR 1959 J & K 139.

10. Applying the aforesaid tests, let us now see whether the order impugned in the instant case can be said to be an interlocutory order as held by the High Court. In the first place, so far as the appellants are concerned, the police had submitted its final report against them and they were released by the Judicial Magistrate. A revision against that order to the Additional Sessions Judge preferred by the complainant had failed. Thus the appellants, by virtue of the order of the Judicial Magistrate as affirmed by the Additional Sessions Judge acquired a valuable right of not being put on trial unless a proper order was made against them. Then came the complaint by respondent No. 2 before the Judicial Magistrate which was also dismissed on merits. The Sessions Judge in revision however, set aside the order dismissing the complaint and ordered further inquiry. The Magistrate on receiving the order of the Sessions Judge summoned the appellants straightway which meant that the appellants were to be put on trial. So long as the Judicial Magistrate had not passed this order, no proceedings were started against the appellants, nor were any such proceedings pending against them. It was only with the passing of the impugned order that the proceedings started and the question of the appellants being put up for trial arose for the first time. This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that the appellants were not at all prejudiced, or that any right of their's was not involved by the impugned order. It is difficult to hold that the impugned order summoning the appellants straightway was merely an interlocutory order which could not be revised by the High Court under Sub- sections (1) and (2) of Section 397 of the 1973 Code. The order of the Judicial Magistrate summoning the appellants in the circumstances of the present case, particularly having regard to what had preceded was undoubtedly a matter of moment, and a valuable right of the appellants had been taken away by the Magistrate in passing an order prima facie in sheer mechanical fashion without applying his mind. We are, therefore satisfied that the order impugned was one which was a matter of moment and which did involve a decision regarding the rights of the appellants. If the appellants were not summoned, then they could not have faced the trial at all, but by compelling the appellants to face a trial without proper application of mind cannot be held to be an interlocutory matter but one which decided a serious question as to the rights of the appellants to be put on trial.

11. For these reasons, the order of the Judicial Magistrate, 1st Class, Karnal dated November 15, 1976 cannot be said to be an interlocutory order and does not fall within the mischief of Sub-section (2) of Section 397 of the 1973 Code and is not covered by the same. That being the position, a revision against this order was fully competent under Section 397(1) or under Section 482 of the 1973 Code, because the scope of both these sections in a matter of this kind is more ear less the same.

12. As we propose to remand this case to the High Court to decide the revision on merits, we refrain from making any observation regarding the merits of the case. The appeal is, therefore, allowed, the order of the High Court dated February 14, 1977 refusing to entertain the revision petition of the appellants is set aside. The High Court is directed to admit the revision petition filed by the appellants and to decide it on merits in accordance with the law.

MANU/SC/0029/1951

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 17 of 1951

Decided On: 24.05.1951

Logendra Nath Jha and Ors. Vs. Polailal Biswas

Back to Section 401 of Code of Criminal Procedure, 1973

Back to Section 423 of Code of Criminal Procedure, 1973

Back to Section 439 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

H.J. Kania, C.J., M. Patanjali Sastri, Sudhi Ranjan Das and Vivian Bose, JJ.

JUDGMENT

M. Patanjali Sastri, J.

1. This is an appeal by special leave from an order of the High Court of Judicature at Patna setting aside an order of acquittal of the appellants by the Sessions Judge, Purnea, and directing their retrial.

2. The appellants were prosecuted for alleged offences under sections 147, 148, 323, 324, 326, 302 and 302/149 of the Indian Penal Code at the instance of one Polai Lal Biswas who lodged a complaint against them before the police. The prosecution case was that, while the complainant was harvesting the paddy crop on his field at about 10 a.m. on 29th November, 1949, a mob of about fifty persons came on to the field armed with ballams, lathis and other weapons and that the first appellant Logendranath Jha, who was leading the mob, demanded a settlement of all outstanding disputes with the complainant and said he would not allow the paddy to be removed unless the disputes were settled. An altercation followed as a result of which Logendra ordered an assault by his men. Then Logendra and one of his men, Harihar, gave ballam blows to one of the abourers, Kangali, who fell down and died on the spot. Information was given to the police who investigated the case and submitted the charge- sheet. The committing Magistrate found that a prima facie case was made out and committed the appellants to the Court of Sessions for trial.

3. The appellants pleaded not guilty alleging inter alia, that Mohender and Debender, the brothers of Logendra (appellants 2 and 3) were not present in the village of Dandkhora with which they had no concern, as all the lands in that village had been allotted to Logendra at a previous partition, that Logendra himself was not in the village at the time of the occurrence but arrived soon after and was dragged to the place at the instance of his enemies in the village and was placed under arrest by the Assistant Sub- Inspector of Police who had arrived there previously. It was also alleged that there were two factions in the village, one of which was led by one Harimohan, a relation of the complainant, and the other by Logendra and there had been

numerous revenue and criminal proceedings and long- standing enmity between the families of these leaders as a result of which this false case was foisted upon the appellants.

4. The learned Sessions Judge examined the evidence in great detail and found that the existence of factions as alleged by the appellants was true. He found, however, that the appellants' plea of alibi was not satisfactorily made out, "but the truth of the prosecution", he proceeded to observe,

"cannot be judged by the falsehood of the defence nor can the prosecution derive its strength from the weakness of the defence. Prosecution must stand on its own legs and must prove the story told by it at the very first stage. The manner of occurrence alleged by the prosecution must be established beyond doubt before the accused persons can be convicted".

Approaching the case in this manner and seeing that the basis of the prosecution case was that Polai had batai settlement of the disputed land and had raised the paddy crop which he was harvesting when the occurrence took place, the learned Sessions Judge examined the evidence of the prosecution witnesses who belonged to the opposite faction critically and found that the story of the prosecution was not acceptable. Polai, who was alleged to have taken the land on batai settlement from his own maternal grandmother Parasmani who brought him up from his childhood, was only 19 years old and unmarried and was still living with his grandmother. He did not claim to be a bataidar of any other person. "In these circumstances", said the learned Judge,

"it does not appear to me to be probable that Polai would have been allowed to maintain himself by running adhi cultivation of his mamu's land in the lifetime of his nani who has brought him up from his infancy like her own child. Nor does it appeal to me that the unmarried boy Polai would have undertaken upon himself the task of running batai cultivation of the lands of his mamu where he has been living since his childhood without any trouble, more particularly in view of the heavy expenses of cultivation brought out by the evidence of Tirthanand (P.W. 14)".

He, therefore, disbelieved the whole story that Polai had taken the lands of his grandmother or his uncles as bataidar for cultivation and that he was engaged in harvesting the paddy crop on the lands at the time of the occurrence. This false story, in his opinion, "vitally affected the prosecution case regarding the alleged manner of the occurrence". He also found a number of discrepancies and contradictions in the evidence of the prosecution witnesses, which, in his view, tended to show that the prosecution was guilty of concealment of the real facts. "In view of such concealment of real facts," the learned Judge concluded,

"it does not appear to me to be possible to apportion liability and to decide which of the two parties commenced the fight and which acted in self- defence. Such being the position, it is not possible at all to hold either party responsible for what took place. In such a view of the matter coupled with the fact that the manner of occurrence alleged by the prosecution has not been established to be true beyond doubt, I think that the accused persons cannot be safely convicted of any of the offences for which they have been charged."

The learned Judge accordingly acquitted the appellants of all the charges framed against them.

5. Against that order the complainant Polai preferred a revision petition to the High Court under section 439 of the Criminal Procedure Code. The learned Judge who heard the petition reviewed the evidence at some length and came to the conclusion that the judgment of the learned Sessions Judge could not be allowed to stand as the acquittal of the appellants was "perverse". In his opinion, "the entire judgment displays a lack of true perspective in a case of this kind. The Sessions Judge had completely misdirected himself in looking to the minor discrepancies in the case and ignoring the essential matters so far as the case is concerned," and there was no justifiable ground for rejecting the prosecution evidence regarding the cultivation and harvesting by Polai. And he concluded with the warning:

"I would, however, make it perfectly clear that when the case is re- tried, which I am now going to order, the Judge proceeding with the trial will not be in the least influenced by any expression of opinion which I may have given in this judgment."

6. On behalf of the appellants Mr. Sinha raised two contentions. In the first place, he submitted that having regard to section 417 of the Criminal Procedure Code which provides for an appeal to the High Court from an order of acquittal only at the instance of the Government, a revision petition under section 439 at the instance of a private party was incompetent, and secondly, that sub- section (4) of section 439 clearly showed that the High Court exceeded its powers of revisions in the present case in upsetting the findings of fact of the trial Judge. We think it is unnecessary to express any opinion on the first contention of Mr. Sinha especially as the respondent is unrepresented, as we are of opinion that his second and alternative contention must prevail.

7. It will be seen from the judgment summarised above that the learned Judge in the High Court re- appraised the evidence in the case and disagreed with the Sessions Judge's findings of fact on the ground that they were perverse and displayed a lack of true perspective. He went further and, by way of "expressing in very clear terms as to how perverse the judgment of the court below is", he indicated that the discrepancies in the prosecution evidence and the circumstances of the case which led the Sessions Judge to discredit the prosecution story afforded no justifiable ground for the conclusion that the prosecution failed to establish their case. We are of opinion that the learned Judge in the High Court did not properly appreciate the scope of inquiry in revision against an order of acquittal. Though sub- section (1) of section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by section 423, sub-section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him.

By merely characterising the judgment of the trial Court as "perverse" and "lacking in perspective", the High Court cannot reverse pure findings of fact based on the trial Court's

appreciation of the evidence in the case. That is what the learned Judge in the court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal. No doubt, the learned Judge formally complied with sub- section (4) by directing only a re- trial of the appellants without convicting them, and warned that the courts retrying the case should not be influenced by any expression of opinion contained in his judgment. But there can be little doubt that he loaded the dice against the appellants, and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to the credibility of the prosecution witnesses and the circumstances of the case in general.

8. We are of opinion that the learned Judge in the High Court exceeded his powers of revision in dealing with the case in the manner he did, and we set aside his order for retrial of the appellants and restore the order of acquittal passed by the Sessions Judge.

MANU/SC/0194/1976

Back to Section 428 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 381 of 1975

Decided On: 02.02.1976

Suraj Bhan Vs. Om Prakash and Ors.

Hon'ble Judges/Coram:

Raja Jaswant Singh, P.K. Goswami and P.N. Shinghal, JJ.

JUDGMENT

P.K. Goswami, J.

1. On April, 19, 1975, the respondent Om Parkash (hereinafter to be described as the accused) inflicted as many as five stab wounds on the appellant Suraj Bhan. The injuries were very severe as will be found from the description given below :

1. Incised wounds 5 cm x 2 cm oblique spindle shape on the left side of the front of abdomen, 8 cm below the xiphisternum and 6 cm to the left of mid line. Depth not probed edges were fresh.

2. Incised wound 21/2 cm x 1 cm oblique, 6 cm on the left and 2 cm above injury No. 1, spindle shaped. Edges were fresh and depth was not probed.

3. Incised wound 21/2 cm x 1 cm horizontal, spindle shaped 6 cm above the left anterior superior iliac spine. Depth was not probed and edges were fresh.

4. Incised wound 1 cm x 1/4 cm x 2 mm deep, horizontal 5 cm inner to end at the level of left anterior superior iliac spin edges were fresh.

5. Penetrating wound 5 cm x 21/2 cm x cavity deep, horizontal on the front of abdomen 2 cm to the right of mid line 10 cm below the level of xiphisternum, edges were clean cut and fresh the coils of small intestine protruding through the wound.

The appellant had also to under go an operation. There is no doubt that prompt and proper medical attention alone saved the appellant from death.

2. The accused was convicted under Section 307 IPC by the trial court by its judgment dated February 26, 1974 and sentenced to 10 years rigorous imprisonment & also to a fine of Rs. 200/- in default rigorous imprisonment for one year. Although the accused gave his age as 19 years, according to the trial court he appeared to be aged about 23 years.

3. The accused appealed to the High Court against his conviction and sentence. The appeal was numbered as Criminal Appeal No. 442 of 1974, The injured Suraj Bhan also filed a Criminal Revision Application being numbered as 606 of 1974 for enhancement of the sentence passed on the accused. The appeal was decided by a learned single judge of the High Court of Punjab and Haryana on January 10, 1975. It appears from the judgment of the High Court in that appeal that conviction of the accused was not challenged. The only point that was argued was that the accused was entitled to set off the period of his detention as an under trial prisoner against the period of imprisonment imposed upon him under Section 423 of the Criminal Procedure Code 1973 (Act No. 2 of 1974) which came into force from April 1, 1974 It appears also from the judgment that the State did not oppose the aforesaid submission on behalf of the accused. The learned single Judge, therefore, passed the order in the following terms :

There is force in this submission of the learned Counsel which is not opposed by the State counsel. I am of the view that the ends of justice will be met if the term of imprisonment of the convict appellant is reduced to that already undergone by him.

Having said so the learned single Judge dismissed the appeal maintaining the conviction and reduced the accused's term of imprisonment to that already undergone by him and also maintained and the sentence of fine. Including the pre- conviction detention the accused served only one year and eight months of the sentence.

4. It appears the State did not choose to prefer any appeal against the grossly inadequate sentence passed by the High Court. On the other hand the injured Suraj Bhan made an application to the High Court for a certificate of fitness for leave to appeal to this Court under Article 134(1)(c) of the Constitution without success and thereafter obtained special leave from this Court after notice to the respondents including the State to show cause why special leave to appeal should not be granted.

5. We have described the above facts in some detail as we fail to appreciate why the State in this case should have ordinarily ignored to take notice of such a grossly lenient sentence.

6. The order of the High Court was clearly unsustainable even in terms of Section 428, Criminal Procedure Code, as the only set off which was urged for under the section and which was admissible, was a period of about nine months which the accused had served as an under trial prisoner prior to the conviction.

7. It is also clear from Section 428, Criminal Procedure Code itself even though the conviction was prior to the enforcement of the CrPC, benefit of Section 428 would be available to such a conviction. Indeed Section 428 does not contemplate any challenge to a conviction or a sentence. It confers a benefit on a conviction reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under trial prisoner. The procedure to invoke Section 428, Criminal Procedure Code, could be a miscellaneous application by the accused to the court at any time while the sentence runs for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section.

8. In the appeal before the High Court there was no scope for the High Court to reduce the sentence only to the period already undergone under Section 428, Criminal Procedure Code, in view of the only point argued before it.

9. Since in an attempt to murder hurt was caused, the maximum punishment under the second part of Section 307, IPC would be imprisonment for life. The injured was not satisfied with the maximum punishment of ten years contained in the first part of the section and moved the High Court in revision for enhancement of the sentence. The revision was separately dismissed by the High Court for the "reasons recorded in Criminal Appeal No. 442 of 1974" and it is against this order of the High Court in revision that special leave was obtained by the appellant.

10. In the absence of an appeal against the judgment of the High Court in Criminal Appeal No. 442 of 1974, either by the State or by the injured, that judgment has become final which means that the accused's sentence remains to be for a period of one year and eight months and a fine of Rs. 200/- , in default rigorous imprisonment for one year.

11. The scope of the criminal revision before the High Court was whether the sentence of ten years should be further enhanced but that sentence itself disappeared by virtue of the judgment of the High Court in the criminal appeal. The criminal revision therefore, became infructuous and we can do nothing about it while the judgment of the High Court remains operative. Unfortunately that judgment in the criminal appeal is not before us in this Court. Although, therefore, we cannot approve of such a grossly lenient sentence in the present case, we have no other alternative than to dismiss the present appeal. The appeal is, therefore, dismissed.

MANU/SC/0406/1991

Back to Section 433A of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 96 of 1989

Decided On: 10.07.1991

Ashok Kumar Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

A.M. Ahmadi, P.B. Sawant and S.C. Agrawal, JJ.

ORDER

A.M. Ahmadi, J.

1. Liberty is the life line of every human being. Life without liberty is 'lasting' but not 'living'. Liberty is, therefore, considered one of the most precious and cherished possessions of a human being. Any attempt to take liberties with the liberty of a human being is visited with resistance. Since no human being can tolerate fetters on his personal liberty it is not surprising that the petitioner Ashok Kumar alias Golu continues to struggle for his liberty, premature release, not fully content with the enunciation of the law in this behalf by this Court in Maru Ram v. Union of India MANU/SC/0159/1980 : 1980CriLJ1440 .

2. The questions of law which are raised in this petition brought under Article 32 of the Constitution arise upon facts of which we give an abridged statement. On the basis of a FIR lodged on October 21, 1977, the petitioner was arrested on the next day and he along with others was chargesheeted for the murder of one Prem Nagpal. The petitioner was tried and convicted for murder on December 20, 1978 in Sessions Case No. 32 of 1978 by the learned Sessions Judge, Ganganagar, and was ordered to suffer imprisonment for life. His appeal, Criminal Appeal No. 40 of 1979, was dismissed by the High Court of Rajasthan. Since then he is serving time. It appears that he filed a Habeas Corpus Writ Petition No. 2963 of 1987 in the High Court of Rajasthan at Jodhpur for premature release on the plea that he was entitled to be considered for such release under the relevant rules of Rajasthan Prisons (Shortening of Sentences) Rules, 1958, (hereinafter alluded to as 'the 1958 Rules') notwithstanding the insertion of Section 433A in the CrPC, 1973 (hereinafter called 'the Code') with effect from December 18, 1978, just two days before his conviction. His grievance was that he was being denied the benefit of early release under the 1958 Rules under the garb of the newly added Section 433A, on the ground that it places a statutory embargo against the release of such a convict 'unless he has served atleast 14 years of imprisonment'. He contended that the said provision could not curtail the constitutional power vested in the Governor by virtue of Article 161 of the Constitution which had to be exercised on the advice of the Council of Ministers which advice could be based on a variety of considerations including the provisions of the 1958 Rules. The writ petition was, however, dismissed by the High

Court on October 31, 1988, on the ground that it was premature inasmuch as the petitioner's two representations, one to the Governor and another to the State Home Minister, were pending consideration. The High Court directed that they should be disposed of within one month. In this view of the matter the High Court did not deem it necessary to consider the various questions of law raised in the petition on merits. After the rejection of his writ petition by the High Court, the petitioner through his counsel addressed a letter dated November 28, 1988 to the Governor inviting his attention to the earlier representation dated August 29, 1988 and requesting him to take a decision thereon within a month as observed by the High Court. Failing to secure his early release notwithstanding the above efforts, the petitioner has invoked the extraordinary jurisdiction of this Court under Article 32 of the Constitution.

3. The petitioner's case in a nutshell is that under the provisions of the 1958 Rules, a 'lifer' who has served an actual sentence of about 9 years and 3 months is entitled to be considered for premature release if the total sentence including remissions works out to 14 years and he is reported to be of good behaviour. However, the petitioner contends, his case for premature release is not considered by the concerned authorities in view of the newly added Section 433A of the Code on the interpretation that by virtue of the said provision the case of a 'lifer' cannot be considered for early release unless he has completed 14 years of actual incarceration, the provisions of Sections 432 and 433 of the Code as well as the 1958 Rules notwithstanding. According to him, even if the provisions of Sections 432 and 433 of the Code do not come into play unless a convict sentenced to life imprisonment has completed actual incarceration for 14 years as required by Section 433A, the authorities have failed to realise that Section 433A cannot override the constitutional power conferred by Articles 72 and 161 of the Constitutional on the President and the Governor, respectively, and the State Government i.e., the Council of Ministers, could advise the Governor to exercise power under Article 161 treating the 1958 Rules as guidelines. Since the petitioner had already moved the Governor under Article 161 of the Constitution it was incumbent on the State Government to consider his request for early release, notwithstanding Section 433A, and failure to do so entitled the petitioner to immediate release as his continued detention was, wholly illegal and invalid. In support of this contention the petitioner has placed reliance on the ratio of Maru Ram's decision.

4. The petitioner brands Section 433A of the Code to be a 'legislative fraud' inasmuch as the said provision was got approved by the Parliament on the assurance that the said provision is complementary to the various amendments proposed in the Indian Penal Code. In the alternative it is contended that in any case this Court should by a process of interpretation limit the scope of Section 433A of the Code to those cases only to which it would have been limited had the legislation proposing amendments in the Indian Penal Code gone through. In any case after the decision of this Court in Maru Ram's case, the efficacy of Section 433A is considerably reduced and the petitioner is entitled to early release by virtue of the power contained in Article 161 read with the 1958 Rules even if guidelines are not formulated notwithstanding the subsequent decision of this Court in Kehar Singh v. Union of India MANU/SC/0240/1988 : 1989CriLJ941 . Counsel submitted that after the decision of this Court in Bhagirath v. Delhi Administration MANU/SC/0062/1985 : 1985CriLJ1179 where- under this Court extended the benefit of Section 428 of the Code even to life convicts, the ratio in Gopal Godse v. State of Maharashtra

MANU/SC/0156/1961 : 1961CriLJ736a had undergone a change. On this broad approach, counsel for the petitioner, formulated questions of law which may be stated as under:

1. Whether the insertion of Section 433A in the Code was a legislative fraud inasmuch as the connected legislation, namely, the Indian Penal Code (Amendment) Bill XLII of 1972 did not become law although passed by the Rajya Sabha as the I.P.C. (Amendment) Act, 1978, on November 23, 1978?

2. Whether on the ratio of Maru Ram's decision, in the absence of any guidelines formulated by the State under Article 72 or 161 of the Constitution, Section 433A of the Code would not apply to life convicts and the 1958 Rules will prevail for the purpose of exercise of power under Article 72 or 161 of the Constitution?

Inter- connected with this question, the following questions were raised:

a) Whether Maru Ram's decision is in conflict with Kehar Singh's Judgment on the question of necessity or otherwise of guidelines for the exercise of power under Article 72 and 161 of the Constitution?

b) Whether the use of two expressions "remission" and "remit" in Articles 72 and 161 convey two different meanings and if yes, whether the content of power in the two expressions is different?

c) Whether the persons sentenced to death by Courts, whose death sentence has been commuted to life imprisonment by executive clemency, form a distinct and separate class for the purpose of application of Section 433A of the Code as well as for the purpose of necessity (or not) of guidelines for premature release in exercise of power under Articles 72 and 161, from the persons who at the initial stage itself were sentenced to life imprisonment by court verdict? And whether in the latter case guide lines are mandatory under Article 72 and 161 and a well designed scheme of remission must be formulated if the constitutional guarantee under Articles 14 and 21 is to be preserved?

d) Whether the whole law of remission needs to be reviewed after Bhagirath's case wherein this Court held that imprisonment for life is also an imprisonment for a term and that a life convict is entitled to set off under Section 428 Cr.P.C.?

e) Whether it is permissible in law to grant conditional premature release to a life convict even before completion of 14 years of actual imprisonment notwithstanding Section 433A of the Code?

If yes, whether the grant of such conditional release will be treated as the prisoner actually serving time for the purpose of Section 433A of the Code?

5. First the legislative history. The Law Commission had in its 42nd Report submitted in June, 1971 suggested numerous changes in the Indian Penal Code (I.P.C.). Pursuant thereto an Amendment Bill No. XLII of 1972 was introduced in the Rajya Sabha on December 11, 1972 proposed wide ranging changes in the I.P.C. One change proposed was to bifurcate Section 302, I.P.C. into two parts, the first part providing that except in cases specified in the second part, the punishment for murder will be imprisonment for life whereas for the more heinous crimes enumerated in Clauses (a) to (c), of Sub- section (2) the punishment may be death or imprisonment for life. A motion for reference of the Bill to the Joint Committee of both the Houses was moved in the Rajya Sabha on December 14, 1972 by the then Minister of State in the Ministry of Home Affairs and was adopted on the same day. The Lok Sabha concurred in the motion of the Rajya Sabha on December 21, 1972. The Joint Parliamentary Committee presented its report to the Rajya Sabha on January 29, 1976 recommending changes in several clauses of the Bill. While retaining the amendment proposed in Section 302, I.P.C., it recommended inclusion of one more Clause (d) after Clause (c) in Sub- section (2) thereof and at the same time recommended deletion of Section 303, I.P.C. It also recommended substitution of the existing Section 57, I.P.C., by a totally new section, the proviso whereto has relevance. The proposed proviso was as under:

Provided that where a sentence of imprisonment for life is imposed on conviction of a person for a capital offence, or where a sentence of death imposed on a person has been commuted into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

The reason which impelled the Committee to introduce the above proviso was "that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years." The Committee, therefore, felt that such a convict should not be released unless he has served atleast 14 years of imprisonment. It is evident from the scheme of the aforesaid recommendations that the proviso was intended to apply to only those convicts who were convicted for a capital offence (this expression was defined by Clause 15 of the Bill recommending substitution of Section 40, I.P.C., as 'an offence for which death is one of the punishments provided by law') or whose sentence of death was commuted into one of imprisonment for life and not to those who were governed by the first part of the proposed Section 302, I.P.C. It was pointed out by counsel that similar benefit would have accrued to offenders convicted for offences covered under Section 305, 307 or 396 if the proposed Sections 305, 307(b) and 396(b) had come into being. That, contends the petitioner's counsel, would have considerably narrowed down the scope of the proposed proviso to Section 57, I.P.C., and consequently the rigour of the said provision would have fallen on a tiny minority of offenders guilty of a capital offence. Pursuant to the recommendations made by the Committee, two bills, namely, the I.P.C. (Amendment) Bill, 1978 and the CrPC (Amendment) Bill, 1978, came to be introduced, the former was passed with changes by the Rajya Sabha on November 23, 1978 while the latter was introduced in the Lok Sabha on November 28, 1978, and in the Rajya Sabha on

December 5, 1978. The proposal to add a proviso to the proposed Section 57, I.P.C. did not find favour as it was thought that the said subject matter appropriately related to Chapter XXXII of the Code and accordingly the said provision was introduced as Section 433A in the Code. While the amendments to the Code became law with effect from December 18, 1978, the I.P.C. amendments, though passed by the Rajya Sabha could not be got through the Lok- Sabha and lapsed. It may here be mentioned that the I.P.C. Bill as approved by the Rajya Sabha contained the proposal to divide Section 302 into two parts, in fact an additional clause was sought to be introduced in the second part thereof and Sections 305, 307 and 396 were also sought to be amended as proposed by the Committee. This in brief is the legislative history.

6. In the backdrop of the said legislative history, counsel for the petitioner argued that a legislative fraud was practised by enacting Section 433A of the Cede and failing to carry out the corresponding changes in Sections 302, 305, 307, 396, etc., assured by the passing of the Indian Penal Code (Amendment) Act, 1978, by the Rajya Sabha on November 23, 1978. According to him it is evident from the scheme of the twin Amendment Bills that the legislative intent was to apply the rigour of Section 433A of the Code to a small number of heinous crimes which fell within the meaning of the expression capital offence. It was to achieve this objective that Section 302, I.P.C. was proposed to be bifurcated so that a large number of murders would fall within the first part of the proposed provision which prescribed the punishment of life imprisonment only and thus fell beyond the mischief of Section 433A of the Code. To buttress his submission our attention was invited to Annexure II to the petition which is a copy of the letter dated July 10, 1979, written by the Joint- Secretary in the Ministry of Home Affairs to Home Secretaries of all the concerned State Governments explaining the purport of the newly added Section 433A. After explaining that Section 57, I.P.C., had a limited scope, namely, calculating fractions of terms of imprisonment only, he proceeds to state in paragraph 3 of the letter as under:

The restrictions imposed by Section 433A applies only to those life convicts who are convicted for offences for which death is one of the punishments prescribed by law. In the Indian Penal Code (Amendment) Bill, 1978 as passed by the Rajya Sabha and now pending in the Lok Sabha, Section 302 is proposed to be amended so as to provide that the normal punishment for murder shall be imprisonment for life and that only in certain cases of aggravating circumstances will the court have discretion to award death sentences.

Then in paragraph 4 he proceeds to clarify as under:

Even regarding these convicts the restriction imposed by Section 433A is not absolute for, the Constitutional power of the Governor under Article 161 to commute and remit sentences remains unaffected and can be exercised in each case in which the exercise of this power is considered suitable.

In paragraph 6 of the detailed note appended to the said letter, the legal position was explained thus:

It may be pointed out that the restriction introduced by Section 433A does not apply to all life convicts. It applies only to those prisoners who are convicted of a capital offence i.e. an offence for which death is one of the punishments prescribed by law. Once the Indian Penal Code (Amendment) Bill becomes the law, offenders sentenced under proposed Section 302(i) will not be covered by this provision as the offence will not be a capital offence. Thus in future the restriction introduced by Section 433A will not be applicable to them and will, in effect, cover only a very small number of cases. Even in this small number of cases the restriction will not in any way curb the Constitutional power to grant remission and commutation vested in the President or the Governor by virtue of Articles 72 and 161.

There can be no doubt that by this letter it was clarified that Section 433A of the Code will apply to only those convicted of a capital offence and not to all life convicts. It is equally clear that the said provision was expected to apply to exceptionally heinous offences falling within the definition of 'capital offence' once the Indian Penal Code (Amendment) Bill became law. Section 433A was, therefore, expected to deny premature release before completion of actual 14 years of incarceration to only those limited convicts convicted of a capital offence, i.e., an exceptionally heinous crime specified in the second part of the proposed Section , I.P.C. Lastly it clarifies that Section 433A cannot and does not in any way affect the constitutional power conferred on the President/Governor under Article 72/161 of the Constitution. It cannot, therefore, be denied that this letter and the accompanying note does give an impression that certain provisions of the Indian Penal Code (Amendment) Bill were interlinked with Section 433A of the Code.

7. Assuming the Criminal Procedure Code (Amendment) Bill and the Indian Penal Code (Amendment) Bill were intended to provide an integrated scheme of legislation, can it be said that the failure on the part of the Lok Sabha to pass the letter renders the enactment of the former by which Section 433A was introduced in the Code, 'a legislative fraud' as counsel has liked to call it or to use a more familiar expression 'colourable exercise of legislative power'? Counsel submitted that Section 433A was got introduced on the statute book by deception, in that, when the former Bill was made law an impression was given that the twin legislation which had already been cleared by the Rajya Sabha on November 23, 1978 would in due course be cleared by the Lok Sabha also so that the application of Section 433A would be limited to capital offences only and would have no application to a large number of 'lifers'. It must be conceded that such would have been the impact if the Indian Penal Code (Amendment) Bill was passed by the Lok Sabha in the form in which the Rajya Sabha had approved it.

8. This is not a case of legislative incompetence to enact Section 433A. No such submission was made. Besides the question of vires of Section 433A of the Code has been determined by the Constitution Bench of this Court in Maru Ram's case. This Court repelled all the thrusts aimed at challenging the constitutional validity of Section 433A. But counsel submitted that the question

was not examined from the historical perspective of the twin legislations. Counsel for the State submitted that it was not permissible for us to reopen the challenge closed by the Constitution Bench on the specious plea that a particular argument or plea was not canvassed or made before that Bench. The objection raised by counsel for the State Government is perhaps not without substance but we do not propose to deal with it because even otherwise we see no merit in the submission of the petitioner's counsel. It is only when a legislature which has no power to legislate frames a legislation so camouflaging it as to appear to be within its competence when it knows it is not, it can be said that the legislation so enacted is colourable legislation. In K.C. Gajapati Narayan Deo v. State of Orissa, [1954] 1SCR 1950, was challenged on the ground of colourable legislation or a fraud on the Constitution as its real purpose was to effect a drastic reduction in the amount of compensation payable under the Orissa Estates Abolition Act, 1952. The facts were that a Bill relating to the Orissa Estates Abolition Act, 1952 was published in the Gazette on January 3, 1950. It provided that any sum payable for agricultural income- tax for the previous year should be deducted from the gross asset of an estate for working out the net income on the basis whereof compensation payable to the estate owner could be determined. Thereafter on January 8, 1950, a Bill to amend the Orissa Agricultural Income- tax, 1947, was introduced to enhance the highest rate of tax from 3 annas to 4 annas in a rupee and to reduce the highest slab from Rs. 30,000 to Rs. 20,000. The next Chief Minister, however, dropped this Bill and introduced a fresh Bill enhancing the highest rate to 12 annas 6 pies in a rupee and reducing the highest slab to Rs. 15,000 only. On the same becoming law it was challenged on the ground that the real purpose of the legislation was to drastically reduce the compensation payable to the estate owners. Mukherjea, J., who spoke for the Court observed as under:

It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power.

Thus the whole doctrine resolves itself into a question of competency of the concerned legislature to enact the impugned legislation. If the legislature has transgressed the limits of its powers and if such transgression is indirect, covert or disguised, such a legislation is described as colourable in legal parlance. The idea conveyed by the use of the said expression is that although apparently a legislature in passing the statute purported to act within the limits of its powers, it had in substance and reality transgressed its powers, the transgression being veiled by what appears on close scrutiny to be a mere pretence or disguise. In other words if in pith and substance the legislation does not belong to the subject falling within the limits of its power but is outside it, the mere form of the legislation will not be determinate of the legislative competence. In Sonapur Tea Co. Ltd. v. Must. Mazirunnessa MANU/SC/0069/1961 : [1962]1SCR724 it was reiterated relying on Gajapati's case that the doctrine of colourable legislation really postulates that legislation attempts to do indirectly what it cannot do directly. Such is not the case before us. It is no body's contention that Parliament was not competent to amend the Criminal Procedure Code by which Section 433A was inserted. Whether or not the connecting Indian Penal Code (Amendment) Bill ought to have been cleared or not was a matter left to the wisdom of the Lok Sabha. Merely

because the Criminal Procedure Bill was made law and the Indian Penal Code (Amendment) Bill was passed by the Rajya Sabha did not obligate the Lok Sabha to clear it. The Lok Sabha could have its own views on the proposed Indian Penal Code amendments. It may agree with the executive's policy reflected in the Bill, with or without modifications, or not at all. Merely because in the subsequent instructions issued by the letter of July 10, 1979 and the accompanying note (Annex. II) the Joint- Secretary had interlinked the two Bills, the Lok Sabha was under no obligation to adopt the measure as such representation could not operate as estoppel against it. Even the indirect attempt on the part of the High Court of Himachal Pradesh in the ragging case to force the State Government to legislate, State of Himachal Pradesh v. A Parent of a student of Medical College, Simla MANU/SC/0046/1985 : [1985]3SCR676 was disapproved by this Court as a matter falling, outside the functions and duties of the judiciary. It is, therefore, obvious that no question of mala fides on the part of the legislature was involved in the enactment of one legislation and failure to enact another. There is no question of 'legislative fraud' or 'colourable legislation' involved in the backdrop of the legislative history of Section 433A of the Code as argued on behalf of the petitioner.

9. Counsel for the petitioner, however, tried to seek support from the Privy Council decision in W.R. Moram v. Deputy Commissioner of Taxation for N.S.W. [1940] AC 838 Wherein the question to be considered was whether the legislative scheme was a colourable one forbidden by Section 5(ii) of the Australian Constitution. There was no attempt to disguise the scheme as it was fully disclosed. The Privy Council, while holding that the scheme was not a colourable legislation, observed that 'where there is admittedly a scheme of proposed legislation, it seems to be necessary when the 'pith and substance' or 'scope and effect' of any one of the Acts is under consideration, to treat them together and to see how they interact'. But that was a case where the scheme was carried out through enactments passed by the concerned legislatures. It is in that context that the above observations must be read and understood. In the present case also if both the Bills had become law, counsel would perhaps have been justified in demanding that in understanding or construing one legislation or the other, the scheme common to both must be kept in view and be permitted to interact. But where the linkage does not exist on account of the Indian Penal Code (Amendment) Bill not having become law we are unable to appreciate how Section 433A can be read down to apply to only those classes of capital offences to which it would have applied had the said Bill been passed by the Lok Sabha in the terms in which it was approved by the Rajya Sabha. The language of Section 433A is clear and unambiguous and does not call for extrinsic aid for its interpretation. To accept the counsel's submission to read down or interpret Section 433A of the Code with the aid of the changes proposed by the Indian Penal Code (Amendment) Bill would tantamount to treating the provisions of the said Bill as forming part of the Indian Penal Code which is clearly impermissible. To put such an interpretation with the aid of such extrinsic material would result in violence to the plain language of Section 433A of the Code. We are, therefore, unable to accept even this second limb of the contention.

10. The law governing suspension, remission and commutation of sentence is both statutory and constitutional. The stage for the exercise of this power generally speaking is post judicial, i.e., after the judicial process has come to an end. The duty to judge and to award the appropriate punishment to the guilty is a judicial function which culminates by a judgment pronounced in accordance with law. After the judicial function thus ends the executive function of giving effect

to the judicial verdict commences. We first refer to the statutory provisions. Chapter III of I.P.C. deals with punishments. The punishments to which the offenders can be liable are enumerated in Section 53, namely, (i) death (ii) imprisonment for life (iii) imprisonment of either description, namely, rigorous or simple (iv) forfeiture of property and (v) fine. Section 54 empowers the appropriate government to commute the punishment of death for any other punishment. Similarly Section 55 empowers the appropriate government to commute the sentence of imprisonment for life for imprisonment of either description for a term not exceeding 14 years. Chapter XXXII of the Code, to which Section 433A was added, entitled 'Execution, Suspension, Remission and Commutation of sentences' contains Sections 432 and 433 which have relevance; the former confers power on the appropriate government to suspend the execution of an offender's sentence or to remit the whole or any part of the punishment to which he has been sentenced while the latter confers power on such Government to commute (a) a sentence of death for any other punishment (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine (c) a sentence of rigorous imprisonment for simple imprisonment or for fine and (d) a sentence of simple imprisonment for fine. It is in the context of the aforesaid provisions that we must read Section 433A which runs as under:

433A. Restriction on powers of remission or commutation in certain cases- Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

The section begins with a non- obstante clause notwithstanding anything contained in Section 432 and proceeds to say that where a person is convicted for an offence for which death is one of the punishments and has been visited with the lesser sentence of imprisonment for life or where the punishment of an offender sentenced to death has been commuted under Section 433 into one of imprisonment for life, such offender will not be released unless he has served at least 14 years of imprisonment. The reason which impelled the legislature to insert this provision has been stated earlier. Therefore, one who could have been visited with the extreme punishment of death but on account of the sentencing court's generosity was sentenced to the lesser punishment of imprisonment for life and another who actually was sentenced to death but on account of executive generosity his sentence was commuted under Section 433(a) for imprisonment for life have been treated under Section 433A as belonging to that class of prisoners who do not deserve to be released unless they have completed 14 years of actual incarceration. Thus the effect of Section 433A is to restrict the exercise of power under Sections 432 and 433 by the stipulation that the power will not be so exercised as would enable the two categories of convicts referred to in Section 433A to freedom before they have completed 14 years of actual imprisonment. This is the legislative policy which is clearly discernible from the plain language of Section 433A of the Code. Such prisoners constitute a single class and have, therefore, been subjected to the uniform requirement of suffering atleast 14 years of internment.

11. Counsel for the petitioner next submitted that after this Court's decision in Bhagirath's case permitting the benefit of set off under Section 428 in respect of the detention period as an undertrial, the ratio of the decision in Godse's case must be taken as impliedly disapproved. We see no basis for this submission. In Godse's case the convict who was sentenced to transportation for life had earned remission for 2963 days during his internment. He claimed that in view of Section 57 read with Section 53A, I.P.C., the total period of his incarceration could not exceed 20 years which he had completed, inclusive of remission, and, therefore, his continued detention was illegal. Section 57, I.P.C. reads as follows:

57. Fractions of terms of punishment- In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

The expression 'imprisonment for life' must be read in the context of Section 45, I.P.C. Under that provision the word 'life' denotes the life of a human being unless the contrary appears from the context. We have seen that the punishments are set out in Section 53, imprisonment for life being one of them. Read in the light of Section 45 it would ordinarily mean imprisonment for the full or complete span of life.

Does Section 57 convey to the contrary? Dealing with this contention based on the language of Section 57, this Court observed in Godse's case at pages 444- 45 as under:

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all- embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

This interpretation of Section 57 gets strengthened if we refer to Sections 65, 116, 119, 120 and 511, of the Indian Penal Code which fix the term of imprisonment thereunder as a fraction of the maximum fixed for the principal offence. It is for the purpose of working out this fraction that it became necessary to provide that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. If such a provision had not been made it would have been impossible to work out the fraction of an in- definite term. In order to work out the fraction of terms of punishment provided in sections such as those enumerated above, it was imperative to lay down the equivalent term for life imprisonment.

12. The second contention urged before the Court in Godse's case was based on the Bombay Rules governing the remission system framed in virtue of the provisions contained in the Prisons Act,

1894. This Court pointed out that the Prisons Act did not confer on any authority a power to commute or remit sentences. The Remission Rules made thereunder had, therefore, to be confined to the scope and ambit of that statute and could not be extended to other statutes. Under the Bombay Rules three types of remissions for good conduct were allowed and for working them out transportation for life was equated to 15 years of actual imprisonment. Dealing with Godse's plea for premature release on the strength of these rules this Court observed at page 447 as under:

The rules framed under the Prisons Act enable such a person to remission ordinary, special and State- and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent the life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate Government to remit the sentence under Section 401 (now Section 432) of the CrPC on a consideration of the relevant factors including the period of remissions earned. The question of remission is exclusively within province of the appropriate Government; and in this case it is admitted that though the appropriate Government made certain remissions under Section 401 of the CrPC, it did not remit the entire sentence.

On this line of reasoning the submission of counsel that if the Court were to take the view that transportation for life or imprisonment for life enures till the last breath of the convict passes out, the entire scheme of remissions framed under the Prisons Act or any like statute and the whole exercise of crediting remissions to the account of the convict would collapse, was spurned. This Court came to the conclusion that the Remission Rules have a limited scope and in the case of a convict undergoing sentence of transportation for life or imprisonment for life it acquires significance only if the sentence is commuted or remitted, subject to Section 433A of the Code or in exercise of constitutional power under Articles 72/161.

13. In Maru Ram's case the Constitution Bench reaffirmed the ratio of Godse's case and held that the nature of a life sentence is incarceration until death; judicial sentence for imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 by the appropriate Government or on a clemency order in exercise of power under Articles 72/161 of the Constitution. At page 1220 the Constitution Bench expressed itself thus:

Ordinary where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where the subtraction result is zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of sentence which has been highlighted in Godse's case. Where the sentence is indeterminate or of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain

quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration.

Referring to the facts of Godse's case and affirming the view that the sentence of imprisonment for life enures upto the last breath of the convict, this Court proceeded to state as under:

Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of the long accumulation of remissions.

It is, therefore, clear from the aforesaid observations that unless the sentence for life imprisonment is commuted or remitted as stated earlier by the appropriate authority under the provisions of the relevant law, a convict is bound in law to serve the entire life term in prison; the rules framed under the Prisons Act or like statute may enable such a convict to earn remissions but such remissions will not entitle him to release before he has completed 14 years of incarceration in view of Section 433A of the Code unless of course power has been exercised under Article 72/161 of the Constitution.

14. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433A of the Code, or constitutional power has been exercised under Articles 72/161 of the Constitution. In Bhagirath's case the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him.

Referring to Section 57, I.P.C., the Constitution Bench reiterated the legal position as under:

The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose.

These observations are consistent with the ratio laid down in Godse and Maru Ram's cases. Coming next to the question of set off under Section 428 of the Code, this Court held:

The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence or such order, passed generally or specially, and apart from the provisions, if any of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life.

We fail to see any departure from the ratio of Godse's case; on the contrary the afore- quoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/writ petition. The Court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the CrPC'. These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as undertrial would enure to the benefit of the convict provided the appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath's case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram.

15. Under the Constitutional Scheme the President is the Chief Executive of the Union of India in whom the executive power of the Union vests. Similarly, the Governor is the Chief Executive of the concerned State and in him vests the executive power of that State. Articles 72 and 161 confer the clemency power of pardon, etc., on the President and the State Governors, respectively. Needless to say that this constitutional power would override the statutory power contained in Sections 432 and 433 and the limitation of Section 433A of the Code as well as the power conferred by Sections 54 and 55, I.P.C. No doubt, this power has to be exercised by the President/Governor on the advice of his Council of Ministers. How this power can be exercised consistently with Article 14 of the Constitution was one of the questions which this Court was invited to decide in Maru Ram's case. In order that there may not be allegations of arbitrary exercise of this power this Court observed at pages 1243- 44 as under:

The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty.

Till such rules are framed this Court thought that extant remission rules framed under the Prisons Act or under any other similar legislation by the State Governments may provide effective guidelines of a recommendatory nature helpful to the Government to release the prisoner by remitting the remaining term. It was, therefore, suggested that the said rules and remission

schemes be continued and benefit thereof be extended to all those who come within their purview. At the same time the Court was aware that special cases may require different considerations and 'the wide power of executive clemency cannot be bound down even by self-created rules'. Summing up its finding in paragraph 10 at page 1249, this Court observed:

We regard it as fair that until fresh rules are made in keeping with the experience gathered, current social conditions and accepted penological thinking- a desirable step, in our view- the present remissions and release Schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, Section 433A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.

It will be obvious from the above that the observations were purely recommendatory in nature.

16. In Kehar Singh's case on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in paragraph 16 as under:

It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case- law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds of and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.

These observations do indicate that the Constitution Bench which decided Kehar Singh's case was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram's case the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh's case. Therefore, the observation made by the Constitution Bench in Kehar Singh's case does not upturn any ratio laid down in Maru Ram's case. Nor has the Bench in Kehar Singh's case said anything with regard to using the provisions of extent Remission Rules as guidelines for the exercise of the clemency powers.

17. It is true that Articles 72/161 make use of two expressions 'remissions' with regard to punishment and 'remit' in relation to sentence but we do not think it proper to express any opinion as to the content and amplitude of these two expressions in the abstract in the absence of a fact- situation. We, therefore, express no opinion on this question formulated by the learned Counsel for the petitioner.

18. Lastly the learned Counsel for the petitioner raised a hypothetical question whether it was permissible in law to grant conditional premature release to a life convict even before completion of 14 years of actual imprisonment, which release would tantamount to the prisoner serving time for the purpose of Section 433A of the Code? It is difficult and indeed not advisable to answer such a hypothetical question without being fully aware of the nature of conditions imposed for release. We can do no better than quote the following observations made at page 1247 in Maru Ram's case:

...the expression 'prison' and 'imprisonment' must receive a wider connotation and include any place notified as such for detention purposes. 'Stone- walls and iron bars do not a prison- make': nor are 'stone walls and iron bars' a sine qua non to make a jail. Open jails are capital instances. Any life under the control of the State whether within high- walled or not may be a prison if the law regards it as such. House detentions, for example, Palaces, where Gandhiji was detained were prisons. Restraint on freedom under the prison law is the test. Licensed releases where instant re-capture is sanctioned by the law and likewise parole, where the parole is no free agent, and other categories under the invisible fetters of the prison law may legitimately be regarded as imprisonment. This point is necessary to be cleared even for computation of 14 years under Section 433A.

Therefore, in each case, the question whether the grant of conditional premature release answers the test laid down by this Court in the afore- quoted passage, would depend on the nature of the conditions imposed and the circumstances in which the order is passed and is to be executed. No general observation can be made and we make none.

19. In paragraph 10 of the memorandum of the Writ Petition., three reasons have been assigned for invoking this Court's jurisdiction under Article 32 of the Constitution, viz., (i) the questions involved in this petition will affect the right of a large body of life convicts seeking premature release; (ii) this Court's judgment in Bhagirath's case deviated from the ratio laid down in Godse's case and, therefore, the entire law of remissions needed a review; and (iii) the High Court of Rajasthan had refused to examine the merits of the various important questions of law raised before it. It is on account of the fact that this petition was in the nature of a representative petition touching the rights of a large number of convicts of the categories referred to in Sections 433A of the Code, that we have dealt with the various questions of law in extenso. Otherwise the petition could have been disposed of on the narrow ground that even though in view of Sections 433A of the Code, premature release could not be ordered under Sections 432/433 of the Code read with

the 1958 Rules until the petitioner had completed 14 years of actual imprisonment, his release could be considered in exercise of powers under Articles 72/161 of the Constitution treating the 1958 Rules guidelines, if necessary.

20. The relief claimed in the petition is two- fold, namely, (a) to grant a mandamus to the appropriate Government for the premature release of the petitioner by exercising constitutional power with the aid of 1958 Rules and (b) to declare the petitioner's continued detention as illegal and void. The petitioner has not completed 14 years of actual incarceration and as such he cannot invoke Sections 432 and 433 of the Code. His continued detention is consistent with Section 433A of the Code and there is nothing on record to show that it is otherwise illegal and void. The outcome of his clemency application under the Constitution is not put in issue in the present proceedings if it has been rejected and if the same is pending despite the directive of the High Court it would be open to the petitioner to approach the High Court for the compliance of its order. Under the circumstance no mandamus can issue. The writ petition must, therefore, fail. It is hereby dismissed. Rule discharged.

MANU/SC/0255/2009

Back to Section 436 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 343 of 2009 (Arising out of SLP (Crl.) No. 4008 of 2008

Decided On: 20.02.2009

Rasiklal Vs. Kisore

Hon'ble Judges/Coram:

R.V. Raveendran and J.M. Panchal, JJ.

JUDGMENT

J.M. Panchal, J.

1. Leave granted.

2. The appellant is accused in Criminal Complaint No. 1604 of 2005 filed in the court of learned Judicial Magistrate First Class, Indore, M.P., for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code and assails the order dated March 24, 2008, rendered by the learned Single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No. 1362 of 2006 by which bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, M.P. on December 1, 2006 is cancelled on the ground that the order granting bail was passed by the learned Judicial Magistrate First Class, Indore, without hearing the original complainant and was, therefore, bad for violation of principles of natural justice.

3. It is the case of the respondent that the appellant gave an interview on December 15, 2004 on Star News TV Channel and defamed him. The respondent, therefore, filed a Criminal Complaint No. 1604 of 2005 in the court of learned Judicial Magistrate First Class, Indore, M.P. on January 27, 2005 for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. The learned Judicial Magistrate examined the respondent on oath as required by Section 200 of the Code of Criminal Procedure, 1973 and issued summons to the appellant for commission of alleged offences under Sections 499 and 500 of the Indian Penal Code vide order dated May 9, 2006. The appellant appeared before the court on November 20, 2006 and submitted an application under Section 317 of the Code of .Criminal Procedure, 1973 seeking exemption for personal appearance along with vakalatnama of his counsel. In the said application prayer for grant of bail was also made. The application was fixed for hearing on December 26, 2006. However, on December 1, 2006 the appellant filed an application mentioning his appearance before the court and to consider his prayer for grant of bail under Section 436 of the Code of Criminal Procedure, 1973 as offences alleged to have been committed by him under Sections 499 and 500 of the Indian Penal Code are bailable. The application was heard on the day on which it

was filed. The learned Magistrate noticed that the offences alleged to have been committed by the appellant were bailable. Therefore, the appellant was admitted to bail on his furnishing a surety in the sum of Rs. 5,000/- and also furnishing a bond of the same amount. While enlarging the appellant on bail the learned Magistrate imposed a condition on the appellant that he would appear before the court on each date of hearing or else he would be taken into custody and sent to jail. The order dated December 1, 2006 passed by the learned Judicial Magistrate further indicates that in compliance of the direction issued by the court the appellant furnished a bail bond in the sum of Rs. 5,000/- and also executed a bond for the said amount and that the bail bonds were accepted by the court after which the appellant was released on bail.

4. The respondent, who is original complainant, filed Criminal Revision No. 1362 of 2006 in the High Court of Madhya Pradesh, Bench at Indore, on December 26, 2006 for cancelling the bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, on the ground that he was not heard and, therefore, the order was violative of principles of natural justice. The learned Single Judge, before whom the revision application was notified for hearing, had issued notice to the appellant but the appellant did not remain present before the High Court. The revision application filed by the respondent was taken up for final disposal on March 24, 2008. The learned Single Judge, by order dated March 24, 2008, has cancelled the bail granted to the appellant by the learned Judicial Magistrate on the ground that the respondent, who was original complainant, was not heard and, therefore, the order granting bail violates the principles of natural justice. After cancelling the bail granted to the appellant the learned Single Judge remitted the matter to the court below with a direction that the matter be taken up according to law between the parties relating to the grant of bail to the appellant. Feeling aggrieved the appellant has invoked appellate jurisdiction of this Court under Article 136 of the Constitution.

5. This Court has heard the learned Counsel for the parties and taken into consideration the documents forming part of the appeal.

6. As is evident, the appellant is being tried for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. Admittedly, both the offences are bailable. The grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. The said section reads as under:

436 - In what cases bail to be taken - (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his. appearance as hereinafter provided:

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

Provided further that nothing in this section shall be deemed to affect the provisions of Sub-section (3) of Section 116 or Section 446A.

(2) Notwithstanding anything contained in Sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446.

There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non- bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

7. There is no express provision in the Code prohibiting the court from re- arresting an accused released on bail under Section 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code. According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code. See: Talab Haji

Hussain v. Madhukar Purushottam Mondkar and Anr. MANU/SC/0028/1958 : 1958CriLJ701 reiterated by a Constitution Bench in Ratilal Bhanji Mithani v. Asstt. Collector of Customs and Anr. MANU/SC/0077/1967 : 1967CriLJ1576 .

8. It may be noticed that Sub- section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

9. The contention raised by the learned Counsel for the respondent on the basis of decision of this Court in Arun Kumar v. State of Bihar and Anr. MANU/SC/7168/2008 : 2008CriLJ1924 , that the complainant should have been heard by the Magistrate before granting bail to the appellant, cannot be accepted. In the decision relied upon by the learned Counsel for the respondent challenge was to the order passed by a learned Single Judge of the Patna High Court quashing the order passed by the learned Fast Track Court holding that the respondent No. 2 therein was not juvenile and, therefore, there was no need to refer his case to the Juvenile Justice Board for ascertaining his age and then for trial. The High Court was of the view that the prayer was rejected only on the ground that two or three witnesses were examined and though the accused was in possession of school leaving certificate, mark sheet, etc. to show that he was a juvenile, the prayer could not have been rejected. This Court found that the High Court in a very cryptic manner had observed that the application of the accused deserved to be allowed and directed the court below to consider the accused as a juvenile and proceed accordingly. Before this Court it was submitted by the learned Counsel for the informant that the documents produced had been analysed by the trial court and it was found at the time of framing charge that he was major' without any doubt. The grievance was made on behalf of the informant before this Court that the High Court did not even consider as to how the conclusions of the trial court suffered from any infirmity and merely referring to the stand of the accused and even without analyzing the correctness or otherwise of the observations and conclusions made by the trial court the learned Single Judge came to the conclusion that the accused was a juvenile. This Court concluded that the High Court had failed to notice several relevant factors and no discussion was made as to how the conclusions of the trial court suffered from any infirmity. It was also noticed by this Court that no notice was issued to the appellant before the matter was disposed of. In view of the above position the order

impugned in the appeal was set aside by this Court. To say the least, the facts of the present case are quite different from those mentioned in the above reported decision. Therefore the ratio laid down in the said decision cannot be applied to the fact of the instant case.

10. Even if notice had been issued to the respondent before granting bail to the appellant, the respondent could not have pointed out to the court that the appellant had allegedly committed non- bailable offences. As observed earlier, what has to be ascertained by the officer or the court is as to whether the person accused is alleged to have committed bailable offences and if the same is found to be in affirmative, the officer or the court has no other alternative but to release such person on bail if he is ready and willing to abide by reasonable conditions, which may be imposed on him. Having regard to the facts of the case this Court is of the firm opinion that the bail granted to the appellant for alleged commission of bailable offence could not have been cancelled by the High Court on the ground that the complainant was not heard and, thus, principles of natural justice were violated. Principles of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it will lead to an empty formality See State Bank of Patiala v. S.K. Sharma MANU/SC/0438/1996 : (1996)IILLJ296SC and Karnataka State Road Transport Corporation v. S.G. Kotturappa MANU/SC/0177/2005 : (2005)IILLJ161SC . The impugned order is, therefore, liable to be set aside.

11. For the foregoing reasons the appeal succeeds. The order dated March 24, 2008, passed by the learned Single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No. 1362 of 2006 cancelling the bail granted to the appellant by the learned Judicial Magistrate is hereby set aside and order dated December 1, 2006, passed by the learned Judicial Magistrate First Class, Indore, M.P., in Criminal Complaint No. 1604 of 2005 is hereby restored.

12. The appeal accordingly stands disposed of.

MANU/SC/0851/2022

Neutral Citation: 2022/INSC/690

Back to Section 436 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Miscellaneous Application No. 1849 of 2021 in SLP (Crl.) No. 5191 of 2021 and Miscellaneous Application Dairy No. 29164 of 2021 in SLP (Crl.) No. 5191 of 2021

Decided On: 11.07.2022

Satender Kumar Antil Vs. Central Bureau of Investigation and Ors.

Hon'ble Judges/Coram:

Sanjay Kishan Kaul and M.M. Sundresh, JJ.

JUDGMENT

M.M. Sundresh, J.

Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and essential requirement of a modern man

- John E.E.D. in "Essays on Freedom and Power"

1. Taking note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of Section 170 of the Code of Criminal Procedure (hereinafter referred to as "the Code" for short), an endeavour was made by this Court to categorize the types of offenses to be used as guidelines for the future. Assistance was sought from Shri Sidharth Luthra, learned Senior Counsel, and learned Additional Solicitor General Shri S.V. Raju. After allowing the application for intervention, an appropriate Order was passed on 07.10.2021. The same is reproduced as under:

We have been provided assistance both by Mr. S.V. Raju, learned Additional Solicitor General and Mr. Sidharth Luthra, learned Senior Counsel and there is broad unanimity in terms of the suggestions made by learned ASG. In terms of the suggestions, the offences have been categorized and guidelines are sought to be laid down for grant of bail, without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under:

Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA (Section 43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

REQUISITE CONDITIONS

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an Accused along with the chargesheet (Siddharth v. State of UP, MANU/SC/0600/2021)

CATEGORY A

After filing of chargesheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an Accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of Accused, if such an application is moved on behalf of the Accused before execution of the NBW on an undertaking of the Accused to appear physically on the next date/s of hearing.

e) Bail applications of such Accused on appearance may be decided w/o. the Accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY B/D

On appearance of the Accused in Court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS Section 37, 45 PMLA, 212(6) Companies Act 43D(5) of UAPA, POSCO etc.

Needless to say that the category A deals with both police cases and complaint cases.

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the Accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the Accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the Accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in Sanjay Chandra v. CBI, MANU/SC/1375/2011 : (2012) 1 SCC 40 has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and

b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

We appreciate the assistance given by the learned Counsels and the positive approach adopted by the learned ASG.

The SLP stands disposed of and the matter need not be listed further.

A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial Courts so that the unnecessary bail matters do not come up to this Court.

This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the Courts.

2. Two more applications, being M.A. No. 1849/2021 and M.A. Diary No. 29164/2021, were filed seeking a clarification referring to category 'C' wherein, inadvertently, Section 45 of the Prevention of Money Laundering Act, 2002 despite being struck down, found a place, thus came the Order dated 16.12.2021:

Learned Senior Counsels for parties state that they will endeavour to work out some of the fine tuning which is required to give meaning to the intent of our order dated 07.10.2021.

We make it clear that our intent was to ease the process of bail and not to restrict it. The order, in no way, imposes any additional fetters but is in furtherance of the line of judicial thinking to enlarge the scope of bail.

At this stage, suffice for us to say that while referring to category 'C', inadvertently, Section 45 of Prevention of Money laundering Act (PMLA) has been mentioned which has been struck down by this Court. Learned ASG states that an amendment was made and that is pending challenge before this Court before a different Bench. That would be a matter to be considered by that Bench.

We are also putting a caution that merely by categorizing certain offences as economic offences which may be non- cognizable, it does not mean that a different meaning is to be given to our order.

We may also clarify that if during the course of investigation, there has been no cause to arrest the Accused, merely because a charge sheet is filed, would not be an ipso facto cause to arrest the Petitioner, an aspect in general clarified by us in Criminal Appeal No. 838/2021 Siddharth v. State of Uttar Pradesh and Anr. dated 16.08.2021.

3. Some more applications have been filed seeking certain directions/clarifications, while impressing this Court to deal with the other aspects governing the grant of bail. We have heard Shri Amit Desai, learned Senior Counsel, Shri Sidharth Luthra, learned Senior Counsel, and learned Additional Solicitor General Shri S.V. Raju.

4. Having found that special leave petitions pertaining to different offenses, particularly on the rejection of bail applications are being filed before this Court, despite various directions issued from time to time, we deem it appropriate to undertake this exercise. We do make it clear that all our discussion along with the directions, are meant to act as guidelines, as each case pertaining to a bail application is obviously to be decided on its own merits.

PREVAILING SITUATION

5. Jails in India are flooded with undertrial prisoners. The statistics placed before us would indicate that more than 2/3rd of the inmates of the prisons constitute undertrial prisoners. Of this category of prisoners, majority may not even be required to be arrested despite registration of a cognizable offense, being charged with offenses punishable for seven years or less. They are not only poor and illiterate but also would include women. Thus, there is a culture of offense being inherited by many of them. As observed by this Court, it certainly exhibits the mindset, a vestige of colonial India, on the part of the Investigating Agency, notwithstanding the fact arrest is a draconian measure resulting in curtailment of liberty, and thus to be used sparingly. In a

democracy, there can never be an impression that it is a police State as both are conceptually opposite to each other.

DEFINITION OF TRIAL

6. The word 'trial' is not explained and defined under the Code. An extended meaning has to be given to this word for the purpose of enlargement on bail to include, the stage of investigation and thereafter. Primary considerations would obviously be different between these two stages. In the former stage, an arrest followed by a police custody may be warranted for a thorough investigation, while in the latter what matters substantially is the proceedings before the Court in the form of a trial. If we keep the above distinction in mind, the consequence to be drawn is for a more favourable consideration towards enlargement when investigation is completed, of course, among other factors.

7. Similarly, an appeal or revision shall also be construed as a facet of trial when it comes to the consideration of bail on suspension of sentence.

DEFINITION OF BAIL

8. The term "bail" has not been defined in the Code, though is used very often. A bail is nothing but a surety inclusive of a personal bond from the Accused. It means the release of an Accused person either by the orders of the Court or by the police or by the Investigating Agency.

9. It is a set of pre- trial restrictions imposed on a suspect while enabling any interference in the judicial process. Thus, it is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial. The word "bail" has been defined in the Black's Law Dictionary, 9th Edn., pg. 160 as:

A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time.

10. Wharton's Law Lexicon, 14th Edn., pg. 105 defines bail as:

to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance

when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him.

BAIL IS THE RULE

11. The principle that bail is the Rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This Court in Nikesh Tarachand Shah v. Union of India, MANU/SC/1480/2017 : (2018) 11 SCC 1, held that:

19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, MANU/SC/0215/1980 : (1980) 2 SCC 565 : 1980 SCC (Cri.) 465], the purpose of granting bail is set out with great felicity as follows: (SCC pp. 586- 88, paras 27- 30)

27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, MANU/WB/0119/1923 : AIR 1924 Cal 476 : 1924 Cri. LJ 732], AIR pp. 479- 80 that the object of bail is to secure the attendance of the Accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor [K.N. Joglekar v. Emperor, MANU/UP/0060/1931 : AIR 1931 All 504 : 1932 Cri. LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard- and- fast Rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson [Emperor v. H.L. Hutchinson, MANU/UP/0014/1931 : AIR 1931 All 356 : 1931 Cri. LJ 1271], AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular Rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various Sections in the Code of Criminal Procedure was that grant of bail is the Rule and refusal is the exception. An Accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore

entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. State [Gudikanti Narasimhulu v. State, MANU/SC/0089/1977 : (1978) 1 SCC 240 : 1978 SCC (Cri.) 115] that: (SCC p. 242, para 1)

'1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an Accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.'

29. In Gurcharan Singh v. State (UT of Delhi) [Gurcharan Singh v. State (UT of Delhi), MANU/SC/0420/1978 : (1978) 1 SCC 118 : 1978 SCC (Cri.) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29)

'29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.'

30. In AMERICAN JURISPRUDENCE (2nd, Vol. 8, p. 806, para 39), it is stated:

'Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the Accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.'

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

xxx xxx xxx

24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only Article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248].

12. Further this Court in Sanjay Chandra v. CBI MANU/SC/1375/2011 : (2012) 1 SCC 40, has observed that:

21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the Accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an Accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the Accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

PRESUMPTION OF INNOCENCE

13. Innocence of a person Accused of an offense is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the Court. Thus, it is for that agency to satisfy the Court that the arrest made was warranted and enlargement on bail is to be denied.

14. Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights acknowledge the presumption of innocence, as a cardinal principle of law, until the individual is proven guilty.

15. Both in Australia and Canada, a prima facie right to a reasonable bail is recognized based on the gravity of offence. In the United States, it is a common practice for bail to be a cash deposit. In the United Kingdom, bail is more likely to consist of a set of restrictions.

16. The Supreme Court of Canada in Corey Lee James Myers v. Her Majesty the Queen, 2019 SCC 18, has held that bail has to be considered on acceptable legal parameters. It thus confers adequate discretion on the Court to consider the enlargement on bail of which unreasonable delay is one of the grounds. Her Majesty the Queen v. Kevin Antic and Ors., MANU/SCCN/0024/2017 : 2017 SCC 27:

The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre- trial stage of the criminal trial process and safeguards the liberty of Accused persons. This right has two aspects: a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail. Under the first aspect, a provision may not deny bail without "just cause" there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect, the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the Accused for the release period. It protects Accused persons from conditions and forms of release that are unreasonable.

While a bail hearing is an expedited procedure, the bail provisions are federal law and must be applied consistently and fairly in all provinces and territories. A central part of the Canadian law of bail consists of the ladder principle and the authorized forms of release, which are found in Section 515(1) to (3) of the Criminal Code. Save for exceptions, an unconditional release on an undertaking is the default position when granting release. Alternative forms of release are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognizance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been considered and rejected as inappropriate. It is not necessary to impose cash bail

on Accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable. When cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the Accused and the circumstances of the case. The judge is under a positive obligation to inquire into the ability of the Accused to pay. Terms of release Under Section 515(4) should only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention and to ensure that the Accused is released. They must not be imposed to change an Accused person's behaviour or to punish an Accused person. Where a bail review is requested, courts must follow the bail review process set out in R. v. St- Cloud, MANU/SCCN/0023/2015 : 2015 SCC 27 : [2015] 2 S.C.R. 328.

17. We may only state that notwithstanding the special provisions in many of the countries world-over governing the consideration for enlargement on bail, courts have always interpreted them on the accepted principle of presumption of innocence and held in favour of the Accused.

18. The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the Accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

An uncontrolled power is the natural enemy of freedom

- Harold Laski in 'Liberty in the Modern State'

19. The Code of Criminal Procedure, despite being a procedural law, is enacted on the inviolable right enshrined Under Article 21 and 22 of the Constitution of India. The provisions governing clearly exhibited the aforesaid intendment of the Parliament.

20. Though the word 'bail' has not been defined as aforesaid, Section 2A defines a bailable and non- bailable offense. A non- bailable offense is a cognizable offense enabling the police officer to arrest without a warrant. To exercise the said power, the Code introduces certain embargoes by way of restrictions.

Section 41, 41A and 60A of the Code

CHAPTER V

ARREST OF PERSONS

41. When police may arrest without warrant.- - (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person- -

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary- -

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this Sub- section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any Rule made Under Sub- section (5) of Section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other

cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of Section 42, no person concerned in a non- cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

41A. Notice of appearance before police officer.- - (1) [The police officer shall], in all cases where the arrest of a person is not required under the provisions of Sub- section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

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60A. Arrest to be made strictly according to the Code.- - No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.

21. Section 41 Under Chapter V of the Code deals with the arrest of persons. Even for a cognizable offense, an arrest is not mandatory as can be seen from the mandate of this provision. If the officer is satisfied that a person has committed a cognizable offense, punishable with imprisonment for a term which may be less than seven years, or which may extend to the said period, with or without fine, an arrest could only follow when he is satisfied that there is a reason to believe or suspect, that the said person has committed an offense, and there is a necessity for an arrest. Such necessity is drawn to prevent the committing of any further offense, for a proper investigation,

and to prevent him/her from either disappearing or tampering with the evidence. He/she can also be arrested to prevent such person from making any inducement, threat, or promise to any person according to the facts, so as to dissuade him from disclosing said facts either to the court or to the police officer. One more ground on which an arrest may be necessary is when his/her presence is required after arrest for production before the Court and the same cannot be assured.

22. This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty- bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offense alleged is more than seven years, among other reasons.

23. The consequence of non- compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offense. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the Accused to a grant of bail.

24. Section 41A deals with the procedure for appearance before the police officer who is required to issue a notice to the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence, and arrest is not required Under Section 41(1). Section 41B deals with the procedure of arrest along with mandatory duty on the part of the officer.

25. On the scope and objective of Section 41 and 41A, it is obvious that they are facets of Article 21 of the Constitution. We need not elaborate any further, in light of the judgment of this Court in Arnesh Kumar v. State of Bihar, MANU/SC/0559/2014 : (2014) 8 SCC 273:

7.1. From a plain reading of the aforesaid provision, it is evident that a person Accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the Accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such Accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the Accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by Sub- clauses (a) to (e) of Clause (1) of Section 41 Code of Criminal Procedure.

8. An Accused arrested without warrant by the police has the constitutional right Under Article 22(2) of the Constitution of India and Section 57 Code of Criminal Procedure to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey:

8.1. During the course of investigation of a case, an Accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power Under Section 167 Code of Criminal Procedure. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.

8.2. Before a Magistrate authorises detention Under Section 167 Code of Criminal Procedure, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty- bound not to authorise his further detention and release the Accused. In other words, when an Accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest Under Section 41 Code of Criminal Procedure has been satisfied and it is only thereafter that he will authorise the detention of an Accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an Accused from tampering with evidence or making inducement, etc. the police

officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the Accused.

8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

9. ...The aforesaid provision makes it clear that in all cases where the arrest of a person is not required Under Section 41(1) Code of Criminal Procedure, the police officer is required to issue notice directing the Accused to appear before him at a specified place and time. Law obliges such an Accused to appear before the police officer and it further mandates that if such an Accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged Under Section 41 Code of Criminal Procedure has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

10. We are of the opinion that if the provisions of Section 41 Code of Criminal Procedure which authorises the police officer to arrest an Accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Code of Criminal Procedure for effecting arrest be discouraged and discontinued.

11. Our endeavour in this judgment is to ensure that police officers do not arrest the Accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case Under Section 498- A Indian Penal Code is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 Code of Criminal Procedure;

11.2. All police officers be provided with a check list containing specified Sub- clauses Under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the Accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the Accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an Accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41- A Code of Criminal Procedure be served on the Accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases Under Section 498- A Indian Penal Code or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine.

26. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.

27. Despite the dictum of this Court in Arnesh Kumar (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua

a police officer, the satisfaction for the need to arrest shall also be present. Thus, Sub- clause (1)(b)(i) of Section 41 has to be read along with Sub- clause (ii) and therefore both the elements of 'reason to believe' and 'satisfaction qua an arrest' are mandated and accordingly are to be recorded by the police officer.

28. It is also brought to our notice that there are no specific guidelines with respect to the mandatory compliance of Section 41A of the Code. An endeavour was made by the Delhi High Court while deciding Writ Petition (C) No. 7608 of 2017 vide order dated 07.02.2018, followed by order dated 28.10.2021 in Contempt Case (C) No. 480 of 2020 & CM Application No. 25054 of 2020, wherein not only the need for guidelines but also the effect of non- compliance towards taking action against the officers concerned was discussed. We also take note of the fact that a standing order has been passed by the Delhi Police viz., Standing Order No. 109 of 2020, which provides for a set of guidelines in the form of procedure for issuance of notices or orders by the police officers. Considering the aforesaid action taken, in due compliance with the order passed by the Delhi High Court in Writ Petition (C) No. 7608 of 2017 dated 07.02.2018, this Court has also passed an order in Writ Petition (Crl.) 420 of 2021 dated 10.05.2021 directing the State of Bihar to look into the said aspect of an appropriate modification to give effect to the mandate of Section 41A. A recent judgment has also been rendered on the same lines by the High Court of Jharkhand in Cr.M.P. No. 1291 of 2021 dated 16.06.2022.

29. Thus, we deem it appropriate to direct all the State Governments and the Union Territories to facilitate standing orders while taking note of the standing order issued by the Delhi Police i.e., Standing Order No. 109 of 2020, to comply with the mandate of Section 41A. We do feel that this would certainly take care of not only the unwarranted arrests, but also the clogging of bail applications before various Courts as they may not even be required for the offences up to seven years.

30. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in Arnesh Kumar (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided Under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision Under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.

Section 87 and 88 of the Code

87. Issue of warrant in lieu of, or in addition to, summons.- - A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest- -

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure

88. Power to take bond for appearance.- - When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

31. When the courts seek the attendance of a person, either a summons or a warrant is to be issued depending upon the nature and facts governing the case. Section 87 gives the discretion to the court to issue a warrant, either in lieu of or in addition to summons. The exercise of the aforesaid power can only be done after recording of reasons. A warrant can be either bailable or non-bailable. Section 88 of the Code empowers the Court to take a bond for appearance of a person with or without sureties.

32. Considering the aforesaid two provisions, courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non- bailable warrant may be issued, if so warranted, as held by this Court in Inder Mohan Goswami v. State of Uttaranchal, MANU/SC/7999/2007 : (2007) 12 SCC 1. Despite the aforesaid clear dictum, we notice that non-bailable warrants are issued as a matter of course without due application of mind and against the tenor of the provision, which merely facilitates a discretion, which is obviously to be exercised in favour of the person whose attendance is sought for, particularly in the light of liberty enshrined Under Article 21 of the Constitution. Therefore, valid reasons have to be given for not exercising discretion in favour of the said person. This Court in Inder Mohan Goswami v. State of Uttaranchal, MANU/SC/7999/2007 : (2007) 12 SCC 1, has held that:

50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice- - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non- bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non- bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non- bailable warrants should be issued.

When non- bailable warrants should be issued

53. Non- bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or
- it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the Accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non- bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the Accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the Accused is avoiding the court's proceeding intentionally, the process of issuance of the non- bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non- bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing

warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an Accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non- bailable warrants should be avoided.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non- bailable warrant.

33. On the exercise of discretion Under Section 88, this Court in Pankaj Jain v. Union of India, MANU/SC/0151/2018 : (2018) 5 SCC 743, has held that:

12. The main issue which needs to be answered in the present appeal is as to whether it was obligatory for the Court to release the Appellant by accepting the bond Under Section 88 Code of Criminal Procedure on the ground that he was not arrested during investigation or the Court has rightly exercised its jurisdiction Under Section 88 in rejecting the application filed by the Appellant praying for release by accepting the bond Under Section 88 Code of Criminal Procedure.

13. Section 88 Code of Criminal Procedure is a provision which is contained in Chapter VI "Processes to Compel Appearance" of the Code of Criminal Procedure, 1973. Chapter VI is divided in four Sections - - A. Summons; B. Warrant of arrest; C. Proclamation and Attachment; and D. Other Rules regarding processes. Section 88 provides as follows:

88. Power to take bond for appearance.- - When any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial.

14. We need to first consider as to what was the import of the words "may" used in Section 88.

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22. Section 88 Code of Criminal Procedure does not confer any right on any person, who is present in a court. Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court or to any other court into which the case may be transferred for trial. Discretion given Under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word "may" is discretionary and it is for the

court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 "any person" has to be given wide meaning, which may include persons, who are not even Accused in a case and appeared as witnesses.

Section 167(2) of the Code

167. Procedure when investigation cannot be completed in twenty- four hours.- -

(1) xxx xxx xxx

(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 of the Accused in custody of the police under this Section unless the Accused is produced before him in person for the first time and subsequently every time till the Accused remains in the custody of the police, but the Magistrate may extend

further detention in judicial custody on production of the Accused either in person or through the medium of electronic video linkage;

(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 I.- - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in Para (a), the Accused shall be 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 Clause (b), the production of the Accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the Accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

34. Section 167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent Sections of society. This is also another limb of Article 21. Presumption of innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the Accused. The right enshrined is an absolute and indefeasible one, inuring to the benefit of suspect. Such a right cannot be taken away even during any unforeseen circumstances, such as the recent pandemic, as held by this Court in M. Ravindran v. Directorate of Revenue Intelligence, MANU/SC/0788/2020 : (2021) 2 SCC 485:

II. Section 167(2) and the Fundamental Right to Life and Personal Liberty

17. Before we proceed to expand upon the parameters of the right to default bail Under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya [Uday Mohanlal Acharya v. State of Maharashtra, MANU/SC/0222/2001 : (2001) 5 SCC 453 : 2001 SCC (Cri.) 760] on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows: (SCC p. 472, para 13)

13. ... Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated Under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the Accused in custody up to a maximum period as indicated in the proviso to Sub- section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution.

17.1. Article 21 of the Constitution of India provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248], that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2) Code of Criminal Procedure and the safeguard of "default bail" contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with Rule of law.

17.2. Under Section 167 of the Code of Criminal Procedure, 1898 ("the 1898 Code") which was in force prior to the enactment of the Code of Criminal Procedure, the maximum period for which an Accused could be remanded to custody, either police or judicial, was 15 days. However, since it was often unworkable to conclude complicated investigations within 15 days, a practice arose wherein investigating officers would file "preliminary charge- sheets" after the expiry of the remand period. The State would then request the Magistrate to postpone commencement of the trial and authorise further remand of the Accused Under Section 344 of the 1898 Code till the time the investigation was completed and the final charge- sheet was filed. The Law Commission of India in Report No. 14 on Reforms of the Judicial Administration (Vol. II, 1948, pp. 758- 760) pointed out that in many cases the Accused were languishing for several months in custody without any final report being filed before the courts. It was also pointed out that there was conflict in judicial opinion as to whether the Magistrate was bound to release the Accused if the police report was not filed within 15 days.

17.3. Hence the Law Commission in Report No. 14 recommended the need for an appropriate provision specifically providing for continued remand after the expiry of 15 days, in a manner that "while meeting the needs of a full and proper investigation in cases of serious crime, will still safeguard the liberty of the person of the individual". Further, that the legislature should prescribe a maximum time period beyond which no Accused could be detained without filing of the police report before the Magistrate. It was pointed out that in England, even a person Accused of grave offences such as treason could not be indefinitely detained in prison till commencement of the trial.

17.4. The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76- 77). The Law Commission reemphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the Accused beyond the statutory period prescribed Under Section 167. It was pointed out that this could lead to serious abuse wherein "the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner". Hence the Commission recommended fixing of a maximum time- limit of 60 days for remand. The Commission considered the reservation expressed earlier in Report No. 37 that such an extension may result in the 60- day period becoming a matter of routine. However, faith was expressed that proper supervision by the superior courts would help circumvent the same.

17.5. The suggestions made in Report No. 41 were taken note of and incorporated by the Central Government while drafting the Code of Criminal Procedure Bill in 1970. Ultimately, the 1898 Code was replaced by the present Code of Criminal Procedure. The Statement of Objects and Reasons of the Code of Criminal Procedure provides that the Government took the following important considerations into account while evaluating the recommendations of the Law Commission:

3. The recommendations of the Commission were examined carefully by the Government, keeping in view, among others, the following basic considerations:

(i) an Accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer Sections of the community.

17.6. It was in this backdrop that Section 167(2) was enacted within the present day Code of Criminal Procedure, providing for time- limits on the period of remand of the Accused, proportionate to the seriousness of the offence committed, failing which the Accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time- limits to complete the investigation with the need to protect the civil liberties of the Accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the Accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the court takes cognizance of the

case without any undue delay from the date of giving information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.

17.7. Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment Under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose. In this regard we find it useful to refer to the decision of the three- Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam [Rakesh Kumar Paul v. State of Assam, MANU/SC/0993/2017 : (2017) 15 SCC 67 : (2018) 1 SCC (Cri.) 401], which laid down certain seminal principles as to the interpretation of Section 167(2) Code of Criminal Procedure though the questions of law involved were somewhat different from the present case. The questions before the three- Judge Bench in Rakesh Kumar Paul [Rakesh Kumar Paul v. State of Assam, MANU/SC/0993/2017 : (2017) 15 SCC 67 : (2018) 1 SCC (Cri.) 401] were whether, firstly, the 90- day remand extension Under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the Accused could be construed as an application for default bail, even though the expiry of the statutory period Under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90- day limit is only available in respect of offences where a minimum ten year' imprisonment period is stipulated, and that the oral arguments for default bail made by the counsel for the Accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: (SCC pp. 95- 96 & 99, paras 29, 32 & 41)

29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time- bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an Accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time- limits have been laid down by the legislature. ...

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32. ...Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an Accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned Counsel for the State.

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41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

(emphasis supplied)

Therefore, the courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

17.8. We may also refer with benefit to the recent judgment of this Court in S. Kasi v. State [S. Kasi v. State, MANU/SC/0491/2020 : (2021) 12 SCC 1], wherein it was observed that the indefeasible right to default bail Under Section 167(2) is an integral part of the right to personal liberty Under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasised that the right of the Accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge- sheet.

17.9. Additionally, it is well- settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the Accused, given the ubiquitous power disparity between the individual Accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the Accused.

17.10. With respect to the Code of Criminal Procedure particularly, the Statement of Objects and Reasons (supra) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the threefold objectives expressed by the legislature, namely, ensuring a fair trial, expeditious investigation and trial, and setting down a rationalised procedure that protects the interests of indigent Sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed Under Article 21.

17.11. Hence, it is from the perspective of upholding the fundamental right to life and personal liberty Under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2) for the purpose of resolving the dilemma that has arisen in the present case.

35. As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an Accused gets the benefit of Section 167(2).

Section 170 of the Code:

170. Cases to be sent to Magistrate when evidence is sufficient.- - (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the Accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the Accused or commit him for trial, or, if the offence is bailable and the Accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

36. The scope and ambit of Section 170 has already been dealt with by this Court in Siddharth v. State of U.P., MANU/SC/0600/2021 : (2021) 1 SCC 676. This is a power which is to be exercised by the court after the completion of the investigation by the agency concerned. Therefore, this is a procedural compliance from the point of view of the court alone, and thus the investigating agency has got a limited role to play. In a case where the prosecution does not require custody of the Accused, there is no need for an arrest when a case is sent to the magistrate Under Section 170 of the Code. There is not even a need for filing a bail application, as the Accused is merely forwarded to the court for the framing of charges and issuance of process for trial. If the court is of the view that there is no need for any remand, then the court can fall back upon Section 88 of the Code and complete the formalities required to secure the presence of the Accused for the commencement of the trial. Of course, there may be a situation where a remand may be required, it is only in such cases that the Accused will have to be heard. Therefore, in such a situation, an opportunity will have to be given to the Accused persons, if the court is of the prima facie view that the remand would be required. We make it clear that we have not said anything on the cases in which the Accused persons are already in custody, for which, the bail application has to be decided on its own merits. Suffice it to state that for due compliance of Section 170 of the Code, there is no need for filing of a bail application. This Court in Siddharth v. State of U.P., MANU/SC/0600/2021 : (2021) 1 SCC 676, has held that:

There are judicial precedents available on the interpretation of the aforesaid provision albeit of the Delhi High Court.

5. In High Court of Delhi v. CBI [High Court of Delhi v. CBI, MANU/DE/0026/2004 : (2004) 72 DRJ 629], the Delhi High Court dealt with an argument similar to the contention of the Respondent that Section 170 Code of Criminal Procedure prevents the trial court from taking a

charge- sheet on record unless the Accused is taken into custody. The relevant extracts are as under : (SCC OnLine Del paras 15- 16 & 19- 20)

15. Word "custody" appearing in this Section does not contemplate either police or judicial custody. It merely connotes the presentation of Accused by the investigating officer before the Court at the time of filing of the charge- sheet whereafter the role of the Court starts. Had it not been so the investigating officer would not have been vested with powers to release a person on bail in a bailable offence after finding that there was sufficient evidence to put the Accused on trial and it would have been obligatory upon him to produce such an Accused in custody before the Magistrate for being released on bail by the Court.

16. In case the police/investigating officer thinks it unnecessary to present the Accused in custody for the reason that the Accused would neither abscond nor would disobey the summons as he has been cooperating in investigation and investigation can be completed without arresting him, the IO is not obliged to produce such an Accused in custody.

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19. It appears that the learned Special Judge was labouring under a misconception that in every non- bailable and cognizable offence the police is required to invariably arrest a person, even if it is not essential for the purpose of investigation.

20. Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of cooperation is provided by the Accused to the investigating officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the investigating officer concerned or officer in charge of the police station thinks that presence of the Accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out.

6. In a subsequent judgment the Division Bench of the Delhi High Court in High Court of Delhi v. State [High Court of Delhi v. State, (2018) 254 DLT 641] relied on these observations in High Court of Delhi [High Court of Delhi v. CBI, MANU/DE/0026/2004 : (2004) 72 DRJ 629] and observed that it is not essential in every case involving a cognizable and non- bailable offence that an Accused be taken into custody when the charge- sheet/final report is filed.

7. The Delhi High Court is not alone in having adopted this view and other High Courts apparently have also followed suit on the proposition that criminal courts cannot refuse to accept a charge- sheet simply because the Accused has not been arrested and produced before the court.

8. In Deendayal Kishanchand v. State of Gujarat [Deendayal Kishanchand v. State of Gujarat, MANU/GJ/0130/1982 : 1983 Cri. LJ 1583], the High Court observed as under : (SCC OnLine Guj paras 2 & 8)

2. ... It was the case of the prosecution that two Accused i.e. present Petitioners 4 and 5, who are ladies, were not available to be produced before the court along with the charge- sheet, even though earlier they were released on bail. Therefore, as the court refused to accept the charge-sheet unless all the Accused are produced, the charge- sheet could not be submitted, and ultimately also, by a specific letter, it seems from the record, the charge- sheet was submitted without Accused 4 and 5. This is very clear from the evidence on record.

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8. I must say at this stage that the refusal by criminal courts either through the learned Magistrate or through their office staff to accept the charge- sheet without production of the Accused persons is not justified by any provision of law. Therefore, it should be impressed upon all the courts that they should accept the charge- sheet whenever it is produced by the police with any endorsement to be made on the charge- sheet by the staff or the Magistrate pertaining to any omission or requirement in the charge- sheet. But when the police submits the charge- sheet, it is the duty of the court to accept it especially in view of the provisions of Section 468 of the Code which creates a limitation of taking cognizance of offence. Likewise, police authorities also should impress on all police officers that if charge- sheet is not accepted for any such reason, then attention of the Sessions Judge should be drawn to these facts and get suitable orders so that such difficulties would not arise henceforth.

9. We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 Code of Criminal Procedure that it does not impose an obligation on the officer- in- charge to arrest each and every Accused at the time of filing of the charge- sheet. We have, in fact, come across cases where the Accused has cooperated with the investigation throughout and yet on the charge- sheet being filed non- bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the Accused and produce him before the court. We are of the view that if the investigating officer does not believe that the Accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 Code of Criminal Procedure does not contemplate either

police or judicial custody but it merely connotes the presentation of the Accused by the investigating officer before the court while filing the charge- sheet.

10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an Accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or Accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it [Joginder Kumar v. State of U.P., MANU/SC/0311/1994 : (1994) 4 SCC 260 : 1994 SCC (Cri.) 1172]. If arrest is made routine, it can cause incalculable harm to the reputation and self- esteem of a person. If the investigating officer has no reason to believe that the Accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the Accused.

11. We are, in fact, faced with a situation where contrary to the observations in Joginder Kumar case [Joginder Kumar v. State of U.P., MANU/SC/0311/1994 : (1994) 4 SCC 260 : 1994 SCC (Cri.) 1172] how a police officer has to deal with a scenario of arrest, the trial courts are stated to be insisting on the arrest of an Accused as a prerequisite formality to take the charge- sheet on record in view of the provisions of Section 170 Code of Criminal Procedure. We consider such a course misplaced and contrary to the very intent of Section 170 Code of Criminal Procedure.

Section 204 and 209 of the Code

204. Issue of process.- - (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be- -

(a) a summons- case, he shall issue his summons for the attendance of the Accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the Accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

209. Commitment of case to Court of Session when offence is triable exclusively by it.- - When in a case instituted on a police report or otherwise, the Accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall- -

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the Accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the Accused to custody during, and until the conclusion of, the trial;

37. Section 204 of the Code speaks of issue of process while commencing the proceeding before the Magistrate. Sub- section (1)(b) gives a discretion to a Magistrate qua a warrant case, either to issue a warrant or a summons. As this provision gives a discretion, and being procedural in nature, it is to be exercised as a matter of course by following the prescription of Section 88 of the Code. Thus, issuing a warrant may be an exception in which case the Magistrate will have to give reasons.

38. Section 209 of the Code pertains to commitment of a case to a Court of Sessions by the Magistrate when the offence is triable exclusively by the said court. Sub- sections (a) and (b) of Section 209 of the Code give ample power to the Magistrate to remand a person into custody during or until the conclusion of the trial. Since the power is to be exercised by the Magistrate on a case- to- case basis, it is his wisdom in either remanding an Accused or granting bail. Even here, it is judicial discretion which the Magistrate has to exercise. As we have already dealt with the definition of bail, which in simple parlance means a release subject to the restrictions and conditions, a Magistrate can take a call even without an application for bail if he is inclined to do so. In such a case he can seek a bond or surety, and thus can take recourse to Section 88. However, if he is to remand the case for the reasons to be recorded, then the said person has to be heard. Here again, we make it clear that there is no need for a separate application and Magistrate is required to afford an opportunity and to pass a speaking order on bail.

Section 309 of the Code

39. This provision has been substituted by Act 13 of 2013 and Act 22 of 2018. It would be appropriate to reproduce the said provision for better appreciation:

309. Power to postpone or adjourn proceedings. - - (1) In every inquiry or trial the proceedings shall be continued from day- to- day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence Under Section 376, [Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA or Section 376DB of the

Indian Penal Code (45 of 1860), the inquiry or trial shall] be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the Accused if in custody:

Provided that no Magistrate shall remand an Accused person to custody under this Section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the Accused person to show cause against the sentence proposed to be imposed on him.

[Provided also that- -

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross- examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination- in- chief or cross- examination of the witness, as the case may be.]

Explanation 1.- - If sufficient evidence has been obtained to raise a suspicion that the Accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- - The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the Accused.

40. Sub- section (1) mandates courts to continue the proceedings on a day- to- day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the non- compliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the Section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the Accused person is under incarceration. This provision must be applied inuring to the benefit of the Accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an Accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions, they shall make sure that the Accused does not suffer for the delay occasioned due to no fault of his own.

41. Sub- section (2) has to be read along with Sub- section (1). The proviso to Sub- section (2) restricts the period of remand to a maximum of 15 days at a time. The second proviso prohibits an adjournment when the witnesses are in attendance except for special reasons, which are to be recorded. Certain reasons for seeking adjournment are held to be permissible. One must read this provision from the point of view of the dispensation of justice. After all, right to a fair and speedy trial is yet another facet of Article 21. Therefore, while it is expected of the court to comply with Section 309 of the Code to the extent possible, an unexplained, avoidable and prolonged delay in concluding a trial, appeal or revision would certainly be a factor for the consideration of bail. This we hold so notwithstanding the beneficial provision Under Section 436A of the Code which stands on a different footing.

Precedents:

• Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, MANU/SC/0119/1979 : 1980 (1) SCC 81:

2. Though we issued notice to the State of Bihar two weeks ago, it is unfortunate that on February 5, 1979, no one has appeared on behalf of the State and we must, therefore, at this stage proceed on the basis that the allegations contained in the issues of the Indian Express dated January 8 and 9, 1979 which are incorporated in the writ petition are correct. The information contained in these newspaper cuttings is most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the undertrial prisoners whose

names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor Accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Article 21 in Maneka Gandhi v. Union of India MANU/SC/0133/1978 : [(1978) 2 SCR 621 : (1978) 1 SCC 248] that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair"' so as to be in conformity with the requirement of that article. It is necessary, therefore, that the law as enacted by the legislature and as administered by the courts must radically change its approach to pre- trial detention and ensure 'reasonable, just and fair' procedure which has creative connotation after Maneka Gandhi case MANU/SC/0133/1978 : [(1978) 2 SCR 621 : (1978) 1 SCC 248].

3. Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre- trial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re- enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an Accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the Accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the Accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the Accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non- poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence, and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non- poor. The Legal Aid Committee appointed by the

Government of Gujarat under the chairmanship of one of us, Mr. Justice Bhagwati, emphasised this glaring inequality in the following words:

The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the Accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the Accused from fleeing is of doubtful validity. There are several considerations which deter an Accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the Accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail is fixed by the Magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.

The Gujarat Committee also pointed out how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the Accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor:

The discriminatory nature of the bail system becomes all the more acute by reason of the mechanical way in which it is customarily operated. It is no doubt true that theoretically the Magistrate has broad discretion in fixing the amount of bail but in practice it seems that the amount of bail depends almost always on the seriousness of the offence. It is fixed according to a Schedule related to the nature of the charge. Little weight is given either to the probability that the Accused will attempt to flee before his trial or to his individual financial circumstances, the very factors which seem most relevant if the purpose of bail is to assure the appearance of the Accused at the trial. The result of ignoring these factors and fixing the amount of bail mechanically having regard only to the seriousness of the offence is to discriminate against the poor who are not in the same position as the rich as regards capacity to furnish bail. The courts by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally produce inequality between the rich and the poor: the rich who is charged with the same offence in the same circumstances is able to secure his release while the poor is unable to do so on account of his poverty. These are some of the major defects in the bail system as it is operated today.

The same anguish was expressed by President Lyndon B. Johnson at the time of signing the Bail Reforms Act, 1966:

Today, we join to recognise a major development in our system of criminal justice: the reform of the bail system.

This system has endured- - archaic, unjust and virtually unexamined - - since the Judiciary Act of 1789.

The principal purpose of bail is to insure that an Accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? The Defendant with means can afford to pay bail. He can afford to buy his freedom. But poorer Defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only- - because he is poor....

The bail system, as it operates today, is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre- trial release without jeopardising the interest of justice.

4. It is high time that our Parliament realises that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our Constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the Accused should in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the Accused wilfully fails to

appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pre- trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pre- trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our courts in regard to pre- trial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the Accused has his roots in the community and is not likely to abscond, it can safely release the Accused on his personal bond. To determine whether the Accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the Accused:

1. The length of his residence in the community,

2. his employment status, history and his financial condition,

3. his family ties and relationships,

4. his reputation, character and monetary condition,

5. his prior criminal record including any record of prior release on recognizance or on bail,

6. the identity of responsible members of the community who would vouch for his reliability,

7. the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non- appearance, and

8. any other factors indicating the ties of the Accused to the community or bearing on the risk of wilful failure to appear.

If the court is satisfied on a consideration of the relevant factors that the Accused has his ties in the community and there is no substantial risk of non- appearance, the Accused may, as far as possible, be released on his personal bond. Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the Accused, his previous record and the nature and circumstances of the offence, there may be a substantial risk of his non- appearance at the trial, as for example, where the Accused is a notorious bad character

or a confirmed criminal or the offence is serious (these examples are only by way of illustration), the Court may not release the Accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the Court in releasing the Accused on his personal bond and particularly in cases where the offence is not grave and the Accused is poor or belongs to a weaker Section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the Accused on personal bond it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the Accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a Schedule keyed to the nature of the charge. Otherwise, it would be difficult for the Accused to secure his release even by executing a personal bond. Moreover, when the Accused is released on his personal bond, it would be very harsh and oppressive if he is required to satisfy the Court- - and what we have said here in regard to the court must apply equally in relation to the police while granting bail- - that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the Accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond. We have no doubt that if the system of bail, even under the existing law, is administered in the manner we have indicated in this judgment, it would go a long way towards relieving hardship of the poor and help them to secure pre- trial release from incarceration. It is for this reason we have directed the undertrial prisoners whose names are given in the two issues of the Indian Express should be released forthwith on their personal bond. We should have ordinarily said that personal bond to be executed by them should be with monetary obligation but we directed as an exceptional measure that there need be no monetary obligation in the personal bond because we found that all these persons have been in jail without trial for several years, and in some cases for offences for which the punishment would in all probability be less than the period of their detention and, moreover, the order we were making was merely an interim order. The peculiar facts and circumstances of the case dictated such an unusual course.

5. There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an Accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:

In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial.

So also Article 3 of the European Convention on Human Rights provides that:

Every one arrested or detained. . . shall be entitled to trial within a reasonable time or to release pending trial.

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India MANU/SC/0133/1978 : [(1978) 2 SCR 621 : (1978) 1 SCC 248]. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right Under Article 21, and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person Accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long- delayed trial in violation of his fundamental right Under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right Under Article 21. That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain, and we cannot impress it too strongly on the State Government that it is high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but the State Government would also have to man them by competent Judges and whatever is necessary for the purpose of recruiting competent Judges, such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is today a meaningless and empty word.

- Hussain and Anr. v. Union of India and Ors., MANU/SC/0274/2017 : 2017 (5) SCC 702:

28. Judicial service as well as legal service are not like any other services. They are missions for serving the society. The mission is not achieved if the litigant who is waiting in the queue does

not get his turn for a long time. The Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of undertrials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial- - vested interests or unscrupulous elements try to delay the proceedings. Lack of infrastructure is another handicap. In spite of all odds, determined efforts are required at every level for success of the mission. Ways and means have to be found out by constant thinking and monitoring. The Presiding Officer of a court cannot rest in a state of helplessness. This is the constitutional responsibility of the State to provide necessary infrastructure and of the High Courts to monitor the functioning of subordinate courts to ensure timely disposal of cases. The first step in this direction is preparation of an appropriate action plan at the level of the High Court and thereafter at the level of each and every individual judicial officer. Implementation of the action plan will require serious efforts and constant monitoring.

29. To sum up:

29.1. The High Courts may issue directions to subordinate courts that- -

29.1.1. Bail applications be disposed of normally within one week;

29.1.2. Magisterial trials, where Accused are in custody, be normally concluded within six months and sessions trials where Accused are in custody be normally concluded within two years;

29.1.3. Efforts be made to dispose of all cases which are five years old by the end of the year;

29.1.4. As a supplement to Section 436- A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence likely to be awarded if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the trial courts concerned from time to time;

29.1.5. The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports.

29.2. The High Courts are requested to ensure that bail applications filed before them are decided as far as possible within one month and criminal appeals where Accused are in custody for more than five years are concluded at the earliest;

29.3. The High Courts may prepare, issue and monitor appropriate action plans for the subordinate courts;

29.4. The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time;

29.5. The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in Harish Uppal [Harish Uppal v. Union of India, MANU/SC/1141/2002 : (2003) 2 SCC 45].

30. Accordingly, we request the Chief Justices of all the High Courts to forthwith take appropriate steps consistent with the directions of this Court in Hussainara Khatoon [Hussainara Khatoon (7) v. State of Bihar, MANU/SC/0760/1995 : (1995) 5 SCC 326 : 1995 SCC (Cri.) 913], Akhtari Bi [Akhtari Bi v. State of M.P., MANU/SC/0188/2001 : (2001) 4 SCC 355 : 2001 SCC (Cri.) 714], Noor Mohammed [Noor Mohammed v. Jethanand, MANU/SC/0073/2013 : (2013) 5 SCC 202 : (2013) 2 SCC (Crv) 754], Thana Singh [Thana Singh v. Central Bureau of Narcotics, MANU/SC/0054/2013 : (2013) 2 SCC 590 : (2013) 2 SCC (Cri.) 818], Supreme Court Legal Aid Committee [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, MANU/SC/0877/1994 : (1994) 6 SCC 731, para 15 : 1995 SCC (Cri.) 39], Imtiaz Ahmad [Imtiyaz Ahmad v. State of U.P., MANU/SC/0073/2012 : (2012) 2 SCC 688 : (2012) 1 SCC (Cri.) 986], [Imtiyaz Ahmad v. State of U.P., MANU/SC/0007/2017 : (2017) 3 SCC 658 : (2017) 3 SCC 665 : (2017) 2 SCC (Civ) 311 : (2017) 2 SCC (Civ) 318 : (2017) 2 SCC (Cri.) 228 : (2017) 2 SCC (Cri.) 235 : (2017) 1 SCC (L & S) 724 : (2017) 1 SCC (L & S) 731], Harish Uppal [Harish Uppal v. Union of India, MANU/SC/1141/2002 : (2003) 2 SCC 45] and Resolution of Chief Justices' Conference and observations hereinabove and to have appropriate monitoring mechanism in place on the administrative side as well as on the judicial side for speeding up disposal of cases of undertrials pending in subordinate courts and appeals pending in the High Courts.

• Surinder Singh @ Shingara Singh v. State Of Punjab, MANU/SC/0541/2005 : 2005 (7) SCC 387:

8. It is no doubt true that this Court has repeatedly emphasised the fact that speedy trial is a fundamental right implicit in the broad sweep and content of Article 21 of the Constitution. The aforesaid Article confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair, or just, such deprivation would be violative of his fundamental right Under Article 21 of the Constitution. It has also been emphasised by this Court that the procedure so prescribed must ensure a speedy trial for determination of the guilt of such person. It is conceded that some amount of deprivation of personal liberty cannot be avoided, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. These are observations made in several decisions of this Court dealing with the subject of speedy trial. In this case, we are

concerned with the case where a person has been found guilty of an offence punishable Under Section 302 Indian Penal Code and who has been sentenced to imprisonment for life. The Code of Criminal Procedure affords a right of appeal to such a convict. The difficulty arises when the appeal preferred by such a convict cannot be disposed of within a reasonable time. In Kashmira Singh v. State of Punjab [MANU/SC/0099/1977 : (1977) 4 SCC 291 : 1977 SCC (Cri.) 559] this Court dealt with such a case. It is observed: (SCC pp. 292- 93, para 2)

The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an Accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the Accused on bail in cases where special leave has been granted to the Accused to appeal against his conviction and sentence.

9. Similar observations are found in some of the other decisions of this Court which have been brought to our notice. But, however, it is significant to note that all these decisions only lay down broad guidelines which the courts must bear in mind while dealing with an application for grant of bail to an Appellant before the court. None of the decisions lay down any invariable Rule for grant of bail on completion of a specified period of detention in custody. Indeed in a discretionary matter, like grant or refusal of bail, it would be impossible to lay down any invariable Rule or evolve a straitjacket formula. The court must exercise its discretion having regard to all the relevant facts and circumstances. What the relevant facts and circumstances are, which the court must keep in mind, has been laid down over the years by the courts in this country in a large number of decisions which are well known. It is, therefore, futile to attempt to lay down any invariable Rule or formula in such matters.

10. The counsel for the parties submitted before us that though it has been so understood by the courts in Punjab, the decision of the Punjab and Haryana High Court in Dharam Pal case [(2000) 1 Chan LR 74] only lays down guidelines and not any invariable rule. Unfortunately, the decision has been misunderstood by the Court in view of the manner in which the principles have been couched in the aforesaid judgment. After considering the various decisions of this Court and the difficulties faced by the courts, the High Court in Dharam Pal case [(2000) 1 Chan LR 74] observed: (Chan LR p. 87, para 18)

We, therefore, direct that life convicts, who have undergone at least five years of imprisonment of which at least three years should be after conviction, should be released on bail pending the hearing of their appeals should they make an application for this purpose. We are also of the opinion that the same principles ought to apply to those convicted by the courts martial and such prisoners should also be entitled to release after seeking a suspension of their sentences. We further direct that the period of five years would be reduced to four for females and minors, with at least two years imprisonment after conviction. We, however, clarify that these directions shall not be applicable in cases where the very grant of bail is forbidden by law.

Section 389 of the Code

389. Suspension of sentence pending the appeal; release of Appellant on bail.- - (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this Section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,- -

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court Under Sub- section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the Appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

42. Section 389 of the Code concerns itself with circumstances pending appeal leading to the release of the Appellant on bail. The power exercisable Under Section 389 is different from that of the one either Under Section 437 or Under Section 439 of the Code, pending trial. This is for the reason that "presumption of innocence" and "bail is the Rule and jail is the exception" may not be available to the Appellant who has suffered a conviction. A mere pendency of an appeal per se would not be a factor.

43. A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available Under Section 436A would also be considered, the Courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the Appellant.

44. Thus, we hold that the delay in taking up the main appeal or revision coupled with the benefit conferred Under Section 436A of the Code among other factors ought to be considered for a favourable release on bail.

Precedents:

- Atul Tripathi v. State of U.P. and Anr., MANU/SC/0627/2014 : 2014 (9) SCC 177:

13. It may be seen that there is a marked difference between the procedure for consideration of bail Under Section 439, which is pre- conviction stage and Section 389 Code of Criminal Procedure, which is post- conviction stage. In case of Section 439, the Code provides that only

notice to the public prosecutor unless impractical be given before granting bail to a person who is Accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post- conviction bail Under Section 389 Code of Criminal Procedure, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.

14. ...in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the Appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice-delivery system, etc. Despite such an opportunity being granted to the Public Prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post- conviction stage.

- Angana v. State of Rajasthan, MANU/SC/0133/2009 : (2009) 3 SCC 767:

14. When an appeal is preferred against conviction in the High Court, the Court has ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of nature of the offence, manner in which occurrence had taken place, whether in any manner bail granted earlier had been misused. In fact, there is no straitjacket formula which can be applied in exercising the discretion. The facts and circumstances of each case will govern the exercise of judicial discretion while considering the application filed by the convict Under Section 389 of the Criminal Procedure Code.

- Sunil Kumar v. Vipin Kumar MANU/SC/0673/2014 : (2014) 8 SCC 868:

13. We have heard the rival legal contentions raised by both the parties. We are of the opinion that the High Court has rightly applied its discretionary power Under Section 389 Code of Criminal Procedure to enlarge the Respondents on bail. Firstly, both the criminal appeal and criminal revision filed by both the parties are pending before the High Court which means that the convictions of the Respondents are not confirmed by the appellate court. Secondly, it is an admitted fact that the Respondents had been granted bail earlier and they did not misuse the

liberty. Also, the Respondents had conceded to the occurrence of the incident though with a different version.

14. We are of the opinion that the High Court has taken into consideration all the relevant facts including the fact that the chance of the appeal being heard in the near future is extremely remote, hence, the High Court has released the Respondents on bail on the basis of sound legal reasoning. We do not wish to interfere with the decision of the High Court at this stage. The appeal is dismissed accordingly.

45. However, we hasten to add that if the court is inclined to release the Appellant on bail, it has to be predicated on his own bond as facilitated by Sub- section (1).

Section 436A of the Code

436A. Maximum period for which an undertrial prisoner can be detained.- - Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one- half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one- half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.- - In computing the period of detention under this Section for granting bail, the period of detention passed due to delay in proceeding caused by the Accused shall be excluded.

46. Section 436A of the Code has been inserted by Act 25 of 2005. This provision has got a laudable object behind it, particularly from the point of view of granting bail. This provision draws the maximum period for which an undertrial prisoner can be detained. This period has to be reckoned with the custody of the Accused during the investigation, inquiry and trial. We have already explained that the word 'trial' will have to be given an expanded meaning particularly when an appeal or admission is pending. Thus, in a case where an appeal is pending for a longer

time, to bring it Under Section 436A, the period of incarceration in all forms will have to be reckoned, and so also for the revision.

47. Under this provision, when a person has undergone detention for a period extending to one-half of the maximum period of imprisonment specified for that offense, he shall be released by the court on his personal bond with or without sureties. The word 'shall' clearly denotes the mandatory compliance of this provision. We do feel that there is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the Accused. We are also conscious of the fact that while taking a decision the public prosecutor is to be heard, and the court, if it is of the view that there is a need for continued detention longer than one- half of the said period, has to do so. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. Once again, we have to reiterate that 'bail is the Rule and jail is an exception' coupled with the principle governing the presumption of innocence. We have no doubt in our mind that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21. The only caveat as furnished under the Explanation being the delay in the proceeding caused on account of the Accused to be excluded. This Court in Bhim Singh v. Union of India, MANU/SC/0786/2014 : (2015) 13 SCC 605, while dealing with the aforesaid provision, has directed that:

5. Having given our thoughtful consideration to the legislative policy engrafted in Section 436- A and large number of undertrial prisoners housed in the prisons, we are of the considered view that some order deserves to be passed by us so that the undertrial prisoners do not continue to be detained in prison beyond the maximum period provided Under Section 436- A.

6. We, accordingly, direct that jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1- 10- 2014 for the purposes of effective implementation of Section 436- A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the undertrial prisoners who have completed half period of the maximum period or maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed Under Section 436- A pass an appropriate order in jail itself for release of such undertrial prisoners who fulfil the requirement of Section 436- A for their release immediately. Such jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge shall submit the report of each of such sittings to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this Court without any delay. To facilitate compliance with the above order, we direct the Jail Superintendent of each jail/prison to provide all necessary facilities for holding the court sitting by the above judicial officers. A copy of this order shall be sent to the Registrar General of each High Court, who in turn will communicate the copy of the order to all Sessions Judges within his State for necessary compliance.

48. The aforesaid directions issued by this Court if not complied fully, are expected to be complied with in order to prevent the unnecessary incarceration of undertrials, and to uphold the inviolable principle of presumption of innocence until proven guilty.

Section 437 of the Code

437. When bail may be taken in case of non- bailable offence.- - [(1) When any person Accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail, but- -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an Accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:]

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this Sub- section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the Accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the Accused shall, subject to the provisions of Section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person Accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail Under Sub- section (1), the Court shall impose the conditions,- -

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is Accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.]

(4) An officer or a Court releasing any person on bail Under Sub- section (1) or Sub- section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail Under Sub- section (1) or Sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person Accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time, after the conclusion of the trial of a person Accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for

believing that the Accused is not guilty of any such offence, it shall release the Accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

49. Seeking to impeach Warren Hastings for his activities during the colonial period, Sir Edmund Burke made the following famous statement in "The World's Famous Orations" authored by Bryan, William Jennings, published by New York: Funk and Wagnalls Company, 1906:

Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power, and I will name protection. It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power. In every patent of office the duty is included. For what else does a magistrate exist? To suppose for power is an absurdity in idea. Judges are guided and governed by the eternal laws of justice, to which we are all subject. We may bite our chains, if we will, but we shall be made to know ourselves, and be taught that man is born to be governed by law; and he that will substitute will in the place of it is an enemy to God.

50. Section 437 of the Code is a provision dealing with bail in case of non- bailable offenses by a court other than the High Court or a Court of Sessions. Here again, bail is the Rule but the exception would come when the court is satisfied that there are reasonable grounds that the Accused has been guilty of the offense punishable either with death or imprisonment for life. Similarly, if the said person is previously convicted of an offense punishable with death or imprisonment for life or imprisonment for seven years or more or convicted previously on two or more occasions, the Accused shall not be released on bail by the magistrate.

51. Proviso to Section 437 of the Code mandates that when the Accused is under the age of sixteen years, sick or infirm or being a woman, is something which is required to be taken note of. Obviously, the court has to satisfy itself that the Accused person is sick or infirm. In a case pertaining to women, the court is expected to show some sensitivity. We have already taken note of the fact that many women who commit cognizable offenses are poor and illiterate. In many cases, upon being young they have children to take care of, and there are many instances when the children are to live in prisons. The statistics would show that more than 1000 children are living in prisons along with their mothers. This is an aspect that the courts are expected to take note of as it would not only involve the interest of the Accused, but also the children who are not expected to get exposed to the prisons. There is a grave danger of their being inherited not only with poverty but with crime as well.

52. The power of a court is quite enormous while exercising the power Under Section 437. Apart from the general principle which we have discussed, the court is also empowered to grant bail on special reasons. The said power has to be exercised keeping in view the mandate of Section 41

and 41A of the Code as well. If there is a proper exercise of power either by the investigating agencies or by the court, the majority of the problem of the undertrials would be taken care of.

53. The proviso to Section 437 warrants an opportunity to be afforded to the learned Public Prosecutor while considering an offense punishable with death, imprisonment for life, or imprisonment for seven years or more. Though, this proviso appears to be contrary to the main provision contained in Section 437(1) which, by way of a positive direction, prohibits the Magistrate from releasing a person guilty of an offense punishable with either death or imprisonment for life. It is trite that a proviso has to be understood in the teeth of the main provision. Section 437(1)(i) operates in a different field. The object is to exclude the offense exclusively triable by the Court of Sessions. Thus, one has to understand the proviso by a combined reading of Sections 437 and 439 of the Code, as the latter provision reiterates the aforesaid provision to the exclusion of the learned Magistrate over an offense triable exclusively by a Court of Sessions. To make the position clear, if the Magistrate has got the jurisdiction to try an offense for which the maximum punishment is either life or death, when such jurisdiction is conferred on the learned Magistrate, it goes without saying that the power to release the Accused on bail for the offense alleged also can be exercised. This Court in Prahlad Singh Bhati v. NCT, Delhi, MANU/SC/0193/2001 : (2001) 4 SCC 280 has held:

7. Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Session, the Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to Section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction.

54. We wish to place reliance on the judgment of the Bombay High Court in The Balasaheb Satbhai Merchant Coop Bank Ltd. v. The State of Maharashtra and Ors., MANU/MH/1159/2011:

13. At this stage, it may be useful to quote the observations of this Court in "Ambarish Rangshahi Patnigere v. State of Maharashtra" referred supra, which reads thus-

17. It may be noted here that the learned Counsel for intervener contended that the Magistrate did not have jurisdiction to grant bail because the offences Under Sections 467 and 409 Indian Penal Code, carry punishment which may be life imprisonment. According to the learned Counsel, if the offence is punishable with sentence of death or life imprisonment, the Magistrate cannot grant bail Under Section 437(1) Code of Criminal Procedure, unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including Prahlad Sigh Bhati v. NCT, Delhi and Anr. MANU/SC/0193/2001 : JT 2001 (4) SCC 280. In that case, offence was Under Section 302 which is punishable with death sentence or life imprisonment and

is exclusively triable by Court of Sessions. The offence Under Section 409 is punishable with imprisonment for life or imprisonment for 10 years and fine. Similarly, the office Under Section 467 is also punishable with imprisonment for life or imprisonment for 10 years and fine. Even though the maximum sentence which may be awarded is life imprisonment, as per Part I of Schedule annexed to Code of Criminal Procedure, both these offences are triable by a Magistrate of First Class. It appears that there are several offences including Under Sections 326 in the Penal Code, 1860 wherein sentence, which may be awarded, is imprisonment for life or imprisonment for lesser terms and such offences are triable by Magistrate of the First Class. If the Magistrate is empowered to try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature, in such cases. In fact, the restriction Under Section 437(1) Code of Criminal Procedure is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment or any other lesser sentence and is triable by Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application. In taking this view, I am supported by the old Judgment of Nagpur Judicial Commissioner's Court in Tularam and Ors. v. Emperor MANU/NA/0031/1926 : 27 Cri.L.J. 1926 page 1063 and also by the Judgment of the Kerala High Court in Satyan v. State MANU/KE/0126/1981 : 1981 Cr.L.J. 1313. In Satyan, the Kerala High Court considered several earlier judgments and observed thus in paras 7 and 8:

7. According to the learned Magistrate Section 437(1) does not empower him to release a person on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or an offence punishable with imprisonment for life. In other words the learned Magistrate has interpreted the expression "offence punishable with death or imprisonment for life" in Section 437(1) to include all offences where the punishment extends to imprisonment for life. This reasoning, no doubt, is seen adopted in an old Rangoon Case H.M. Boudville v. Emperor, MANU/RA/0131/1924 : AIR 1925 129 : (1925) 26 Cri. LJ 427 while interpreting the phrase "an offence punishable with death or transportation for life" in Section 497 Code of Criminal Procedure 1898. But that case was dissented from in Mahammed Eusoof v. Emperor, MANU/RA/0325/1925 : AIR 1926 Rang 51 : (1926) 27 Cri LJ 401). The Rangoon High Court held that the prohibition against granting bail is confined to cases where the sentence is either death or alternative transportation for life. In other words, what the Court held was that the phrase "death or transportation for life" in Section 497 of the old Code did not extend to offences punishable with transportation for life only, it will be interesting to note the following passage from the above judgment:

It is difficult to see what principle, other than pure empiricism should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu Accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be transportation for life? It cannot seriously be argued that the comparatively slight difference in decree of possible punishment will render it morally less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand the degree of difference is so great as

between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the Magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be willing to pay a material price, however, exorbitant, for life.

The above decision has been followed by the Nagpur High Court in the case reported in Tularam v. Emperor, (MANU/NA/0031/1926 : AIR 1927 Nag 53) : (1926) 27 Cri LJ 1063).

8. The reasoning applies with equal force in interpreting the phrase "offence punishable with death or imprisonment for life" So long as an offence Under Section 326 is triable by a Magistrate of the First Class there is no reason why it should be viewed differently in the matter of granting bail from an offence Under Section 420 Indian Penal Code for which the punishment extends imprisonment for 7 years or any other non- bailable offence for which the punishment is a term of imprisonment.

It would be illogical and incomprehensible to say that the magistrate who can hold the trial and pass judgment of acquittal or conviction for the offences punishable with sentence of life imprisonment or lesser term of imprisonment, for example in offences Under Section 326, 409, 467, etc., cannot consider the application for bail in such offences. In fact, it appears that the restriction Under Section 437(1)(a) is applicable only to those cases which are punishable with death sentence or life imprisonment as alternative sentence. It may be noted that in Prahlad Sigh Bhati (supra), in para 6, the Supreme Court held that even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of session, yet it would be proper and appropriate that in such a case the Magistrate directs the Accused person to approach the Court of Session for the purposes of getting the relief of bail. This may be applicable to many cases, wherein the sentence, which may be awarded, is not even life imprisonment, but the offence is exclusively triable by court of Sessions for example offences punishable Under Sections 306, 308, 314, 315, 316, 399, 400 and 450. Taking into consideration the legal position, I do not find any substance in the contention of Mr. Bhatt, learned Counsel for the intervener that merely because the offence is Under Section 409 and 467 Indian Penal Code, Magistrate did not have jurisdiction to hear and grant the bail.

14. It may also be useful to refer the observations of this Court in Ishan Vasant Deshmukh v. State of Maharashtra" referred supra, which read thus- -

The observations of the Supreme Court that generally speaking if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to Section 437 of the Code. Thus, merely because an offence is punishable when imprisonment for life, it does not follow a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate

would be entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life. This Judgment in Prahlad Singh Bhati's case had not been cited before Judge, who decided State of Maharashtra v. Rajkumar Kunda Swami. Had this Judgment been noticed by the Hon'ble Judge deciding that case, the observation that the Magistrate may not decide an application for bail if the offence is punishable with imprisonment for life would possibly would not have been made. In view of the observations of the Supreme Court in Prahlad Singh Bhati's case, it is clear that the view taken by J.H. Bhatia, J. in Ambarish Rangshahi Patnigere v. State of Maharashtra, reported at MANU/MH/0806/2010 : 2010 ALL Mr. (Cri.) 2775 is in tune with the Judgment of the Supreme Court and therefore, the Magistrate would have jurisdiction to grant bail.

55. Thus, we would like to reiterate the aforesaid position so that the jurisdictional Magistrate who otherwise has the jurisdiction to try a criminal case which provides for a maximum punishment of either life or death sentence, has got ample jurisdiction to consider the release on bail.

Section 439 of the Code

439. Special powers of High Court or Court of Session regarding bail.- -

(1) A High Court or Court of Session may direct- -

(a) that any person Accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub- section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that Sub- section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is Accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

xxx xxx xxx

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

56. Section 439 confers a power upon the High Court or a Court of Sessions regarding the bail. This power is to be exercised against the order of the judicial magistrate exercising power Under Section 437 of the Code or in a case triable by the Court of Sessions exclusively. In the former set of cases, the observations made by us would apply to the exercise of power Under Section 439 as well.

57. Interestingly, the second proviso to Section 439 prescribes for the notice of an application to be served on the public prosecutor within a time limit of 15 days on the set of offenses mentioned thereunder. Similarly, proviso to Sub- section (1)(a) makes it obligatory to give notice of the application for bail to the public prosecutor as well as the informant or any other person authorised by him at the time of hearing the application for bail. This being the mandate of the legislation, the High Court and the Court of Sessions shall see to it that it is being complied with.

58. Section 437 of the Code empowers the Magistrate to deal with all the offenses while considering an application for bail with the exception of an offense punishable either with life imprisonment or death triable exclusively by the Court of Sessions. The first proviso facilitates a court to conditionally release on bail an Accused if he is under the age of 16 years or is a woman or is sick or infirm, as discussed earlier. This being a welfare legislation, though introduced by way of a proviso, has to be applied while considering release on bail either by the Court of Sessions or the High Court, as the case may be. The power Under Section 439 of the Code is exercised against an order rejecting an application for bail and against an offence exclusively decided by the Court of Sessions. There cannot be a divided application of proviso to Section 437, while exercising the power Under Section 439. While dealing with a welfare legislation, a purposive interpretation giving the benefit to the needy person being the intendment is the role required to be played by the court. We do not wish to state that this proviso has to be considered favourably in all cases as the application depends upon the facts and circumstances contained therein. What is required is the consideration per se by the court of this proviso among other factors.

Section 440 of the Code

440. Amount of bond and reduction thereof.- - (1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

59. Before we deal with the objective behind Section 440, certain precedents and laws adopted in the United States of America are required to be taken note of.

60. In the State of Illinois, a conscious decision was taken to dispense with the requirement of cost as a predominant factor in the execution of a warrant while granting bail, as such a condition is an affront to liberty, and thus, affects the fundamental rights of an arrestee. If an individual is not able to comply with the condition due to the circumstances beyond his control, and thus making it impossible for him to enjoy the fruits of the bail granted, it certainly constitutes an act of injustice. The objective behind granting of bail is different from the conditions imposed. The State of Illinois took note of the fact that a prisoner cannot be made to comply with the deposit of cash as a pre- condition for enlargement, and therefore dispensed with the same.

61. When such an onerous condition was challenged on the premise that it affects a category of persons who do not have the financial wherewithal, making them to continue in incarceration despite a temporary relief being granted, enabling them to conduct the trial as free persons, the Supreme Court of California in In re Kenneth Humphrey, S247278; 482 P.3d 1008 (2021), was pleased to hold that the very objective is lost and would possibly impair the preparation of a defense, as such, the court was of the view that such onerous conditions cannot be sustained in the eye of law. Relevant paras of the judgment are reproduced hereunder:

IV.

....In choosing between pretrial release and detention, we recognize that absolute certainty - - particularly at the pretrial stage, when the trial meant to adjudicate guilt or innocence is yet to occur - - will prove all but impossible. A court making these determinations should focus instead on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur. (See Stack v. Boyle MANU/FENT/0191/1951 : (1951) 342 U.S. 1, 8 (conc. opn. of Jackson, J.) ["Admission to bail always involves a risk that the Accused will take flight. That is a calculated risk which the law takes as the price of our system of justice"]; cf. Salerno, supra, 481 U.S. at p. 751 [discussing an arrestee's "identified and articulable threat to an individual or the community"].)

Even when a bail determination complies with the above prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail - - a question not resolved here - - and with due process. While due process does not categorically prohibit the government from ordering pretrial detention, it remains true that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (Salerno, supra, 481 U.S. at p. 755.)

V.

In a crucially important respect, California law is in line with the federal Constitution: "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (Salerno, supra, 481 U.S. at p. 755.) An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the Defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. (See Humphrey, supra, 19 Cal.App. 5th at p. 1026.) Pretrial detention on victim and public safety grounds, subject to specific and reliable constitutional constraints, is a key element of our criminal justice system. Conditioning such detention on the arrestee's financial resources, without ever assessing whether a Defendant can meet those conditions or whether the state's interests could be met by less restrictive alternatives, is not.

62. Under Section 440 the amount of every bond executed Under Chapter XXXIII is to be fixed with regard to the circumstances of the case and shall not be excessive. This is a salutary provision which has to be kept in mind. The conditions imposed shall not be mechanical and uniform in all cases. It is a mandatory duty of the court to take into consideration the circumstances of the case and satisfy itself that it is not excessive. Imposing a condition which is impossible of compliance would be defeating the very object of the release. In this connection, we would only say that Section 436, 437, 438 and 439 of the Code are to be read in consonance. Reasonableness of the bond and surety is something which the court has to keep in mind whenever the same is insisted upon, and therefore while exercising the power Under Section 88 of the Code also the said factum has to be kept in mind. This Court in Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, MANU/SC/0119/1979 : 1980 (1) SCC 81, has held that:

8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. [Section 440, Code of Criminal Procedure.] A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966:

In determining which conditions of releases will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the Accused, the Accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. [18 US S. 3146(b)]

These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pre- trial release in India could be avoided or, in any event, greatly reduced. See Moti Ram v. State of M.P. [MANU/SC/0132/1978 : (1978) 4 SCC 47]

CATEGORIES A & B

63. We have already dealt with the relevant provisions which would take care of categories A and B. At the cost of repetition, we wish to state that, in category A, one would expect a better exercise of discretion on the part of the court in favour of the Accused. Coming to category B, these cases will have to be dealt with on a case- to- case basis again keeping in view the general principle of law and the provisions, as discussed by us.

SPECIAL ACTS (CATEGORY C)

64. Now we shall come to category (C). We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided Under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.

Precedents

- Union of India v. K.A. Najeeb, MANU/SC/0046/2021 : (2021) 3 SCC 713:

15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, MANU/SC/0877/1994 : (1994) 6 SCC 731, para 15 : 1995 SCC (Cri.) 39], it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the Accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

• Supreme Court Legal Aid Committee v. Union of India MANU/SC/0877/1994 : (1994) 6 SCC 731:

15. ...In substance the Petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act, that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act. It is equally true that similar is the objective of Section 309 of the Code. It is also true that this Court has emphasised in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of "personal liberty" must prescribe a procedure which is just, fair and reasonable, i.e., a procedure which promotes speedy trial. See Hussainara Khatoon (IV) v. Home Secy., State of Bihar [MANU/SC/0121/1979 : (1980) 1 SCC 98 : 1980 SCC (Cri.) 40], Raghubir Singh v. State of Bihar [MANU/SC/0199/1986 : (1986) 4 SCC 481 : 1986 SCC (Cri.) 511] and Kadra Pahadiya v. State of Bihar [MANU/SC/0757/1981 : (1983) 2 SCC 104 : 1983 SCC (Cri.) 361] to quote only a few. This is also the avowed objective of Section 36(1) of the Act. However, this laudable objective got frustrated when the State Government delayed the constitution of sufficient number of Special Courts in Greater Bombay; the process of constituting the first two Special Courts started with the issuance of notifications Under Section 36(1) on 4- 1- 1991 and Under Section 36(2) on 6- 4- 1991 almost two years from 29- 5- 1989 when Amendment Act 2 of 1989 became effective. Since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases piled up and the provision in regard to enlargement on bail being strict the offenders have had to languish in jails for want of trials. As stated earlier Section 37 of the Act makes every offence punishable under the Act cognizable and non- bailable and provides that no person Accused of an offence punishable for a term of five years or more shall be released on bail unless (i) the Public Prosecutor has had an opportunity to oppose bail and (ii) if opposed, the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision very few persons Accused

of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person Accused of an offence under the Act can be released. Indeed, we have adverted to this Section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab [MANU/SC/1597/1994 : (1994) 3 SCC 569 : 1994 SCC (Cri.) 899]. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak [MANU/SC/0326/1992 : (1992) 1 SCC 225 : 1992 SCC (Cri.) 93], release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the Accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the Accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned Counsel for the Petitioner that we should quash the prosecutions and set free the Accused persons whose trials are delayed beyond reasonable time. Alternatively, he contended that such Accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned Counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(i) Where the undertrial is Accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial Accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term

set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial Accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial Accused is charged for the commission of an offence punishable Under Sections 31 and 31- A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial Accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial Accused;

(ii) the undertrial Accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under Clause (i), once in a fortnight in the case of those covered under Clause (ii) and once in a week in the case of those covered by Clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those Accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial Accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner- Accused belongs, that the said Accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial Accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial Accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial Accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one- time directions for cases in which the Accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail Under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the Accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.

65. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that if an Accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the Special Act would get applied thereafter. It is only in a case where the Accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. Similarly, we would also add that the existence of a pari materia or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the Accused for a default bail. Even here the court will have to consider the satisfaction Under Section 440 of the Code.

ECONOMIC OFFENSES (CATEGORY D)

66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of P. Chidambaram v. Directorate of Enforcement, MANU/SC/1670/2019 : (2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an

economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

Precedents

• P. Chidambaram v. Directorate of Enforcement, MANU/SC/1670/2019 : (2020) 13 SCC 791:

23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the Rule and refusal is the exception so as to ensure that the Accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the Accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the Accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a Rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case- to- case basis on the facts involved therein and securing the presence of the Accused to stand trial.

• Sanjay Chandra v. CBI MANU/SC/1375/2011 : (2012) 1 SCC 40:

39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the Accused persons is very serious involving deep- rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the Accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the

punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the Accused. The primary purposes of bail in a criminal case are to relieve the Accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the Accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

xxx xxx xxx

46. We are conscious of the fact that the Accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge- sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the Appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.

ROLE OF THE COURT

67. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice.

68. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the Criminal Courts. Any conscious failure by the Criminal Courts would constitute an affront to liberty. It is the pious duty of the Criminal Court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest. This Court in Arnab

Manoranjan Goswami v. State of Maharashtra, MANU/SC/0902/2020 : (2021) 2 SCC 427, has observed that:

67. Human liberty is a precious constitutional value, which is undoubtedly subject to Regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure. Section 482 recognises the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of Code of Criminal Procedure "or prevent abuse of the process of any court or otherwise to secure the ends of justice". Decisions of this Court require the High Courts, in exercising the jurisdiction entrusted to them Under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the Accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one- - and a significant- - end of the spectrum. The other end of the spectrum is equally important : the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. The Code of Criminal Procedure, 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognised the inherent power in Section 561- A. Post- Independence, the recognition by Parliament [Section 482 Code of Criminal Procedure, 1973] of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower courts in this country must be alive. In the present case, the High Court could not but have been cognizant of the specific ground which was raised before it by the Appellant that he was being made a target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the Appellant is that he has been targeted because his opinions on his television channel are unpalatable to authority. Whether the Appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum- - the district judiciary, the High Courts and the Supreme Court- - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum- - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the Rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting.

(emphasis supplied)

69. We wish to note the existence of exclusive Acts in the form of Bail Acts prevailing in the United Kingdom and various States of USA. These Acts prescribe adequate guidelines both for investigating agencies and the courts. We shall now take note of Section 4(1) of the Bail Act of 1976 pertaining to United Kingdom:

General right to bail of Accused persons and Ors..

4.- (1) A person to whom this Section applies shall be granted bail except as provided in Schedule 1 to this Act.

70. Even other than the aforesaid provision, the enactment does take into consideration of the principles of law which we have discussed on the presumption of innocence and the grant of bail being a matter of right.

71. Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation. Persons Accused with same offense shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India.

72. The Bail Act of United Kingdom takes into consideration various factors. It is an attempt to have a comprehensive law dealing with bails by following a simple procedure. The Act takes into consideration clogging of the prisons with the undertrial prisoners, cases involving the issuance of warrants, granting of bail both before and after conviction, exercise of the power by the investigating agency and the court, violation of the bail conditions, execution of bond and sureties on the unassailable principle of presumption and right to get bail. Exceptions have been carved out as mentioned in Schedule I dealing with different contingencies and factors including the nature and continuity of offence. They also include Special Acts as well. We believe there is a pressing need for a similar enactment in our country. We do not wish to say anything beyond the observation made, except to call on the Government of India to consider the introduction of an Act specifically meant for granting of bail as done in various other countries like the United Kingdom. Our belief is also for the reason that the Code as it exists today is a continuation of the pre- independence one with its modifications. We hope and trust that the Government of India would look into the suggestion made in right earnest.

SUMMARY/CONCLUSION

73. In conclusion, we would like to issue certain directions. These directions are meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments.:

a) The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.

b) The investigating agencies and their officers are duty- bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.

c) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non- compliance would entitle the Accused for grant of bail.

d) All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed Under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.

e) There need not be any insistence of a bail application while considering the application Under Section 88, 170, 204 and 209 of the Code.

f) There needs to be a strict compliance of the mandate laid down in the judgment of this Court in Siddharth (supra).

g) The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

h) The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

i) While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

j) An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh (supra), followed by appropriate orders.

k) Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

l) All State Governments, Union Territories and High Courts are directed to file affidavits/status reports within a period of four months.

74. The Registry is directed to send copy of this judgment to the Government of India and all the State Governments/Union Territories.

75. As such, M.A. 1849 of 2021 is disposed of in the aforesaid terms. I.A. No. 51315 of 2022, application for intervention is allowed. I.A. Nos. 164761 of 2021, 148421 of 2021 and M.A. Diary No. 29164 of 2021 (I.A. No. 154863 of 2021), applications for clarification/direction are also disposed of. List for compliance after a period of four months from today.

MANU/SC/0215/1980

IN THE SUPREME COURT OF INDIA

Back to Section 437 of Code of Criminal Procedure, 1973

Criminal Appeal Nos. 335, 336, 337, 338, 339, 346, 347, 350, 351, 352, 365, 366, 367, 383, 396, 397, 398, 399, 406, 415, 416, 417, 418, 419, 420, 430, 431, 438, 439, 440, 447, 448, 449, 463, 473, 474, 477, 498, 506, 508, 512, 511 of 1977, 1, 15, 16, 38, 53, 69, 70 of 1978, 469, 499 of 1977, 40, 41, 81, 82, 98, 109, 130, 141, 142, 145, 149, 153 and 154 of 1978. and Special Leave Petitions (Criminal) Nos. 260, 272, 273, 274, 383, 388 & 479 of 1978.

Back to Section 438 of Code of Criminal Procedure, 1973

Decided On: 09.04.1980

Gurbaksh Singh Sibbia and Ors. Vs. State of Punjab

Back to Section 439 of Code of Criminal Procedure, 1973

Hon'ble Judges/Coram:

Y.V. Chandrachud, C.J., O. Chinnappa Reddy, P.N. Bhagwati, R.S. Pathak and N.L. Untwalia, JJ.

JUDGMENT

Y.V. Chandrachud, C.J.

1. These appeals by Special Leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interests while determining the scope of Section 438 of the CrPC, 1973 (Act No. 2 of 1974).

2. Section 438 provides for the issuance of direction for the grant of bail to a person who apprehends arrest. It reads thus :

438. (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under Sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub- section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub- Section (1).

3. Criminal Appeal No. 335 of 1975 which is the first of the many appeals before us, arises out of a judgment dated September 13, 1977 of a Full Bench of the High Court of Punjab and Haryana. The appellant herein, Shri Gurbaksh Singh Sibbia, was a Minister of Irrigation and Power in the Congress Ministry of the Government of Punjab. Grave allegations of political corruption were made against him and others whereupon, applications were filed in the High Court of Punjab and Haryana Under Section 438, praying that the appellants be directed to be released on bail, in the event of their arrest on the aforesaid charges. Considering the importance of the matter, a learned Single Judge referred the applications to a Full Bench, which by its judgment dated September 13, 1977 dismissed them.

4. The CrPC, 1898 did not contain any specific provision corresponding to the present Section 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail, in anticipation of arrest, the preponderance of view being that it did not have such power. The need for extensive amendments to the CrPC was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed put the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipate; bail". It observed in paragraph 39.9 of its report (Volume I) :

39.9. The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to- grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to' implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a, new section is placed for consideration :

497A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps Under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the Court under Sub- section (1).

(3) if any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that; offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion, of the; court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any

observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused.

5. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clause 447 in the Draft Bill of the CrPC, 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. That Clause read thus :

447. (1) When any person has reason to believe that he would be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the lime of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub- section (1).

6. The Law Commission, in paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid Clause.

31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the CrPC, 1973 which we have extracted at the outset of this judgment.

7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognizance , suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non- bailable offences. An order of anticipatory bail, constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post- arrest order of bail, it is a pre- arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the CrPC which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction Under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.

8. No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sangfroid, in so far as the ordinary rut of criminal investigation is concerned. It is the normal day-to- day business of the police to investigate into charges brought before them and, broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants can occasionally possess extra- ordinary features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

9. Are we right in saying that the power conferred by Section 438 to grant anticipatory bail is "not limited to these contingencies"? In fact that is one of the main points of controversy between the parties. Whereas it is argued by Shri M.C. Bhandare, Shri O.P. Sharma and the other learned Counsel who appear for the appellants that the power to grant anticipatory bail ought to be left to the discretion of the court concerned, depending on the facts and circumstances of each particular case, it is argued by the, learned Additional Solicitor General on behalf of the State Government that the grant of anticipatory bail should at least be conditional upon the applicant showing that he is likely to be arrested for an ulterior motive, that is to say, that the proposed charge or charges are evidently baseless: and are actuated by mala, fides It is argued that anticipatory bail is an extra- ordinary remedy and therefore, whenever it appears that the proposed accusations are prima facie plausible, the applicant should be left to the ordinary remedy of applying for bail Under Section 437 or Section 439, Criminal Procedure Code, after he is arrested.

10. Shri V.M. Tarkunde, appearing on behalf of some of the appellants, while supporting the contentions of the other appellants, said that since the denial of bail amounts to deprivation of personal liberty, court should lean against the imposition of unnecessary restrictions on the scope of Section 438, when no such restrictions are imposed by the legislature in the terms of that Section. The learned Counsel added a new dimension to the argument by invoking Article 21 of the Constitution. He urged that Section 438 is a procedural provision which is concerned with the personal liberty of an individual who has not been convicted of the offence in respect of which he seeks bail and who must therefore be presumed to be innocent. The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

11. The Full Bench of the Punjab and Haryana High Court rejected the appellants' applications for bail after summarising, what according to it Is the true legal position, thus:

(1) The power Under Section 438, Criminal Procedure Code, is of an extra- ordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far leveled.

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody Under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender Under Section 27 of the Evidence Act can be made out, the power Under Section 438 should not be exercised.

(6) The discretion Under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion Under Section 438 of the Code should not be exercised; and

(8) Mere general allegation of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.

It was urged before the Full Bench that the appellants were men of substance and position who were hardly likely to abscond and would be prepared willingly to face trial. This argument was rejected with the observation that to accord differential treatment to the appellants on account of their status will amount to negation of the concept of equality before the law and that it could hardly be contended that every man of status, who was intended to be charged with serious crimes, including the one Under Section 409 which was punishable with life imprisonment, "was entitled to knock at the door of the court for anticipatory bail". The possession of high status, according to the Full Bench, is not only an irrelevant consideration for granting anticipatory bail but is, if anything, an aggravating circumstance.

12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose.

This is especially true when the statutory provisions which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep- grained in our Criminal Jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, in so far as the right to apply for bail is concerned. It had before it two cognate provisions of the Code : Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non- bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail. That section reads thus :

437. When bail may be taken in case of non- bailable offence. (1) When any person accused of or suspected of the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life :

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail:

Provided further that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under Sub- Section (1), the Court may impose any condition which the Court considers necessary-

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) Art officer or a Court releasing any person on bail under Sub- section (1) or Sub- section (2), shall record in writing his or its reasons for so doing.

(5) Any Court which has released a person on bail under Sub- section (1) or Sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date feed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of an non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

13. Section 439(1)(a) incorporates the conditions mentioned in Section 437(3) if the offence in respect of which the bail is sought is of the nature specified in that Sub- section. Section 439 reads thus :

439. Special powers of High Court or Court of Session regarding bail. (1) A High Court or Court of Session direct-

(a) That any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub- section (3) of Section 437. may impose any condition which it considers necessary for the purposes mentioned in that Sub- section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

14. The provisions of Section 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully : Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 29.9 that it had "considered" carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion of the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory, bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub- section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provided that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in Clauses (i) to (iv) of Sub- section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non- bailable offence. A person who has yet to lose his freedom by being arrested

asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non- bailable offence asks for bail. In the latter situation, adequate data is available to the Court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

15. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though Sub- section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub- section (2) confers on the Court the power to include such conditions in the direction as, it may think fit in the light of the facts of the particular case, including the conditions mentioned in Clauses (i) to (iv) of that sub- section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant Under Section 439 of the Code.

16. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn L.C. said in Hyman and Anr. v. Rose [1912] A. C 623 :

I desire in the first instance to point out that the discretion given by the section is very wide.... Now it seems to me that when the Act is so express to provide a wide discretion... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would, regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand.

17. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait- jacket. While laying down cast- iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if We were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide- lines and cannot compel blind adhere'nce. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law.

18. A close look at some of the rules in the eight- point code formulated by he High Court will show how difficult it is to apply them in practice. The seventh proposition says :

The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion Under Section 438 of the Code should not be exercised.

19. How can the Court, even if it had a third eye, assess the bluntness of corruption at the stage of anticipatory bail ? And will it be correct to say that bluntness of the accusation will suffice for rejecting bail, even if the applicant's conduct is painted in colours tod lurid to be true ? The eighth proposition rule framed by. the High Court says :

Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fide are substantial and the accusation appears to be false and groundless,

20. Does this rule mean, and that is the argument of the learned Additional Solicitor- General, that the anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide ? It is understandable that if mala fides are shown anticipatory ;bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides, a safeguard against its abuse.

21. According to the sixth proposition framed by the High Court, the discretion Under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court: at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non- bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted Under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases, of non- bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief Under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non- bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre- conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this 'distinction bears with the grant or refusal of bail is that in cases falling Under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling Under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the First Information Report. In the majority- of cases falling Under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, Section 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty

of an offence punishable with death or imprisonment for life". In this process one shall have overlooked that whereas, the power Under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fits to do so, Section 437(1) does not confer the power to grant bail in the same wide terms. The expression "if it thinks fit", which occurs in Section, 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for re- writing Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefore is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

22. A great deal has been said by the High Court on the fifth proposition, framed by it, according to which, inter alia, the power Under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender Under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the Judiciary and the police are in a sense complementary and not overlapping, And, as, observed by the Privy Council in King Emperor v. Khwaja Nasir Ahmed 71 Ind App 203.

Just as it is essential that every one 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. The functions of the Judiciary and the Police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function....

23. But, these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561A, Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two First Information Reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the Court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the F.I.R. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued Under Section 438(1) are those recommended in Sub- section (2) (i) and (ii) which require the applicant to co- operate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted

investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery Under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya MANU/SC/0060/1960 : 1960CriLJ1504 to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the CrPC does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody Under Section 167(2) of the Code is made out by the investigating agency.

24. It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitations are implicit in Section 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the section must be given its full play.

25. The High Court says in its fourth proposition that in addition the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in, regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

26. By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the

bail is applied for Under Section 437 or Section 439. These Sections deal with the power to grant or, refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extra- ordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self- imposed limitations.

27. It remains only to consider the second proposition formulated by the High Court, Which is the only one with which we are disposed to agree but we will say more about it a little later.

28. It will be appropriate at this stage to refer to a decision of this Court in Balchand Jain v. State of Madhya Pradesh MANU/SC/0172/1976 : [1977]2SCR52 on which. the High Court has leaned heavily in formulating its propositions. One of us, Bhagwati J. who spoke for himself and A.C. Gupta, J. observed ed in that case that :

the power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against farm, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised.

29. Fazal Ali, J. who delivered a separate judgment of concurrence also observed that:

an order for anticipatory bail is an extraordinary remedy available in special cases", and proceeded to say :

As Section 438 immediately follows Section 437 which is the main provision for bail in respect of non- bailable offences, it is manifest that the conditions imposed by Section 437(1) are implicitly contained in Section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away Under Section 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of Section 437 nugatory and will give a free licence to the accused persons charged with non- bailable offences to get easy bail by approaching the Court Under Section 438 and by-passing Section 437 of the Code. This, we feel, could never have been the intention of the Legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in Section 437, there is a special case made out for passing the order. The words "for a direction under this section" and "Court may, if it thinks fit, direct" clearly show

that the Court has to be guided by a large number of considerations including those mentioned in Section 437 of the Code.

While stating his conclusions Fazal Ali, J. reiterated in conclusion no. 3 that "Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases."

30. We hold the decision in Balchand Jain (supra) in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case. Fazal Ali, J. has stated in paragraph 3 of his judgment that "the only point" which arose for consideration before the Court was whether the provisions of Section 438 relating to anticipatory bail stand overruled and repealed by virtue of Rule 184 of the Defence and Internal Security of India Rules, 1971: or whether both the provisions can, by the rule of harmonious interpretation, exist side by side. Bhagwati, J. has also stated in his judgment, after adverting to Section 438 that Rule 184 is what the Court was concerned with in the appeal. The observations made in Balchand Jain (supra) regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible- to agree with the observations made in Balchand Jain (supra) in an altogether different context on an altogether different point.

31. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over- generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on, compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt) can linger after the decision in Maneka Gandhi MANU/SC/0133/1978 : [1978]2SCR621 that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it; is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein.

32. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra v. King

Emperor MANU/WB/0119/1923 : AIR1924Cal476 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases' observations are to- be found regarding the right to bail which observe a special mention. In K.N. Joglekar v. Emperor MANU/UP/0060/1931 : AIR1931All504 , it was observed, while dealing with Section 438 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge of the High Court wide powers to grant bail which were not handicapped by tire restrictions in the preceding Section 497 which corresponds) to the present Section 437. It was observed by the Court that there was no; hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H.L. Hutchinson MANU/UP/0014/1931 : AIR1931All356 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the Court unfettered. According) to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

33. Coming nearer home, it was observed by Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh MANU/SC/0089/1977 : 1978CriLJ502 that "the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by (law. The last four words of Article 21 are the life of that human right."

34. In Gurcharan Singh v. State (Delhi Admn.) MANU/SC/0420/1978 : 1978CriLJ129 it was observed by Goswami, J. who spoke for the Court, that "there cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail."

35. In American Jurisprudence (2d, Volume 8, page 806, para 39) it is stated :

Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to

the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

36. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; told, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in The State v. Captain Jagjit Singh MANU/SC/0139/1961 : [1962]3SCR622 which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

37. A word of caution may perhaps be necessary in the evaluation of the consideration whether the applicant is likely to abscond. There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it. In his charge to the grand jury at Salisbury Assizes, 1899 (to which Krishna Iyer, J. has referred in Gudikanti), Lord Russel of Killowen said :

...it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them

to the place where they carried on their work. They had not the golden wings with which to fly from justice.

This, incidentally, will serve to show how no hard and fast rules can A, be laid down in discretionary matters like the grant or refusal of bail, whether anticipatory or otherwise. No such rules can be laid down for the simple reason that a circumstance which, in a given case, turns out to be conclusive, may have no more than ordinary signification in another case.

38. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction Under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

39. This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.

40. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must; show that he has "reason to believe" that he may be arrested for a non- bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non- bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail H will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

41. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned Under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

42. Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power Under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

43. Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

44. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he 'is arrested, are concerned. After arrest, the accused must seek his remedy Under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

45. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is preposition No. (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue Under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever." That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction Under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non- bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading hi a civil case and such is not requirement of the section.; But specific events; and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

46. Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction Under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided.

47. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of

offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a. vacuum.

48. There was some discussion before us on certain minor modalities regarding the passing of bail orders Under Section 438(1). Can an carder of bail be passed under that section without notice to the public prosecutor? It can be. But notice should issue to the public prosecutor or the Government Advocate forthwith and the question of bail should be re- examined in the light of the respective contentions of the parties. The ad- interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed Under Section 438(1) be limited in point of tune? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail Under Section 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

49. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in; Section 438(2)(i), (ii) and (iii). The Court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made Under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the Court has", in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the F.I.R. in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily , causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The Court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court Under Section 438(1) of the Code.

50. The various appeals and Special Leave petitions before us will stand disposed of in terms of this Judgment. The judgment of the Full Bench of the Punjab and Haryana High Court, which was treated as the main case under appeal, is substantially set aside as indicated during the course of this Judgment.

MANU/DE/7847/2023

Neutral Citation: 2023/DHC/8429

Back to Section 482 of Code of Criminal Procedure, 1973

IN THE HIGH COURT OF DELHI

W.P. (Crl.) 562/2023 and Crl. M.A. 5126/2023

Decided On: 24.11.2023

Rajinder Singh Chadha Vs. Union of India and Ors.

Hon'ble Judges/Coram:

Amit Sharma, J.

JUDGMENT

Amit Sharma, J.

1. The present petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') seeks primarily the following prayer:

"i. Pass a writ/order/direction in the nature of certiorari thereby issuing direction to quash and set aside all proceedings and actions taken pursuant to the Enforcement Case Information Report bearing number ECIR/09/HIU/2019 dated 27.06.2019."

Background

2. Briefly stated, the facts of the case, relevant for adjudication of the present petition are as under:

i. Two FIRs, i.e., FIR No. 16/2018 dated 24.01.2018 and FIR No. 49/2021 dated 12.03.2021 were registered under Sections 420/406/120B of the Indian Penal Code, 1860 ('IPC') at PS Economic Offences Wing ('EOW'). The said FIRs. were registered against the persons accused therein, including the petitioner and arose out of a similar set of facts and circumstances.

ii. In both the FIRs, the respective complainants, inter- alia, alleged that despite payment of monies in 2006- 07, they did not receive possession of flats, as was promised by accused company M/s Uppal Chadha Hi- Tech (hereinafter referred to as the 'company'). It was alleged that in his capacity as a Director of the said firm, the petitioner was responsible for siphoning of the funds collected from the complainants.

iii. During the pendency of the respective trials in FIRs. No. 16/2018 and 49/2021, the accused persons therein settled the dispute with the respective complainants amicably.

iv. In FIR No. 16/2018, the accused persons moved an application for compounding under Section 320 of the CrPC before the learned Trial Court, which was allowed vide order dated 19.11.2019 passed by Sh. Deepak Sherawat, Chief Metropolitan Magistrate, South- East, Saket and the accused persons were accordingly acquitted for offences under Sections 406/420/120B of the IPC.

v. FIR No. 49/2021 was quashed by a coordinate bench of this Court, vide order dated 22.12.2022 passed in CRL.MC. 7083/2022 titled 'Uppal Chadha Hi Tech Developers Pvt. Ltd. & Ors. v. State & Ors.'.

vi. The present ECIR was lodged on 26.07.2019 by the Directorate of Enforcement/respondent no. 2 ('the department') against M/s Uppal Chadha Hi- Tech, Harmandeep Singh, Gurjit Singh Kochar, Kritika Gupta, Rajinder Singh Chadha- the petitioner and other unknown persons.

vii. After the ECIR was lodged, the department carried out a search and seizure on 18.11.2022 under Section 17(1) of the Prevention of Money Laundering Act, 2002 at the office and residential premises of the petitioner. Various phones, documents, digital records and cash was seized. Follow- up searches were conducted on 19.11.2022, 22.11.2022 and 09.12.2022. Pursuant to the search and seizure, the department filed an application under Section 17(4) of the PMLA for retention of records and digital devices seized on 18.11.2022, 19.11.2022, 22.11.2022 and 09.12.2022.

viii. A show- cause notice under Section 8(1) of the PMLA, alongwith recording of reasons dated 21.12.2022 was issued by the Adjudicating Authority to the petitioner, for filing of a written response, on or before 09.02.2023, as to why the department's application under Section 17(4) of the PMLA should not be allowed.

Submissions of behalf of the Petitioner/Rajinder Singh Chadha

3. Learned Senior Counsel appearing on behalf of the petitioner submitted that the basis of the present ECIR, i.e., the predicate offences in FIRs. No. 16/2018 and 49/2021 now stand compounded and quashed, respectively. As a consequence of that, the jurisdictional fact which formed the basis of the department's investigation has now come to an end and hence, the ECIR and the subsequent proceedings cannot continue any longer. Attention of this Court was drawn

to the application under Section 17(4) of the PMLA filed on behalf of the department, wherein it has been clearly stated that the ECIR in question was registered on account of FIRs. No. 16/2018 and 49/2021. It was submitted that it is thus clear, that the ECIR was initiated on account of the aforesaid two FIRs, which no longer exist and therefore, the ECIR cannot continue either. In support of the said argument, learned Senior Counsel for the petitioner placed reliance on the following judgments:

i. Vijay Madanlal Choudhary & Ors. v. Union of India & Ors., MANU/SC/0924/2022 : 2022:INSC:757.

ii. Harish Fabiani and Ors. v. Enforcement Directorate & Ors., MANU/DE/3707/2022.

iii. Naresh Goyal v. The Directorate of Enforcement, Judgment dated 20.02.2023 passed by the Hon'ble High Court of Bombay in Criminal Writ Petition No. 4037 of 2022.

iv. Prakash Industries Limited v. Union of India and Ors., MANU/DE/0424/2023 : 2023:DHC:481.

v. Parvathi Kollur and Anr. v. State by Directorate of Enforcement MANU/SC/1517/2022, Order dated 16.08.2022 passed by the Hon'ble Supreme Court in Criminal Appeal No. 1254/2022.

vi. Directorate of Enforcement v. M/s Obulapuram Mining Company, Order dated 02.12.2022 passed by the Hon'ble Supreme Court in Criminal Appeal No. 1269/2017.

vii. EMTA Coal v. Deputy Director, Directorate of Enforcement MANU/DE/0181/2023, 2023/DHC/000277.

viii. M/s Nik Nish Retail and Anr. v. Assistant Director, Enforcement Directorate, Government of India and Ors., MANU/WB/1688/2022.

ix. Manturi Shashi Kumar v. ED, MANU/TL/0641/2023.

x. Arun Kumar and Ors vs. Union of India and Others, MANU/SC/7267/2007 : (2007) 1 SCC 732.

3.1. Reliance was placed on Vijay Madanlal Choudhary and Ors. v. Union of India, (supra), and in particular, the following paragraphs thereof:

"253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money- laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now.

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281. The next question is : whether the offence under Section 3 is a standalone offence? Indeed, it is dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. Nevertheless, it is concerning the process or activity connected with such property, which constitutes offence of money- laundering. The property must qualify the definition of "proceeds of crime" under Section 2(1)(u) of the 2002 Act. As observed earlier, all or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of "proceeds of crime" under Section 2(1)(u) will necessarily be crime properties. Indeed, in the event of acquittal of the person concerned or being absolved from allegation of criminal activity relating to scheduled offence, and if it is established in the court of law that the crime property in the concerned case has been rightfully owned and possessed by him, such a property by no stretch of imagination can be termed as crime property and ex- consequenti proceeds of crime within the meaning of Section 2(1)(u) as it stands today. On the other hand, in the trial in connection with the scheduled offence, the Court would be obliged to direct return of such property as belonging to him. It would be then paradoxical to still regard such property as proceeds of crime despite such adjudication by a Court of competent jurisdiction. It is well within the jurisdiction of the concerned Court trying the scheduled offence to pronounce on that matter.

467. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:-

*** *** ***

(v)

*** *** ***

(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money- laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money- laundering against him or any one claiming such property being the property linked to stated scheduled offence through him."

3.2. Learned Senior Counsel submitted that in Naresh Goyal (supra), it was held as under:

"11. Although, the learned counsel for the respondent No. 1- ED tried to impress upon this Court that the ECIR is a private internal document and not at par with an FIR, and as such is not required to be quashed, the said submission was not pressed, when the learned senior counsel for the petitioner in both the petitions showed a copy of the order passed by the Apex Court in the case of M/s. Obulapuram Mining Company Pvt. Ltd. (supra). In the said case, the learned Solicitor General appearing for the appellant- ED made a statement that since the proceedings before the Court (Apex Court) arose from an order of attachment and there is acquittal in respect of the predicate offence, the ED proceeding really would not survive.

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13. As noted above, admittedly there is no scheduled offence as against the petitioner in both the petitions, in view of the closure report filed by the police, which was accepted by the Courts as stated aforesaid. There being no predicate offence i.e. scheduled offence, the impugned ECIR registered by the respondent No. 1- ED will not survive and as such the said ECIR will have to be quashed and set aside."

3.3. Reliance was placed on a judgment of the Hon'ble High Court of Calcutta in Nik Nish Retail (supra) and in particular, on the following paragraph thereof:

"34. The quashing of FIR of regular case automatically created a situation that the offences, stated and alleged in the FIR has no existence; thus the "Scheduled Offence" has also no existence after quashing of the FIR. When there is no "Scheduled Offence", the proceeding initiated under the provisions of Prevention of Money Laundering Act, 2002 cannot stand alone."

It was further submitted that the aforesaid judgment in Nik Nish Retail (supra) was carried in appeal before the Hon'ble Supreme Court and was not interfered with. The said Special Leave Petition (Criminal) Diary No. 24321/2023 titled 'Assistant Director Enforcement Directorate v. M/s Nik Nish Retail Ltd. & Ors.' was disposed of by the Hon'ble Supreme Court vide order dated 14.07.2023 in the following terms:

"In paragraph 187 (v)(d) of the decision in the case of Vijay Madanlal Chowdhury & Ors. v. Union of India & Ors. MANU/SC/0924/2022, it is held that even if predicate offence is quashed by the Court of competent 1 jurisdiction, there can be no offence of money laundering against the accused.

Appropriate proceedings can be always filed by the concerned parties for challenging the order by which predicate offence was quashed. If the said order is set aside and the case is revived, it will be always open for the petitioner to revive the proceedings under the Prevention of Money Laundering Act, 2002.

The Special Leave Petition is accordingly disposed of.

Pending application also stands disposed of."

3.4. In support of his contentions, learned Senior Counsel drew the attention of this Court to Arun Kumar (supra), wherein it has been held as under:

"74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. In Halsbury's Laws of England, it has been stated:

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction."

Submissions on behalf of Respondent No. 2/Directorate of Enforcement

4. Per contra, learned Special Counsel for the department submitted that on the basis of the complaints filed by the investors of the company, the EOW registered FIRs. no. 16/2018 under Sections 420/406/120B of the IPC against the company and its Directors, including the petitioner. On the basis of the aforesaid FIR, the department recorded ECIR/09/HIU/2019 on 27.06.2019. It was further pointed out that initially, in the FIR, there were 20 complainants/victims, however, at the time of filing of chargesheet, there were 60 more complainants and as per the petitioner, they had settled the dispute only with 61 out of aforesaid 80 complainants. It was pointed out that so far as regarding compounding of offences is concerned, in the order dated 19.11.2019 passed by the learned Magistrate compounding FIR No. 16/2018, it has been recorded that the petitioner had undertaken to settle the dispute with the remaining complainants as well. It was further pointed out that thereafter, fresh complaints were received and the EOW registered another FIR No. 49/2021 dated 12.03.2021 and the said FIR was also taken on record in the existing ECIR/09/HIU/2019. Thereafter, the petitioner approached this Court seeking quashing of FIR No. 49/2021 and the same was allowed by a coordinate bench of this Court vide order dated 22.12.2022 passed in CRL.MC. 7083/2022.

5. It was submitted on behalf of the department that as per the chargesheet dated 14.02.2022, filed by the EOW in FIR No. 49/2021, there were a total of 77 complainants and the petitioner had only settled the dispute with 55 complainants. It was further pointed out that there are 22 more complainants/victims with whom the petitioner has not settled the dispute. It was further submitted that 79 complaints are still pending before RERA, Uttar Pradesh against the company.

6. It was further pointed out that during the pendency of the present petition, on the basis of the complaint received from one Ms. Shobhna Gupta, FIR No. 55/2023 dated 10.07.2023 was registered against the aforesaid company and its Directors under Sections 409/420/120B of the IPC at PS EOW. The said FIR No. 55/2023 is stated to have been made on the basis of similar allegations as in the previous FIRs. It was further pointed that the aforesaid FIR was taken on

record for further investigation in the already opened ECIR/09/HIU/2019, which is the subject matter of the present petition.

7. Learned Special Counsel for respondent further submitted that the petitioner was one of the Directors in the companies- M/s UCHDPL, Chadha Infrastructure Developers Pvt. Ltd. and M/s Wave Infratech Pvt. Ltd. An amount of Rs. 175.95 crores is stated to have been transferred to Chadha Infrastructure Developers Pvt. Ltd. and Rs. 87.02 crores has been transferred to M/s Wave Infratech Pvt. Ltd. It was submitted that the petitioner was a director in the companies Chadha Infrastructure Developers Pvt. Ltd. as well as M/s Wave Infratech Pvt Ltd at the time of transfer of funds. It was pointed out that the petitioner is ultimate beneficiary and had a significant role in the activities connected with money laundering including possession and diversion of funds.

8. In support of his contentions, learned Special Counsel placed reliance on Vijay Madanlal Choudhary (supra) and in particular, the following paragraphs thereof:

"461. It is true that the ED Manual may be an internal document for departmental use and in the nature of set of administrative orders. It is equally true that the accused or for that matter common public may not be entitled to have access to such administrative instructions being highly confidential and dealing with complex issues concerning mode and manner of investigation, for internal guidance of officers of ED. It is also correct to say that there is no such requirement under the 2002 Act or for that matter, that there is nothing like investigation of a crime of money-laundering as per the scheme of 2002 Act. The investigation, however, is to track the property being proceeds of crime and to attach the same for being dealt with under the 2002 Act. Stricto sensu, it is in the nature of an inquiry in respect of civil action of attachment. Nevertheless, since the inquiry in due course ends in identifying the offender who is involved in the process or activity connected with the proceeds of crime and then to prosecute him, it is possible for the department to outline the situations in which that course could be adopted in reference to specific provisions of 2002 Act or the Rules framed thereunder; and in which event, what are the options available to such person before the Authority or the Special Court, as the case may be. Such document may come handy and disseminate information to all concerned. At least the feasibility of placing such document on the official website of ED may be explored.

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457. Suffice it to observe that being a special legislation providing for special mechanism regarding inquiry/investigation of offence of money- laundering, analogy cannot be drawn from the provisions of 1973 Code, in regard to registration of offence of money- laundering and more so being a complaint procedure prescribed under the 2002 Act. Further, the authorities referred to in Section 48 of the 2002 Act alone are competent to file such complaint. It is a different matter that the materials/evidence collected by the same authorities for the purpose of civil action of

attachment of proceeds of crime and confiscation thereof may be used to prosecute the person involved in the process or activity connected with the proceeds of crime for offence of money-laundering. Considering the mechanism of inquiry/investigation for proceeding against the property (being proceeds of crime) under this Act by way of civil action (attachment and confiscation), there is no need to formally register an ECIR, unlike registration of an FIR by the jurisdictional police in respect of cognizable offence under the ordinary law. There is force in the stand taken by the ED that ECIR is an internal document created by the department before initiating penal action or prosecution against the person involved with process or activity connected with proceeds of crime. Thus, ECIR is not a statutory document, nor there is any provision in 2002 Act requiring Authority referred to in Section 48 to record ECIR or to furnish copy thereof to the accused unlike Section 154 of the 1973 Code. The fact that such ECIR has not been recorded, does not come in the way of the authorities referred to in Section 48 of the 2002 Act to commence inquiry/investigation for initiating civil action of attachment of property being proceeds of crime by following prescribed procedure in that regard.

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467. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:-

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(xviii)(a) In view of special mechanism envisaged by the 2002 Act, ECIR cannot be equated with an FIR under the 1973 Code. ECIR is an internal document of the ED and the fact that FIR in respect of scheduled offence has not been recorded does not come in the way of the Authorities referred to in Section 48 to commence inquiry/investigation for initiating "civil action" of "provisional attachment" of property being proceeds of crime...."

9. Learned Special Counsel for the department further submitted that since the inquiries/investigation under PMLA culminate into a complaint and the same being a complaint case, at this stage, raising an argument that ECIR is to be quashed because some of the FIRs. are compromised, is pre- mature since the scheduled offence continues to exist. It was submitted that once the inquiry/investigation is concluded and the respondent files a complaint, the petitioner can avail of his remedies under the CrPC.

10. Learned Special Counsel submitted that as on the present day, even if there exists a single complainant, who is aggrieved by the accused company and its directors, the two conditions laid down by the Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra) for closing the PMLA proceedings, cannot be satisfied. The said two conditions are as under:

"281. The next question is : whether the offence under Section 3 is a standalone offence? Indeed, it is dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. Nevertheless, it is concerning the process or activity connected with such property, which constitutes offence of money- laundering. The property must qualify the definition of "proceeds of crime" under Section 2(1)(u) of the 2002 Act. As observed earlier, all or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of "proceeds of crime" under Section 2(1)(u) will necessarily be crime properties. Indeed, in the event of acquittal of the person concerned or being absolved from allegation of criminal activity relating to scheduled offence, and if it is established in the court of law that the crime property in the concerned case has been rightfully owned and possessed by him, such a property by no stretch of imagination can be termed as crime property and ex- consequenti proceeds of crime within the meaning of Section 2(1)(u) as it stands today. On the other hand, in the trial in connection with the scheduled offence, the Court would be obliged to direct return of such property as belonging to him. It would be then paradoxical to still regard such property as proceeds of crime despite such adjudication by a Court of competent jurisdiction. It is well within the jurisdiction of the concerned Court trying the scheduled offence to pronounce on that matter."

(emphasis supplied)

11. It was further contended on behalf of the department that it is a well settled principle that the offence of money laundering is an independent offence. Reliance in support of the said contention was placed on:

i. Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors MANU/SC/0924/2022 : 2022:INSC:757.

ii. Judgment dated 12.05.2023 passed by the Hon'ble Supreme Court in ED vs Aditya Tripathi MANU/SC/0571/2023, Criminal Appeal No. 1401/2023.

iii. P. Rajendran vs. Directorate of Enforcement MANU/TN/7667/2022- Judgment dated 14.09.2022 passed by the Hon'ble Madras High Court in Criminal Original Petition No. 19880 of 2022.

iv. J. Sekar vs. Union of India & Ors. MANU/DE/0075/2018.

v. Radha Mohan Lakhotia vs. Directorate of Enforcement MANU/MH/1011/2010.

vi. Dr. Manik Bhattacharaya vs. Ramesh Malik & Ors. MANU/SC/1356/2022- SLP (C) 16325/2022.

12. It was submitted that the petitioner, during the course of arguments has heavily placed reliance on the judgement of Nik Nish Retail (supra), but the same is misplaced, as the facts of the said case were that a full and final settlement was entered between the Bank and Group of Companies, and the same was duly complied with. In the present case, the hard- earned money of innocent home- buyers was at stake, and the company i.e., M/s UCHDPL failed to settle the matter with every complainant, rather new FIRs. by aggrieved home- buyers continued to be filed like the FIR 55/2023.

13. Similarly, it was submitted that in the relied upon judgement of Manturi Shashi Kumar (supra), the Hon'ble Court observed- "In the meanwhile, in view of the settlement arrived at between the de facto complainant and appellant No. 1, the criminal court referred the matter to Lok Adalat and when the matter was settled in Lok Adalat, the criminal court discharged appellant No. 1 vide order dated 20.03.2018 leading to closure of the criminal case as well." However, in the present case it is an admitted fact that the petitioner/accused persons have not settled the matter with all the complainants, which is evident from the facts that on 10.07.2023 the EOW on the basis of a complaint received from one Mrs. Shobhna Gupta registered a FIR bearing No. 55/2023 against M/s Uppal Chadha Hi Tech Developers Ltd (M/s UDCHDPL), Manpreet Singh Chadha, Harmandeep Singh Kandhari, Rajiv Gupta, Ginni Chadha, Sanjeev Jain, Rahul Chauhan and others.

14. Learned Special Counsel further submitted that the petitioner has placed reliance on the judgement of Hon'ble High Court of Karnataka in Mantri Developers and Ors. vs. DOE in Writ Petition 20713 of 2022, however the same has no bearing on the present case as the scheduled offence exists till date. In the present case the scheduled offences took place pursuant to which multiple FIRs. were registered, some of which were settled by the accused. However fresh complaints were filed against the same accused, and on basis of that fresh FIR No. 55/2023 was filed registered qua the same project and same company, which is still in existence.

15. It was further contended on behalf of the department that the argument of the petitioner that FIR No. 55/2023 cannot be added to the existing ECIR, and the department should record an additional ECIR is against the scheme of the PMLA. In this regard it was submitted that the entire PMLA does not mention or define the term 'ECIR' and the same is an internal departmental document for administrative purposes.

16. It was submitted that the scheme of the PMLA is that when a scheduled offence exists, and if there exist prima facie proceeds of crime, the department is statutorily empowered to commence an "inquiry". Further, for inquiry under the Act, neither an FIR nor an ECIR is required.

17. Therefore, it was submitted that the judgements relied upon on behalf of the petitioner are not applicable to the present case, for the reason that in all the cited judgements, either pursuant to a settlement there was a complete quashing of the predicate offence and nothing survived, or there was a clean acquittal in the predicate offence, unlike the peculiar facts of the present case.

Rejoinder on behalf of the Petitioner/Rajinder Singh Chadha

18. In rejoinder, learned counsel for the petitioner submitted that the argument raised by the learned Special Counsel for the department that investigation of the department can be quashed only if a person is finally absolved is not tenable in view of the precedents cited hereinabove, i.e., Nik Nish Retail (supra), which has been confirmed by the Hon'ble Supreme Court vide order dated 14.07.2023 and in Manturi Shashi Kumar (supra) where it has been held in Para 28 that 'it is immaterial for the purpose of PMLA whether acquittal is on merit or composition'.

19. The second limb of arguments raised by the learned Special Counsel for respondent to the effect "that possibility of commission of scheduled offence cannot be ruled out" is also not tenable in view of the observation made by the Hon'ble Supreme Court in Vijay Madanlal (supra) at Para 467 (v)(d) that "the authorities under the 2002 act cannot prosecute any person on a notional basis or on the assumption that a scheduled offence has been committed". It was submitted that the stand taken by the department is contrary to the aforesaid proposition since it is seeking to justify continuing an investigation on a notional basis that there exists a possibility of commission of a scheduled offence.

20. It was submitted that the third limb of the department's argument that the investigation in the impugned ECIR must be kept active on the basis of FIR No. 55/2023 dated 10.07.2023 registered at PS EOW is misplaced as a predicate offence is a jurisdictional fact which permits the department to carry out an investigation under the PMLA. Reliance was placed on a judgment dated 14.12.2022 passed by the Hon'ble High Court of Karnataka, Principal Bench at Bengaluru in WP No. 20713/2022 titled 'Mantri Developers Pvt. Ltd. v. Directorate of Enforcement', wherein it was held that because the predicate offence is a jurisdictional fact, if the investigation in the predicate offence is stayed, the investigation in the PMLA offence should also be stayed.

21. Reliance was further placed on Arun Kumar (supra) wherein it has been held that 'a jurisdictional fact is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter.'. Similarly, reliance was placed on Badrinath v. Government of Tamil Nadu, MANU/SC/0624/2000 : (2000) 8 SCC 395 and on State of Kerala v. Puthenkavu

N.S.S. Karayogam, MANU/SC/2110/2001 : (2001) 10 SCC 191 wherein the Hon'ble Supreme Court has observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.

22. Lastly, it was submitted that the final limb of argument of the department that it can commence an investigation is an existing ECIR without the existence of predicate offence is fallacious. Reliance was placed on a judgment of a coordinate bench of this Court in Prakash Industries (supra) wherein it has been held that 'what needs to be emphasized is that while the adoption of peremptory measures by the ED may be justified and are so sanctioned by the Act, it would be incorrect to construe those powers as the ED alone being entitled to adjudge or declare that a predicate offence stands committed'.

23. It was further submitted that the power of the department to investigate/enquire without registration of scheduled offence is an emergency power which can only be exercised at a preliminary stage and that too subject to the respondent ensuring the registration of a scheduled offence.

Analysis and Findings

24. Heard learned counsel for the parties and perused the record.

25. The proposition of law, as advanced by learned Senior Counsel for the petitioner is not in dispute. In absence of a predicate offence, there can be no offence of money laundering and as per the judgment of the Hon'ble Supreme Court in Vijay Madanlal Choudhary & Ors. v. Union of India & Ors., MANU/SC/0924/2022 : 2022:INSC:757, such prosecution will not be maintainable. In absence of a 'scheduled offence', criminal proceedings initiated under the PMLA cannot survive. In the present case, the two FIRs, i.e., FIR No. 16/2018 dated 24.01.2018 and FIR No. 49/2021 dated 12.03.2021 registered at PS EOW, have been compounded and quashed, respectively, on the ground of compromise. It is pertinent to note that the State has not challenged the aforesaid orders on the ground that the matter was not settled with all the complainants. It is also noted that the remaining complainants, if any, have also not challenged the aforesaid orders on the ground that settlement was not arrived at with them.

26. For the purpose of adjudication of the present petition, the following dates are relevant:

i. 24.01.2018- FIR No. 16/2018 under Sections 420/406/120B of the IPC is registered at PS EOW against the accused persons, including the petitioner.

ii. 27.06.2019- Impugned ECIR/09/HIU/2019 is registered by the departments on the basis of the scheduled offences in FIR No. 16/2018.

iii. 19.11.2019- The learned Trial Court allows an application under Section 320 of the CrPC moved on behalf of the accused persons for compounding of FIR No. 16/2018 registered at PS EOW based on an amicable settlement arrived at between the parties and acquitted the accused persons.

iv. 12.03.2021- FIR No. 49/2021 under Sections 420/406/120B of the IPC is registered at PS EOW against the accused persons, including the petitioner. Consequently, the said FIR is taken on record in the existing ECIR/09/HIU/2019.

v. 18.11.2022- The department carries out search and seizure in terms of Section 17(1) of the PMLA.

vi. 19.11.2022, 22.11.2022 and 09.12.2022- The department carries out follow- up searches and seizures.

ix. 15.12.2022- An application under Section 17(4) of the PMLA is moved by the department for retention of records and digital devices seized on 18.11.2022, 19.11.2022, 22.11.2022 and 09.12.2022.

x. 21.12.2022- A show- cause notice under Section 8(1) of the PMLA was issued by the Adjudicating Authority to the petitioner, for filing of a written response to the department's application under Section 17(4) of the PMLA.

vii. 22.12.2022- FIR No. 49/2021 is quashed by a coordinate bench of this Court.

viii. 10.07.2023- FIR No. 55/2023 is registered at PS EOW under Sections 409/420/120B of the IPC and taken on record in impugned ECIR/09/HIU/2019.

27. Thus, in the aforesaid peculiar facts of the case, the issue before this Court is whether the department is justified in continuing with the investigation/proceedings in the impugned ECIR/09/HIU/2019, which was initially registered on the basis of scheduled offences in FIR No. 16/2018 and thereafter continued on the basis of FIR No. 49/2021, by taking on record scheduled

offences in FIR No. 55/2023 registered at PS EOW on 10.07.2023 based on similar allegations as in the earlier FIRs, especially in view of the fact that scheduled offences in the first two FIRs. stood compounded/quashed?

28. It is pertinent to note that the aforesaid FIRs. were registered at the instance of investors who were aggrieved by the non- completion of a project by the company. A perusal of the aforesaid list of dates reflect that although the impugned ECIR was registered initially on the basis of scheduled offences registered vide FIR No. 16/2018 dated 24.01.2018 which stood compounded vide order dated 19.11.2019, the second FIR No. 49/2021 which was registered on 12.03.2021 was taken on record in the impugned ECIR by the department and the proceedings continued under the same. The department chose not to register a separate ECIR, but took on record the scheduled offences registered vide FIR No. 49/2021 in the same ECIR, inter- alia, on the ground that it related to the same transaction and involved the same accused persons. The fact that FIR No. 49/2021 was taken on record by the department in the present ECIR despite an order of compounding and acquittal was not challenged by the petitioner.

29. Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra) has held that there is no corresponding provision to Section 154 of the CrPC in the PMLA requiring registration of an offence of money laundering. While observing the same, the Hon'ble Supreme Court held as under:

"457....there is no need to formally register an ECIR, unlike registration of an FIR by the jurisdictional police in respect of cognizable offence under the ordinary law. There is force in the stand taken by the ED that ECIR is an internal document created by the department before initiating penal action or prosecution against the person involved with process or activity connected with proceeds of crime. Thus, ECIR is not a statutory document, nor there is any provision in 2002 Act requiring Authority referred to in Section 48 to record ECIR or to furnish copy thereof to the accused unlike Section 154 of the 1973 Code "

(emphasis supplied)

30. In the aforesaid context, it is pertinent to refer to a reference decided by a learned division bench of this Court in State v. Khimji Bhai Jadeja, MANU/DE/2157/2019 : 2019:DHC:3239- DB , wherein, inter- alia, the following question of law was considered:

"a. Whether in a case of inducement, allurement and cheating of large number of investors/depositors in pursuance to a criminal conspiracy, each deposit by an investor constitutes a separate and individual transaction or all such transactions can be amalgamated and clubbed into a single FIR by showing one investor as complainant and others as witnesses?"

Answering the aforesaid question, the learned Division Bench of this Court held as under:

"61. The practice followed by the Delhi Police/State of registering a single FIR on the basis of the complaint of one of the complainants/victims, and of treating the other complainants/victims merely as witnesses, even otherwise, raises very serious issues with regard to deprivation of rights of such complainants/victims to pursue their complaints, and to ensure that the culprits are brought to justice. Firstly, the other complainants/victims cannot be merely cited as witnesses in respect of the complaint of one of the victims on the basis of which the FIR is registered. They may not be witnesses in respect of the transaction forming the basis of the registration of the case. In a situation where hundreds of persons claim that they have been cheated by the same accused at different locations and at different points of time by adoption of the same modus operandi, it is unthinkable and unlikely that all the complainants/victims- who are cited as witnesses, would be witnesses to the single transaction in relation to which FIR is registered. They may, at the most, be witnesses only to establish the conspiracy- which is an allied offence, but unless there is a charge framed in respect of the specific act of cheating- to which each of the Complainant/victim is subjected, it may not be permissible to cite such other complainants/victims as witnesses to prove the act of cheating relating to them. Mere citing a large number of complainants/victims only as witnesses would also deny them the right to file their protest petitions in the eventuality of a closure report being field by the police in respect of the complaint on the basis of which FIR was registered, or the Magistrate not accepting the final report/charge- sheet and discharging the accused. (See Bhagwat Singh v. Commissioner of Police, MANU/SC/0063/1985 : (1985) 2 SCC 537 : AIR 1985 SC 1285). Their right to oppose, or to seek cancellation of bail that the accused may seek in relation to their particular transaction would also be denied. If the accused enters into a settlement/compromise with the complainant on whose complaint the FIR stands registered, and he chooses not to diligently participate in the trial, the complaints of other victims may go unaddressed. Thus, the practice adopted by the State/Delhi Police, and which is sought to be defended by them, is clearly erroneous and not sustainable in law.

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63. Thus, our answer to Question (a) is that in a case of inducement, allurement and cheating of large number of investors/depositors in pursuance to a criminal conspiracy, each deposit by an investor constitutes a separate and individual transaction. All such transactions cannot be amalgamated and clubbed into a single FIR by showing one investor as the complainant, and others as witnesses. In respect of each such transaction, it is imperative for the State to register a separate FIR if the complainant discloses commission of a cognizable offence.?"

The aforesaid judgment was challenged before the Hon'ble Supreme Court in SLP (Crl.) No. 9198/2019 titled 'The State (NCT) of Delhi v. Khimji Bhai Jadeja MANU/SCOR/51993/2019' and was stayed vide order dated 25.11.2019.

31. The significance of the aforesaid judgment is with respect to the scheme of the CrPC, and in particular, Section 154 of the said Code. As pointed out hereinabove, Hon'ble Supreme Court, in

Vijay Madanlal Choudhary (supra) has clearly carved out a distinction between an ECIR under the PMLA and an FIR under the provisions of the CrPC. The Hon'ble Supreme Court accepted the statement of the department that the ECIR is an 'internal document' created by them. The ECIR in the present case was registered on a prima facie satisfaction for commission of offence under Section 3 of the PMLA. The department, by way of the present ECIR, was not investigating the case of home- buyers/investors in respect of the allegations in the first two FIRs. but with respect to alleged 'proceeds of crime' generated from commission of the alleged scheduled offences in the FIR registered at the instance of the home- buyers/investors. There is no dispute with regard to the fact that the third FIR, i.e., FIR No. 55/2023 also relates to the same project which was the subject matter of the two previous FIRs. In the present factual context, even if separate FIRs. are registered at the instance of separate home- buyers/investors, each of the said FIRs. cannot be considered as a separate cause of action for registration of different ECIRs.

32. The stand taken by the department in the written submissions filed by learned Special Counsel is that 'The argument of the petitioner that FIR 55/2023 cannot be added to the existing ECIR, and ED should record an additional ECIR is against the scheme of the PMLA Act. In this regard it is submitted that the entire PMLA Act does not even mention the term 'ECIR', that ECIR is an internal departmental document for administrative purposes'. In view thereof, as stated hereinbefore, the third FIR in the present case relates to the commission of a 'scheduled offence' in respect of the complainant therein, but for the purposes of an investigation under the PMLA, it would be the part of the same ECIR which related to investigation pertaining to 'proceeds of crime' under the PMLA in the previous FIRs. Needless to state, the Hon'ble Supreme Court, in Vijay Madanlal Choudhary (supra), has categorically held that the offence under PMLA is an independent offence. Since the ECIR has not been equated with an FIR and has been held to be an internal document, there cannot possibly be a restriction to bringing on record on any subsequent 'scheduled offence' registered by way of an FIR alleged to have been committed in respect of the same transaction which was the subject matter of such ECIR.

33. The proposition of law laid down in judicial precedents relied upon by learned Senior Counsel for the petitioner is not in dispute. In the said cases, the 'scheduled offence' was quashed or compounded in all respects. In the present case, 'scheduled offences' by way of the third FIR still exist. It is pertinent to note that even in an FIR being investigated by the local police involving multiple complainants, compounding with some of them will not be a ground for quashing of the said FIR. However, partial compounding/quashing is permissible.

34. In so far as the submission of learned Senior Counsel with respect to the issue of the 'jurisdictional fact' is concerned, it is noted that during the pendency of the impugned ECIR, the registration of a third FIR with respect to 'scheduled offences' gives jurisdiction to the department to investigate by taking the said third FIR on record. The authorities cited by learned Senior Counsel for the petitioner are distinguishable with respect to the facts of the present cases. For the sake of repetition, it is noted that after the third FIR was taken on record, the impugned ECIR cannot be stated to be without a predicate offence. The issue before the Court, as explained hereinabove, is whether the investigation in the impugned ECIR can continue on the basis of

registration of the third FIR. It is clarified that since this Court is of the opinion that the ECIR, as explained in Vijay Madanlal Choudhary (supra) cannot be equated with an FIR and as per the stand of the department, the same is only for administrative purposes, there is no impediment in taking the third FIR on record which related to the same project forming the basis for registration of the first two FIRs, resulting in initiation of the impugned ECIR. This, however, cannot ipso facto have any bearing on the legitimacy of the investigation or proceeding in the ECIR with respect to the 'scheduled offences' in the first two FIRs. Reliance is placed on Vijay Madanlal Choudhary (supra), wherein it has been held as under:

"467. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:-

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(v)

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(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money- laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money- laundering against him or any one claiming such property being the property linked to stated scheduled offence through him."

In light of the aforesaid judgment of the Hon'ble Supreme Court and in view of the judgments relied upon by learned Senior Counsel for the petitioner, the principle that can be culled out is that a 'scheduled offence', after an FIR has been quashed, cannot exist and therefore, if there is no 'scheduled offence', there can be no offence of money laundering with respect to the same. Thus, in the considered opinion of this Court, in the present case, there can be no prosecution under the PMLA with respect to the 'scheduled offences' in the first two FIRs, i.e., FIR No. 16/2018 and FIR No. 49/2021 registered at PS EOW.

35. More recently, a coordinate bench of this Court, in Nayati Healthcare and Research NCR Pvt. Ltd. and Ors. through its Authorised Representative Sh. Satish Kumar Narula & Ors. v. Union of India Ministry of Home Affairs through its Standing Counsel & Anr., MANU/DEOR/123327/2023 : 2023:DHC:7542, while relying upon Vijay Madanlal Choudhary (supra) and Nik Nish Retail (supra)observed and held as under:

"13. The Telangana High Court in Manturi Shashi Kumar (supra) has also quashed a complaint under Section 3 of the PMLA on the grounds of the accused being discharged/acquitted of the scheduled offence. The relevant observations of the said judgment are set out below:-

"28. Thus, according to Supreme Court, the offence under Section 3 of PMLA is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. If the person is finally discharged or acquitted of the scheduled offence or the criminal case against him is quashed by the court, there can be no offence of money laundering against him or anyone claiming such property being the property linked to the scheduled offence. It is immaterial for the purpose of PMLA whether acquittal is on merit or on composition."

14. In view of the aforesaid legal position, the present complaint filed by the ED and the proceedings arising therefrom cannot survive. Considering that the FIR has been quashed by this court and that it has not been challenged till date, there can be no offence of money laundering under section 3 of the PMLA against the petitioners.

15. Accordingly, the present petition is allowed and the ECIR bearing No. ECIR/51/DLZO-II/2021 and proceedings arising therefrom are quashed. Consequently, the Look Out Circular issued against the petitioners in respect of the aforesaid ECIR also stands quashed.

36. In view of the aforesaid discussion and in the peculiar facts and circumstances of the case, ECIR/09/HIU/2019 dated 27.06.2019 cannot be quashed in view of registration of FIR No. 55/2023 dated 10.07.2023 under Sections 409/420/120B of the IPC at PS EOW as this would constitute 'scheduled offences' legitimizing the existence of the said ECIR. However, since 'scheduled offences' in FIR No. 16/2018 dated 24.01.2018 under Sections 420/406/120B of the IPC and FIR No. 49/2021 dated 12.03.2021 under Sections 420/406/120B of the IPC, registered at PS EOW have been compounded and quashed, respectively, the department cannot initiate or continue any proceeding including investigation in connection with the said two FIRs. Accordingly, the proceedings undertaken with respect to the said two FIRs. qua the present petitioner in the present ECIR stand quashed.

37. The petition is accordingly partly allowed and disposed of.

38. Pending applications, if any, also stand disposed of.

39. Judgment be uploaded on the website of this Court, forthwith.

MANU/SC/0196/2004

Back to Section 482 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 357 of 1997

Decided On: 09.03.2004

Jagdish Ram Vs. State of Rajasthan and Ors.

Hon'ble Judges/Coram:

Y.K. Sabharwal and Dr. Arijit Pasayat, JJ.

JUDGMENT

Y.K. Sabharwal, J.

1. This matter pertains to an incident that took place in the year 1985. The criminal proceedings before the Magistrate have not crossed the stage of taking cognizance. One of the contentions urged in this appeal for quashing the criminal proceedings is long delay of 19 years.

2. The appellant is a District Ayurvedic Officer. The complainant is a Class IV employee in Ayurvedic Aushdhalaya, Fatehgarh. According to the complainant on 7th November, 1985 when the appellant visited the said place several patients were present. The appellant asked the complainant to bring water. When the complainant brought water, he was insulted by the appellant who said to him "I do not want to spoil my religion by drinking water from your hands. How have you dared to give water" and started abusing him. The complainant has filed a complaint in the court of Chief Judicial Magistrate alleging commission of offence punishable under Section 7 of the Protection of Civil Rights Act, 1955 (hereinafter referred to as 'the Act').

3. The practice of untouch ability in any form has been forbidden by Article 17 of the Constitution of India which inter alia provides that "untouch ability" is abolished, the enforcement of any disability arising out of "untouch ability" shall be an offence punishable in accordance with law. To comply the mandate of the Constitution, the Act has been enacted inter alia with a view to prescribe punishment for the preaching and practice of "untouch ability", for the enforcement of disability arising therefrom and for matters connected therewith.

4. The aforesaid complaint was sent to the police under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for investigation. A case was registered and investigation conducted. The investigating officer examined the complainant and other witnesses and also obtained copies of certain documents. After completing the investigation the police

submitted a final reported under Section 173 of the Code stating that the complaint was false and in fact on 7th November the complainant was found absent from duty and, therefore, he was asked to take casual leave for half day and it is on that account a false complaint was lodged by him.

5. After the submission of the above noticed final report by the police the complainant submitted another complaint. The statements of the witnesses who were said to be present at the time of the occurrence were examined by the Additional Chief Judicial Magistrate who by order dated 26th June, 1986 found a prima facie case, took cognizance and issued process against the appellant. The order issuing the process was challenged by the appellant in a revision petition filed before the Sessions Judge which was dismissed. On a petition filed under Section 482 of the Code, the orders of the Additional Chief Judicial Magistrate taking cognizance as also of the Sessions Judge were set aside by the High Court by judgment dated 26th May, 1988 and the case was remanded to the trial court to proceed according to law keeping in view the observations made in the judgment. The High Court inter alia observed that the trial court should consider the entire material available on record before deciding whether the process should be issued against the accused or not

6. After remand, on consideration of the material on record, the Magistrate again reached the same conclusion and took cognizance by order dated 22nd January, 1990. This led to filing of another petition under Section 482 of the Code by the appellant. Again the High Court by judgment dated 27th May, 1994 set aside the order dated 22nd January, 1990 inter alia noticing that the Additional Chief Judicial Magistrate while disagreeing with the final report should have given some reasons for not accepting it and this time also the case was remanded to the Magistrate directing him to consider the material available on record and thereafter pass appropriate order deciding whether the process should be issued or not on the basis of the available material.

7. In this appeal, we are not going into the correctness of the judgments of the High Court dated 26th May, 1988 or 27th May, 1994. These judgments have attained finality. Suffice it to say that as directed by the High Court, the Magistrate again considered the matter for the third time. Again, by order dated 16th December, 1994 the Magistrate reached the same conclusion as had been reached on two earlier occasions and took cognizance of offence under Section 7 of the Act against the appellant and directed that the appellant be summoned.

8. There was a third petition under Section 482 of the Code before the High Court challenging the order taking cognizance. This time the appellant was not lucky. The High Court by the impugned judgment dated 4th May, 1996 rejected the contention that the Additional Chief Judicial Magistrate passed the order without considering the entire material on record. The High Court held that no case for exercising inherent powers under Section 482 of the Code was made out.

9. Challenging the judgment of the High Court, the appellant is before this Court on grant of leave. This Court had stayed the proceedings before the Magistrate pending decision of the appeal.

10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.

(Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors. MANU/SC/0182/2003 :

2003CriLJ1698).

11. The High Court has rightly concluded that the order passed by the Magistrate does not call for any interference in exercise of inherent powers under Section 482 of the Code.

12. Mr. Jain urged an additional ground for quashing the order. Learned counsel contends that the appellant is facing the criminal proceedings for the last 19 years and, therefore, the proceedings deserve to be quashed on the ground of delay. Support is sought from S.G. Nain v. Union of India MANU/SC/0114/1992 : 1992CriLJ560 , Bihar State Electricity Board and Anr. v. Nand Kishore Tamakhuwala MANU/SC/0286/1986 : 1986CriLJ1246 and Ramanand Chaudhary v. State of Bihar and Ors. [2002] 1 SCC 153. In these cases, the criminal proceedings were quashed having regard to peculiar facts involved therein including this Court also entertaining some doubts about the case being made against the accused. In none of these decisions any binding principle has been laid down that the criminal proceedings deserve to be quashed merely on account of delay without anything more and without going into the reasons for delay.

13. It is to be borne in mind that the appellant has been successively approaching the High Court every time when an order taking cognizance was passed by the Magistrate, It is because of the appellant that the criminal proceedings before the Magistrate did not cross the stage of taking cognizance. As earlier noticed, since earlier judgments of the High Court have attained finality, we are not going into correctness of these judgments. When third time the appellant was not successful before the High Court, he has approached this Court and at his instance the proceedings before the trial court were stayed. In fact, from 1986 till date the criminal case has not proceeded further because of the appellant. It would be an abuse of the process of the court if the appellant is now allowed to urge delay as a ground for quashing the criminal proceedings. In considering the question whether criminal proceedings deserve to be quashed on the ground of delay, the first question to be looked into is the reason for delay as also the seriousness of the offence. Regarding the reasons for delay, the appellant has to thank himself. He is responsible for delay. Regarding the seriousness of the offence, we may notice that the ill of untouch ability was abolished under the Constitution and the Act under which the complaint in question has been filed was enacted nearly half a century ago. The plea that the complaint was filed as a result of vindictiveness of the complainant is not relevant at this stage. The appellant would have adequate opportunity to raise all pleas available to him in law before the trial court at an appropriate stage. No case has been made out to quash the criminal proceedings on the ground of delay.

14. Having regard to the enormous delay, we direct the trial court to expedite the trial and dispose of the case within a period of six months. For the reasons aforestated, the appeal is dismissed.

MANU/SC/0448/2020

Neutral Citation: 2020/INSC/400

Back to Section 482 of Code of Criminal Procedure, 1973

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) No. 130 of 2020 and Writ Petition (Criminal) Dairy No. 11189 of 2020
(Under Article 32 of the Constitution of India)

Decided On: 19.05.2020

Arnab Ranjan Goswami Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:

Dr. D.Y. Chandrachud and M.R. Shah, JJ.

JUDGMENT

Dr. D.Y. Chandrachud, J.

Writ Petition (Crl.) No. 130 of 2020

1. The Petitioner is the Editor- in- Chief of an English television news channel, Republic TV. He is also the Managing Director of ARG Outlier Media Asianet News Private Limited which owns and operates a Hindi television news channel by the name of R Bharat. The Petitioner anchors news shows on both channels.

2. On 16 April 2020, a broadcast took place on Republic TV. This was followed by a broadcast on R Bharat on 21 April 2020. These broadcasts led to the lodging of multiple First Information Reports1 and criminal complaints against the Petitioner. They have been lodged in the States of Maharashtra, Chhattisgarh, Rajasthan, Madhya Pradesh, Telangana and Jharkhand as well as in the Union Territories of Jammu and Kashmir. In the State of Maharashtra, an FIR was lodged at Police Station Sadar, District Nagpur City. The details of this FIR are:

Maharashtra

FIR No. 238 of 2020, dated 22 April 2020, registered at Police Station Sadar, District Nagpur City, Maharashtra, Under Sections 153, 153- A, 153- B, 295- A, 298, 500, 504(2), 506, 120- B and 117 of the Indian Penal Code 1860.

Apart from the above FIR, as many as fourteen other FIRs and complaints have been lodged against the Petitioner, of which the details are extracted below:

• FIR No. 245 of 2020, dated 22 April 2020, registered at Police Station Supela, District Durg, Chhattisgarh, Under Sections 153- A, 295- A and 505(2) of the Indian Penal Code 1860.

• FIR No. 180 of 2020, dated 23 April 2020, registered at Police Station Bhilal Nagar, District Durg, Chhattisgarh, Under Sections 153- A, 188, 290 and 505(1) of the Indian Penal Code 1860.

• FIR No. 176 of 2020, dated 22 April 2020, registered at Police Station Civil Lines, District Raipur, Chhattisgarh, Under Sections 153- A, 295- A and 505(2) of the Indian Penal Code 1860.

• Complaint dated 21 April 2020 by District Congress Committee- Antagrah, Kanker, Chhattisgarh.

• Complaint dated 22 April 2020 by Pritam Deshmukh (adv.), Durg District Congress Committee- to SHO city PS Durg, Chhattisgarh.

• Complaint dated 22 April 2020 by Suraj Singh Thakur, State Vice President, Indian Youth Congress- to Sr. Police Officer, Chirag Nagar, Ghatkopar East, Mumbai.

• Complaint dated 22 April 2020- Pankaj Prajapti (party worker of INC and ex- spokesperson NSUI) through counsel Anshuman Shrivastavas- Superintendent of Police, Crime Branch, Indore, Madhya Pradesh.

• Complaint dated 22 April 2020- Balram Jakhad (adv.)- to PS Shyam Nagar- Under Section 153, 188, 505, 120B in Jaipur.

• Complaint by Jaswant Gujar- to SHO Bajaj Nagar PS, Jaipur.

• Complaint dated 22 April 2020 by Fundurdihari, Ambikapur, District Sarguja, Chhattisgarh- Rajesh Dubey, Chhattisgarh State Congress Committee- to SHO Gandhi Nagar, Ambikapur- Under Section 153, 153A, 153B, 504, 505.

• Complaint dated 22 April 2020 in Telangana by Anil Kumar Yadav, State President of Telangana Youth Congress- to SHO Hussaini Alam- Under Section 117, 120B, 153, 153A, 295A, 298, 500, 504, 505 and 506. Also 66A of the IT Act.

• Complaint dated 23 April 2020 by Anuj Mishra before Kotwali, Urai, Tulsi Nagar.

• Complaint dated 22 April 2020 by Kumar Raja, VP, Youth Congress, Jharkhand Congress Committee before Kotwali Police Station, Upper Bazar, Ranchi.

• Complaint dated 22 April 2020 by Madhya Pradesh Youth Congress.

3. The genesis of the FIRs and complaints originates in the broadcasts on Republic TV on 16 April 2020 and R Bharat on 21 April 2020 in relation to an incident which took place in Gadchinchle village of Palghar district in Maharashtra. During the course of the incident which took place on 16 April 2020, three persons including two sadhus were brutally killed by a mob, allegedly in the presence of the police and forest guard personnel. The incident was widely reported in the print and electronic media. The petition states that a video recording of the incident is available in the public domain. In his news show titled "Poochta hai Bharat" on 21 April 2020 on R Bharat, the Petitioner claims to have raised issues in relation to the allegedly tardy investigation of the incident. The segment of the news broadcast is available for public viewing online at:

https://www.youtube.com/watch?v=C2i4MMpKu9I

4. The viewpoint which the Petitioner claims to have put across during the course of the broadcast, is described in the following extract from the Writ Petition which has been instituted by the Petitioner before this Court Under Article 32 of the Indian Constitution:

A review of the above debate would show that its thrust was to question the tardy investigation, inconsistent versions of the authorities and the administration and the State Government's silence on the Palghar incident given that the unfortunate incident happened in Maharashtra which is presently Under Rule of an alliance government jointly formed by Shiv Sena, the Congress and the Nationalist Congress Party. The debate highlighted the manner in which the incident was being portrayed by the authorities, including the glaring fact that the incident occurred in the presence of numerous police officials which fact was initially suppressed.

5. The Petitioner claims that following the broadcast, "a well- coordinated, widespread, vindictive and malicious campaign" was launched against him by the Indian National Congress2 and its activists. The campaign, he alleges, was carried out online through news reports and tweets

indicating that members of the INC had filed multiple complaints simultaneously against the Petitioner before various police stations seeking the registration of FIRs and an investigation into offences alleged to have been committed by him Under Sections 153, 153A, 153B, 295A, 298, 500, 504, 506 and 120B of the Indian Penal Code 18603. A campaign for the arrest of the Petitioner was allegedly launched on social media, using the hashtag:

#ArrestAntiIndiaArnab

6. The Petitioner submitted, in the course of his pleadings, that all the complaints and FIRs have incidentally been lodged in States where the governments which were formed owe allegiance to the INC and that he believes that the law enforcement machinery was being set in motion with an ulterior motive. To substantiate this, the Petitioner refers to an incident which allegedly took place on 23 April 2020, while he was returning by car from his studio at Worli, Mumbai accompanied by his spouse between 12:30 and 1:00 am. His car was confronted by two individuals on a motor- cycle. Confronted by the security personnel of the Petitioner, the two individuals on the motor- cycle are alleged to have disclosed their identity as members of the INC. An FIR was registered at the behest of the Petitioner at NM Joshi Marg Police Station in Mumbai in which the details of the alleged attack on him have been set out.

7. The Petitioner denies that he has propagated views of a communal nature in the course of the news broadcasts which gave rise to the institution of numerous complaints. Asserting his fundamental right to the freedom of speech and expression Under Article 19(1)(a) of the Constitution, the Petitioner has moved this Court Under Article 32 for the protection of those rights. The reliefs which have been sought are:

(i) Quashing all the complaints and FIRs lodged against the Petitioner in multiple States and Union Territories;

(ii) A writ direction that no cognisance should be taken of any complaint or FIR on the basis of the cause of action which forms the basis of the complaints and FIRs which have led to the present writ proceedings; and

(iii) A direction to the Union Government to provide adequate safety and security to the Petitioner and his family as well as to his colleagues at Republic TV and R Bharat.

8. While entertaining the Writ Petition on 24 April 2020, this Court heard submissions by Senior Counsel: on behalf of the Petitioner by Mr. Mukul Rohatgi and Mr. Siddhartha Bhatnagar; on behalf of the State of Maharashtra by Mr. Kapil Sibal; on behalf of the State of Chhattisgarh by Mr. Vivek Tankha; and on behalf of the State of Rajasthan by Dr Abhishek Manu Singhvi. Having

heard the rival submissions, this Court noted in its interim order that the order which it intended to pass should strike a balance between the following governing principles:

(i) The need to ensure that the criminal process does not assume the character of a vexatious exercise by the institution of multifarious complaints founded on the same cause in multiple States;

(ii) The need for the law to protect journalistic freedom within the ambit of Article 19(1)(a) of the Constitution;

(iii) The requirement that recourse be taken to the remedies available to every citizen in accordance with the Code of Criminal Procedure 1973;

(iv) Ensuring that in order to enable the citizen to pursue legal remedies, a protection of personal liberty against coercive steps be granted for a limited duration in the meantime;

(v) The investigation of an FIR should be allowed to take place in accordance with law without this Court deploying its jurisdiction Under Article 32 to obstruct the due process of law; and

(vi) Assuaging the apprehension of the Petitioner of a threat to his safety and the safety of his business establishment.

9. Learned Senior Counsel appearing on behalf of the Petitioner apprised this Court, on instructions, that the Petitioner had no objection to the transfer of FIR 238 of 2020 which was lodged at Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai for the purpose of investigation. Mr. Kapil Sibal, learned Senior Counsel appearing on behalf of the State of Maharashtra similarly had no objection to this course of action. This is recorded specifically in the order passed by this Court on 24 April 2020 in the following terms:

9. The Court was apprised by Mr. Mukul Rohatgi, learned senior Counsel, on seeking instructions, that the Petitioner would have no objection if the FIR which has been lodged at Nagpur is transferred for the purpose of investigation to the N.M. Joshi Marg Police Station, Mumbai, where the Petitioner has lodged an FIR on 23 April 2020. The FIR by the Petitioner is in relation to an incident which took place at midnight, during the course of which, he and his spouse were obstructed by two persons and an alleged to have been subjected to an assault, while returning home from the studio.

10. Mr. Sibal has indicated that there should be no objection to the transfer of the FIR which has been lodged at Nagpur to Mumbai.

Consequently, this Court, by its interim order:

(i) Transferred FIR 238 of 2020 lodged at Police Station Sadar, District Nagpur City to the NM Joshi Marg Police Station in Mumbai with a clarification that the Petitioner shall cooperate in the investigation;

(ii) Stayed further proceedings arising out of the complaints and FIRs other than the one which had been instituted at Police Station Sadar, District Nagpur City and stood transferred;

(iii) Allowed the investigation to proceed in FIR 238 of 2020 which was transferred from Police Station Sadar, District Nagpur City to the NM Joshi Marg Police Station in Mumbai;

(iv) Protected the Petitioner against coercive steps arising out of and in relation to the above FIR, in relation to the telecast dated 21 April 2020;

(v) Granted liberty to the Petitioner to move an application for anticipatory bail before the Bombay High Court Under Section 438 of the Code of Criminal Procedure 19734 and to pursue such other remedies as are available in law. It was clarified that any such application shall be considered on its own merits by the competent court;

(vi) Stayed further proceedings in respect of any other FIR, or as the case may be, criminal complaints which have been filed or which may thereafter be filed with respect to the same incident; and

(vii) Directed the Commissioner of Police5, Mumbai to consider the request of the Petitioner for being provided with security at his residence and at the business establishment.

10. Following the interim order of this Court, several interim applications were filed in the course of the proceedings. The details of each of the IAs are necessary to facilitate our eventual analysis of the case:

IA No. 48585 of 2020: filed by the Petitioner

11. The Petitioner submits that:

(i) The Mumbai police is not conducting a fair and impartial investigation in relation to FIR 238 of 20206 which has been transferred from Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai for investigation;

(ii) The manner in which the investigation has been conducted by the Mumbai police leads to the "inescapable conclusion" that the authorities "harbor grave malice and mala fide intention" against the Petitioner;

(iii) The investigation is politically motivated and has been conducted with "a pre- determined and pre- meditated objective" to arm- twist, harass and humiliate the Petitioner and his family and to diminish his right to free speech and expression Under Article 19(1)(a) of the Constitution;

(iv) Since the Petitioner's news channel is questioning the complicity of the Maharashtra police in the Palghar incident and the police fall under the administration and control of the State government (ruled by an alliance government of the INC), there is a clear conflict of interest in the investigation by the Mumbai police; and

(v) It is necessary that the investigation is stayed to prevent any miscarriage of justice. These apprehensions are sought to be established on the basis of the following averments:

(a) On 25 April 2020, the Petitioner was served with a notice Under Section 41(a) of the Code of Criminal Procedure 19737 summoning him to the police station on 26 April 2020;

(b) On 26 April 2020, the Petitioner expressed his willingness to appear before the Investigating Officer8 through Video Conferencing9;

(c) Rejecting the above request, the IO called upon the Petitioner by a summons dated 26 April 2020 to be physically present at NM Joshi Marg Police Station in Mumbai on 27 April 2020;

(d) On 27 April 2020, the Petitioner was questioned without a break for nearly twelve hours during which he was not allowed to keep possession of his mobile phone or to wear his personal fitness band;

(e) During the course of the investigation, the Petitioner was informed by the Mumbai police that the complainant Dr Nitin Kashinath Raut, who is a Cabinet Minister in the Maharashtra government and a working President of the INC, had filed a supplementary statement indicating when he had been provided with a clip of the broadcast;

(f) A substantial bulk of the questions during the investigation was in relation to a small segment comprising fifteen seconds out of a total broadcast of fifty- two minutes;

(g) During the course of the investigation, the Petitioner was asked by the IO whether he had defamed or maligned the President of the INC in the course of the broadcast on 21 April 2020;

(h) FIR 164 of 2020 is not based on a complaint by the President of the INC and hence, it is inconceivable as to how the IO could have questioned the Petitioner on an alleged act of defamation which he, in any event, denies;

(i) Tweets made on the social media by members of the INC during and around the time of the investigation indicate that the Mumbai police was relying on real time information during the course of the interrogation by "their political masters";

(j) Questions posed to the Petitioner during the course of the investigation have no nexus to FIR 164 of 2020. The questions which were posed included the following:

(i) Corporate structure of the Petitioner's company, ARG Outlier Media Asianet Private Limited ("ARG") including its board of directors. ARG owns and operates Republic TV and R. Bharat.

(ii) Process of obtaining broadcasting licenses by the news channels of the Petitioner.

(iii) Location of archives of Petitioner's news channels; whether the Hindi channel of the Petitioner, R. Bharat is based outside or inside Maharashtra.

(iv) Does the Petitioner's news channel send recordings of news reports to the Central Government (this question was asked multiple times.)

(v) Process of selecting panelists for debates aired on Petitioner's news channels. Are the panelists paid remuneration by the Petitioner's news channel for this purpose.

(vi) Does the Petitioner own the house in which he is currently staying or pays rent.

(k) The complainant, Dr Nitin Kashinath Raut was interviewed on 29 April 2020 by a reporter of Republic TV in regard to the contradictions between the statement in the FIR and his subsequent supplementary statement as to the place where he had watched the video clip. In response to the query posed to him in the interview, the complainant stated:

There is no need to be confused over this point, whatever I have mentioned in my statement, it is true. After watching at home, I also got a clip, which was sent to me from my party office. When I say that I watched it earlier, it's the truth, and later I watched a clip, which is mentioned in the complaint that I filed in the police station. If you have read Article 19(1) of the Constitution, where freedom of expression and thought is mentioned but nowhere does it allow crossing the limits or making extreme comments. There are restrictions mentioned and Mr. Arnab has violated them. I have a lot of respect of Mr. Arnab, he's a senior journalist, and he has handled the media well till now but what happened lately. I don't know. During his speech, he forgot that he's a citizen of this country and a citizen has to abide by the Constitution. I have always supported freedom of expression for journalists but the question is, these comments involve a clear attempt to incite a riot. Arnab was questioned for along during because he's facing a charge of criminal conspiracy, involving Indian Penal Code 153, Indian Penal Code 153(a) and others. You raise the point of him being questioned for 12 to 12.5 hours, I want to ask you that this country's former home minister and former finance minister P. Chidambaram was made to sit for so many hours, why did that happen? You people never raise questions on the reason behind that interrogation. I have heard that clip and Arnab tried to stoke communal sentiments in that speech. No one gave him that right, not even the Constitution.

(l) On 30 April 2020, the IO issued two notices to the Chief Financial Officer10 of Republic TV Under Sections 91 and 160 of the Code of Criminal Procedure requesting for documents. Pursuant to the notice, the CFO appeared before the Mumbai police with publicly available documents and copies of broadcast licenses. He was interrogated for about 6.5 hours inter alia in regard to the following aspects:

(i) Role of the Petitioner's wife, Mrs. Samyabrata Ray Goswami in the news channels and the corporate structure of company.

(ii) Details of the investors in the Petitioner's company, ARG Outlier Media News Private Limited and whether the Petitioner ran the news channel as a proxy owner for an on behalf of someone else.

(iii) Surprisingly, Mr. Sundaram was also asked whether there was "someone" instructing the Petitioner to pose questions concerning Mrs. Sonia Gandhi and concerning her alleged defamation.

(iv) As with the Petitioner, Mr. Sundaram was also asked if the Petitioner's news channel has any arrangement of sending video recording of news reports to the Central Government.

(v) Details on how the Petitioner's channel selects panelists for news shows and whether any remuneration is paid to them.

(m) It has been allegedly learned that an asymptomatic officer attached to the NM Joshi Marg Police Station in Mumbai where the CFO was being interrogated had tested positive for Covid-19 a day earlier with the result that all officers at the police station were now being tested. The CFO had been subjected to grave and unnecessary danger; and

(n) While on the one hand, the police had been investigating FIR 164 of 2020, the FIR lodged by the Petitioner following the attack on him11 is not being investigated satisfactorily. Two persons alleged to have been involved in the attack on the Petitioner were enlarged on bail on 27 April 2020 by the Magistrate's Court at Bhoiwada, Mumbai.

12. On the basis of the above averments, the Petitioner seeks the following reliefs by his IA:

(i) A stay of the investigation and all incidental steps by the Mumbai police in connection with FIR 238 of 2020 transferred to the NM Joshi Marg Police Station in Mumbai (renumbered as FIR 164 of 2020) in pursuance of the order of this Court dated 24 April 2020;

(ii) In the alternative, for a transfer of the investigation to the Central Bureau of Investigation12 with a direction to the CBI to submit reports to this Court from time to time;

(iii) A transfer of the investigation of FIR 148 of 2020 lodged by the Petitioner to the CBI or to an independent investigating agency;

(iv) Permission to the Petitioner to join in the investigation by video conferencing; and

(v) Providing security to the Petitioner and his family at his residence and for the business establishment.

IA 48588 of 202013: filed by the Government of Maharashtra

13. The IA is supported by an affidavit of Abhinash Kumar, Deputy Commissioner of Police, Zone- 3, Mumbai, who is supervising the investigation into Cr. No. 164 of 2020 at the NM Joshi Marg Police Station in Mumbai. The Mumbai police has sought to highlight the conduct of the Petitioner in obstructing the due course of investigation. The reliefs which have been sought in the IA are as follows:

a. Issue appropriate directions as this Hon'ble Court may deem fit so as to insulate the investigation agency from any pressure, threat or coercion from the Petitioner and to enable the Investigating Agency to carry out its lawful obligations in a fair and transparent manner;

b. Restrain the Petitioner from abusing the interim protection granted to the Petitioner vide the order dated 24th April 2020;

14. The basis of the IA appears from the following averments:

(i) On 27 April 2020, the Petitioner attended the NM Joshi Marg Police Station in Mumbai at 9 am accompanied by an entourage of his reporters and camerapersons and gave several speeches which were allegedly telecast live;

(ii) After the Petitioner had been interrogated for 4 hours, a tweet was posted on Republic Bharat stating in Hindi that upon coming out of the police station, the Petitioner had claimed that 'truth will prevail';

(iii) Two other tweets posted on Republic Bharat in regard to the conduct of the investigation have sought to create an impression that:

(a) The police is biased;

(b) The FIR lodged by the Petitioner is not being investigated; and

(c) The Petitioner has been unnecessarily questioned over several hours;

(iv) On 28 April 2020, the Petitioner hosted a debate on Republic Bharat in the course of a programme titled "Puchta hai Bharat" where he made allegations against the Commissioner of Police14, Mumbai of his complicity in a scam involving India Bulls. The Petitioner threatened to reveal these details;

(v) The statements against the CP are intended to hinder the course of the investigation and the allegations have surfaced only after the investigation against the Petitioner commenced on 26 April 2020;

(vi) The allegation of the Petitioner that the police were not investigating his FIR is belied by the circumstance that an FIR was registered Under Sections 341 and 504 read with Section 34 of the Indian Penal Code;

(vii) The two Accused in the FIR filed by the Petitioner were arrested and eventually released on bail on 27 April 2020 by the Metropolitan Magistrate at the 13th Court at Dadar Mumbai; and

(viii) The Deputy Commissioner of Police15, Mumbai has submitted that Palghar lies beyond the territorial jurisdiction of the Mumbai police and hence the accusations made by the Petitioner are false. It has been submitted that the Petitioner has misused his freedom Under Article 19(1)(a) of the Constitution by casting unfounded allegations on the CP and hence, directions of this Court are necessary to insulate the investigating agency so as to the enable it carry on its function in a smooth and transparent manner.

IA 48532 of 2020: filed by the Petitioner

15. The IA is by the Petitioner to produce on the record an affidavit of Shri S. Sundaram, the CFO of Republic Media Network. The affidavit of the CFO attempts to support the case of the Petitioner that:

(i) A prolonged interrogation is being carried out for a seemingly vindictive and malicious purpose;

(ii) The CFO has been interrogated on the structure of the holding company, shareholding pattern and investors: matters which are extraneous to the investigation of the FIR;

(iii) Questions have been posed during the course of the interrogation about the equity cash transactions, the names of the remaining stakeholders, investment by the key investor and the role of the Petitioner's spouse; and

(iv) The CFO was interrogated on the editorial process of the channel, the editorial teams involved and the process whereby a programme is put together. The IO also inquired about how participants are chosen.

IA 48586 of 2020: filed by the Petitioner

16. The Petitioner moved this IA seeking an amendment to the petition filed Under Article 32. The Petitioner seeks the addition of the following reliefs:

(i) A declaration that Section 499 of the Indian Penal Code is violative of Article 19(1)(a) of the Constitution and is hence unconstitutional;

(ii) A declaration that FIR 164 of 202016 and the consequent investigation initiated by the State of Maharashtra are illegal and violative of the fundamental rights guaranteed to the Petitioner Under Articles 19 and 21 of the Constitution;

(iii) A writ of prohibition restraining the State of Maharashtra from registering any FIR against the Petitioner in relation to the broadcast on R Bharat on 21 April 2020 in relation to the Palghar incident; and

(iv) A writ of prohibition restraining the State of Maharashtra from continuing any investigation initiative pursuant to FIR 164 of 2020.

Among the documents which have been annexed to the IA for amendment are copies of:

(a) FIR 238 of 2020 registered on 22 April 2020 at Police Station Sadar, District Nagpur city which now stands transferred;

(b) Copies of the complaints lodged in relation to the broadcast on 21 April 2020 by R Bharat at diverse police stations across the country;

(c) The tweets posted from the tweeter accounts of members of the INC party;

(d) The transcript of the interview with the complaint of FIR 164 of 2020; and

(e) The notices issued to the CFO on 30 April 2020 by the Senior Police Inspector, NM Joshi Marg Police Station in Mumbai.

IA 48515 of 2020 and IA 48519 of 2020:

17. These IAs have been filed by the Petitioner and cover the same reliefs which have been sought in IAs 48585 of 2020 and 48586 of 2020.

Writ Petition (Crl.) Diary No. 11189 of 2020

18. The Writ Petition has been instituted Under Article 32 of the Constitution following the interim order dated 24 April 2020 passed by this Court in the earlier petition. The subsequent petition has been occasioned by the registration of an FIR17 against the Petitioner on 2 May 2020 at the Pydhonie Police Station, Mumbai. The FIR which has been lodged by the third Respondent, claiming to be the Secretary of an organization called Raza Educational Welfare Society. The FIR states that on 29 April 2020, the Petitioner made certain statements in the course of a programme which was broadcast on R Bharat insinuating (with reference to a place of worship) that the "people belonging to the Muslim religion are responsible for the spread of Covid- 19". According to the FIR:

The statements made by Arnab Goswami on 29/04/2020 on republic Bharat TV Channel in connection with the incident of the public gathered in the area of Bandra railway station on 14/04/2020 clearly show that despite Jama Masjid, Bandra being a holy place of worship and despite having no connection with the incident of the gathering of migrant workers at Bandra railway station, Arnab Goswami gave it a communal colour and blamed the Muslim community of being responsible for the spread of Corona. By making statements such as the aforesaid repeatedly on the show, he has severely hurt the sentiments of the Muslim community. He has tried to create communal tensions, incite riots and deliberately hurt the sentiments of the Muslim community by insulting their place of worship. By directly connecting the gathering of migrant workers at the Bandra railway station on 14/04/2020 with Jama Masjid, Arnab Goswami disrupted communal harmony. His statements further implied that the Muslim community is violent and does not respect the law. Arnab Goswami as the owner and anchor of the said TV

show has made these statements with an intention of create a strain/communal disharmony between the Hindu and Muslim communities.

19. Having adverted to the telecast which took place on 29 April 2020, the FIR makes a reference to 14 April 2020 as the date on which the Petitioner as the "anchor and owner" of R Bharat has attempted to connect a place of religious worship with the gathering of migrant workers at Bandra railway station. The FIR has been registered Under Sections 153, 153A, 295A, 500, 505(2), 511, 505(1)(c) and 120B of the Indian Penal Code. Challenging the FIR, the Petitioner seeks to invoke the jurisdiction of this Court for an order quashing the FIR and for a writ directing that no cognisance should be taken on any complaint or FIR on the same cause of action hereafter.

20. Leading the arguments on behalf of the Petitioner, Mr. Harish Salve, learned Senior Counsel submitted that the petition which has been instituted before this Court Under Article 32 raises "wider issues" implicating the freedom of speech and expression of a journalist to air views which fall within the protective ambit of Article 19(1)(a). Mr. Salve submitted that the Petitioner is justified in invoking this jurisdiction since it is necessary for this Court to lay down safeguards which protect the democratic interest in fearless and independent journalism. The submissions which Mr. Salve urges can be formulated for analysis thus:

(i) Both the FIRs which have been lodged against the Petitioner are intended to stifle the free expression of views by an independent journalist which is protected within the ambit of Article 19(1)(a) of the Constitution;

(ii) The investigation by the Mumbai police is mala fide;

(iii) The fact that the lodging of the FIR and the commencement of investigation is mala fide is evident from the following circumstances:

a. All the FIRs, or as the case may be, the complaints are replicas with little variation of language or content and with respect to the same cause of action;

b. The complainants have all chosen states where the government has been formed of or with the support of the INC;

c. The enquiries which were made by the police during the course of interrogating the Petitioner and the CFO bear no nexus with the contents of the FIR and it is evident that the Petitioner is being targeted for expressing views critical of the President of the INC;

d. The involvement of the INC in targeting the Petitioner is evident from the fact that during the course of the investigation, tweets by activists and members of the party appeared on social media bearing on the course of the interrogation;

e. The complainant of the FIR, who is a Cabinet Minister in the State Government of Maharashtra, has gone on record in the course of an interview to target the Petitioner for airing his views;

f. The investigation by the Mumbai police is directed against an alleged act of defamation committed against the President of the INC. The police are trying to implicate the Petitioner in the offence of defamation despite the settled position of law that absent a complaint by the person who is allegedly defamed, no FIR can be lodged; and

g. The Petitioner has, in the course of his programmes on R Bharat and Republic TV, implicated the Maharashtra police and the State Government for their failure to investigate the Palghar incident. He has leveled serious allegations against the CP, Mumbai. Hence, there is an evident conflict of interest in the investigation being conducted by the Mumbai police and the Petitioner apprehends that a fair and impartial process will be denied to him were the investigation to continue; and

(iv) In the circumstances which have been set out above, it is appropriate to protect the constitutional rights of the Petitioner by directing that the investigation be stayed or that, in the alternative, it be handed over to the CBI.

21. Mr. Tushar Mehta, learned Solicitor General has urged that this is a peculiar situation where the Mumbai police, as the investigating agency, has sought the protection of this Court in order to conduct a fair and impartial investigation, complaining that the Petitioner is impeding the process. The Solicitor General submitted that in this backdrop, it would be appropriate if the Court were to decide that an impartial agency conduct the investigation. Mr. Mehta urged that should this Court be inclined to hand over the investigation to the CBI, the agency will conduct the investigation. The Solicitor General urged that:

(i) The conduct of the state police in the present case is 'disturbing';

(ii) The police, as an investigating agency, has sought insulation from the Accused; and

(iii) Investigation by an agency which allays any apprehension of victimisation would be the appropriate course of action.

22. Mr. Kapil Sibal, learned Senior Counsel appearing on behalf of the State of Maharashtra has, while opposing the petitions, urged that:

(i) Both the petitions are an attempt to seek directions from this Court to monitor the course of the investigation which is impermissible in view of the settled legal position;

(ii) The pleadings in the petitions as well as the submissions urged during the hearing indicate that the Petitioner is objecting to the questions which were posed to him during the course of the investigation;

(iii) The Petitioner, as the person against whom the first FIR has been lodged, has absolutely no locus to question the line of investigation or nature of the interrogation;

(iv) The rights of the Petitioner Under Article 19(1)(a) are subject to the limitation stipulated in Article 19(2). The FIRs and the video clips from the programmes posted by the Petitioner (clips of which were played by Mr. Kapil Sibal, learned Senior Counsel over video conferencing during the course of the hearing) indicate that the offences in question are made out;

(v) Contrary to the allegations which have been leveled by the Petitioner against the Maharashtra police, it is the Petitioner who has made a conscious effort to stifle the investigation by an unrestrained use of social media, which is evident from the tweets emanating from the channel during and after the interrogation;

(vi) The Petitioner can have absolutely no grievance with the course of the investigation when he was summoned for interrogation only on one day between the date of the registration of the FIR and the present time;

(vii) Mumbai police has no territorial jurisdiction or connection with the investigation which has been conducted into the Palghar incident;

(viii) The conduct of the Petitioner would indicate that he has made baseless allegations against the CP, Mumbai for the first time after his interrogation took place on 27 April 2020. The attempt

by the Petitioner is clearly to use his position as a media journalist to create an environment of ill-feeling towards the investigating agency;

(ix) As regards the second FIR, no investigation has commenced and hence recourse to the jurisdiction of this Court Under Article 32 is premature;

(x) Despite the liberty which was granted to the Petitioner by this Court in its order dated 24 April 2020, the Petitioner has neither moved the Bombay High Court for quashing the FIRs Under Section 482 of the Code of Criminal Procedure or for the grant of anticipatory bail; and

(xi) In the above circumstances, the petitions filed by the Petitioner Under Article 32 of the Constitution ought not to be entertained.

23. Dr Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the investigating agency of the Maharashtra police adduced seven precepts as the foundation of his submission that the petitions ought not to be entertained. Dr Singhvi urged:

(i) The facts of the present case clearly demonstrate that in the garb of an arc of protection, the Accused is attempting to browbeat the police;

(ii) The petitions Under Article 32 constitute an attempt of 'leapfrogging' the normal procedure available under the Code of Criminal Procedure;

(iii) Any interference in the course of an investigation is impermissible;

(iv) What the Petitioner seeks to attempt by the process which has been adopted is to convert the jurisdiction Under Article 32 into one Under Section 482 of the Code of Criminal Procedure;

(v) Though the Petitioner is entitled to the fundamental rights Under Article 19(1)(a), their exercise is subject to the limitations stipulated in Article 19(2). The content of the FIRs and the video clips would demonstrate that the restrictions Under Article 19(2) are attracted;

(vi) Applying the sub judice doctrine, the Petitioner is not entitled to seek the intervention of this Court in the course of an investigation; and

(vii) The transfer of an ongoing investigation to the CBI has been held to be an extraordinary power which must be sparingly exercised in exceptional circumstances. The Accused, it is well-settled, can have no locus in regard to the choice of the investigating agency.

24. Elaborating these submissions, Dr Singhvi submitted that:

(i) Despite the protection that was granted by this Court for three weeks, the Petitioner has not moved the competent court for anticipatory bail or for quashing the FIRs;

(ii) No complainant was impleaded when the first petition was filed;

(iii) In respect of the FIR at the Pydhonie Police Station, no investigation has even commenced;

(iv) The transfer of the investigation of the first FIR from Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai was at the request of and with the consent of the Petitioner; and

(v) The conduct of the Petitioner indicates that it is he who is stifling the investigation.

25. Dr Singhvi submitted that an interrogation does not infringe personal liberty. On the basis of the above submissions, it has been urged that no case has been made out for the transfer of the investigation to the CBI. He urged that the second Writ Petition must, in any event, be dismissed.

26. At this stage, it is necessary to note that the attention of Mr. Kapil Sibal and Dr Singhvi, learned Senior Counsel was specifically drawn to the fact that the FIRs which were filed in various states by persons professing allegiance to the INC appear, prima facie, to be reproductions of the same language and content. Responding to this, Mr. Sibal fairly stated that in the exercise of the jurisdiction Under Article 32, this Court may well quash all the other FIRs and allow the investigation into the FIR which has been transferred to the NM Joshi Marg Police Station in Mumbai to proceed in accordance with law. Mr. Sibal has also urged that there cannot be any dispute in regard to the legal position that a complaint in regard to the offence of defamation can only be at the behest of the person who is aggrieved. Consequently, the FIR which has been presently under investigation at the NM Joshi Marg Police Station in Mumbai would not cover any offence Under Section 499 of the Indian Penal Code.

27. Mr. K.V. Vishwanathan, learned Senior Counsel appearing on behalf of the complainant in the second FIR submitted that:

(i) The FIR which was lodged on 2 May 2020 pertains to a broadcast which took place on 29 April 2020;

(ii) The maintainability of the Writ Petitions Under Article 32 is questioned; and

(iii) The statements made by the Petitioner in the course of the programmes which were broadcast clearly implicate offences Under Sections 153A, 295A and cognate provisions of the Indian Penal Code.

Analysis

28. The fundamental basis on which the jurisdiction of this Court has been invoked Under Article 32 is the filing of multiple FIRs and complaints in various States arising from the same cause of action. The cause of action was founded on a programme which was telecast on R Bharat on 21 April 2020. FIRs and criminal complaints were lodged against the Petitioner in the States of Maharashtra, Rajasthan, Madhya Pradesh, Telangana and Jharkhand besides the Union Territories of Jammu and Kashmir. The law concerning multiple criminal proceedings on the same cause of action has been analyzed in a judgment of this Court in TT Antony v. State of Kerala MANU/SC/0365/2001 : (2001) 6 SCC 181 ("TT Antony"). Speaking for a two judge Bench, Justice Syed Shah Mohammed Quadri interpreted the provisions of Section 154 and cognate provisions of the Code of Criminal Procedure including Section 173 and observed:

20. ...under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 Code of Criminal Procedure, only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Code of Criminal Procedure. Thus, there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 Code of Criminal Procedure.

The Court held that "there can be no second FIR" where the information concerns the same cognisable offence alleged in the first FIR or the same occurrence or incident which gives rise to

one or more cognisable offences. This is due to the fact that the investigation covers within its ambit not just the alleged cognisable offence, but also any other connected offences that may be found to have been committed. This Court held that once an FIR postulated by the provisions of Section 154 has been recorded, any information received after the commencement of investigation cannot form the basis of a second FIR as doing so would fail to comport with the scheme of the Code of Criminal Procedure. The court observed:

18. ...All other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling Under Section 162 Code of Criminal Procedure. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of Code of Criminal Procedure.

This Court adverted to the need to strike a just balance between the fundamental rights of citizens Under Articles 19 and 21 and the expansive power of the police to investigate a cognisable offence. Adverting to precedent, this Court held:

27. ...the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report Under Section 173(2) Code of Criminal Procedure. It would clearly be beyond the purview of Sections 154 and 156 Code of Criminal Procedure, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter- case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report Under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power Under Section 482 Code of Criminal Procedure or Under Articles 226/227 of the Constitution.

(Emphasis supplied)

The Court held that barring situations in which a counter- case is filed, a fresh investigation or a second FIR on the basis of the same or connected cognisable offence would constitute an "abuse of the statutory power of investigation" and may be a fit case for the exercise of power either Under Section 482 of the Code of Criminal Procedure or Articles 226/227 of the Constitution.

29. The decision in TT Antony came up for consideration before a three judge Bench in Upkar Singh v. Ved Prakash MANU/SC/0733/2004 : (2004) 13 SCC 292 ("Upkar Singh"). Justice N

Santosh Hegde, speaking for this Court adverted to the earlier decisions of this Court in Ram Lal Narang v. State (Delhi Administration) MANU/SC/0216/1979 : (1979) 2 SCC 322 ("Ram Lal Narang"), Kari Choudhary v. Mst. Sita Devi MANU/SC/0781/2001 : (2002) 1 SCC 714 ("Kari Choudhary") and State of Bihar v. JAC Saldanha MANU/SC/0253/1979 : (1980) 1 SCC 554 ("Saldanha"). The Court noted that in Kari Choudhary, this Court held that:

11. ...Of course the legal position is that there cannot be two FIRs against the same Accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency.

30. In Saldanha, this Court had held that the power conferred upon the Magistrate Under Section 156(3) does not affect the power of the investigating officer to further investigate the case even after submission of the report Under Section 173(8). In Upkar Singh, this Court noted that the decision in Ram Lal Narang is "in the same line" as the judgments in Kari Choudhary and Saldanha and held that the decision in TT Antony does not preclude the filing of a second complaint in regard to the same incident as a counter complaint nor is this course of action prohibited by the Code of Criminal Procedure. In that context, this Court held:

23. Be that as it may, if the law laid down by this Court in T.T. Antony case [MANU/SC/0365/2001 : (2001) 6 SCC 181 : 2001 SCC (Cri.) 1048] is to be accepted as holding that a second complaint in regard to the same incident filed as a counter- complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real Accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimate right to bring the real Accused to book. This cannot be the purport of the Code.

These principles were reiterated by a two judge Bench of this Court in Babubhai v. State of Gujarat MANU/SC/0643/2010 : (2010) 12 SCC 254. Dr. Justice B.S. Chauhan observed:

21. In such a case the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the Accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted.

This Court held that the relevant enquiry is whether two or more FIRs relate to the same incident or relate to incidents which form part of the same transactions. If the Court were to conclude in the affirmative, the subsequent FIRs are liable to be quashed. However, where the subsequent FIR relates to different incidents or crimes or is in the form of a counter- claim, investigation may proceed.

[See also in this context Chirra Shivraj v. State of Andhra Pradesh MANU/SC/0992/2010 : (2010) 14 SCC 444 and Chirag M Pathak v. Dollyben Kantilal Patel MANU/SC/1439/2017 : (2018) 1 SCC 330].

31. In the present case, all the FIRs or complaints which have been lodged in diverse jurisdictions arise out of one and the same incident- the broadcast by the Petitioner on 21 April 2020 on R Bharat. The broadcast is the foundation of the allegation that offences have been committed under the provisions of Sections 153, 153A, 153B, 295A, 298, 500, 504 and 506 of the Indian Penal Code. During the course of the hearing, this Court has had the occasion, with the assistance of the learned Senior Counsel, to peruse the several complaints that were filed in relation to the incident dated 21 April 2020. They are worded in identical terms and leave no manner of doubt that an identity of cause of action underlies the allegations leveled against the Petitioner on the basis of the programme which was broadcast on 21 April 2020. Moreover, the language, content and sequencing of paragraphs and their numbering is identical. It was in this backdrop that Mr. Kapil Sibal, learned Senior Counsel fairly submitted (in our view correctly) that this Court may proceed to quash all the other FIRs and complaints lodged in diverse jurisdictions in the States, leaving open, however, the investigation in respect of the FIR 238 of 2020 dated 22 April 2020 transferred from the Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai.

32. Article 32 of the Constitution constitutes a recognition of the constitutional duty entrusted to this Court to protect the fundamental rights of citizens. The exercise of journalistic freedom lies at the core of speech and expression protected by Article 19(1)(a). The Petitioner is a media journalist. The airing of views on television shows which he hosts is in the exercise of his fundamental right to speech and expression Under Article 19(1)(a). India's freedoms will rest safe as long as journalists can speak truth to power without being chilled by a threat of reprisal. The exercise of that fundamental right is not absolute and is answerable to the legal regime enacted with reference to the provisions of Article 19(2). But to allow a journalist to be subjected to multiple complaints and to the pursuit of remedies traversing multiple states and jurisdictions when faced with successive FIRs and complaints bearing the same foundation has a stifling effect on the exercise of that freedom. This will effectively destroy the freedom of the citizen to know of the affairs of governance in the nation and the right of the journalist to ensure an informed society. Our decisions hold that the right of a journalist Under Article 19(1)(a) is no higher than the right of the citizen to speak and express. But we must as a society never forget that one cannot exist without the other. Free citizens cannot exist when the news media is chained to adhere to one position.

Yuval Noah Harari has put it succinctly in his recent book titled "21 Lessons for the 21st Century": "Questions you cannot answer are usually far better for you than answers you cannot question."

33. A litany of our decisions- to refer to them individually would be a parade of the familiar- has firmly established that any reasonable restriction on fundamental rights must comport with the proportionality standard, of which one component is that the measure adopted must be the least restrictive measure to effectively achieve the legitimate state aim. Subjecting an individual to numerous proceedings arising in different jurisdictions on the basis of the same cause of action cannot be accepted as the least restrictive and effective method of achieving the legitimate state aim in prosecuting crime. The manner in which the Petitioner has been subjected to numerous FIRs in several States, besides the Union Territories of Jammu and Kashmir on the basis of identical allegations arising out of the same television show would leave no manner of doubt that the intervention of this Court is necessary to protect the rights of the Petitioner as a citizen and as a journalist to fair treatment (guaranteed by Article 14) and the liberty to conduct an independent portrayal of views. In such a situation to require the Petitioner to approach the respective High Courts having jurisdiction for quashing would result into a multiplicity of proceedings and unnecessary harassment to the Petitioner, who is a journalist.

34. The issue concerning the registration of numerous FIRs and complaints covering different states is however, as we will explain, distinct from the investigation which arises from FIR 164 of 2020 at NM Joshi Marg Police Station in Mumbai. The Petitioner, in the exercise of his right Under Article 19(1)(a), is not immune from an investigation into the FIR which has been transferred from Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai. This balance has to be drawn between the exercise of a fundamental right Under Article 19(1)(a) and the investigation for an offence under the Code of Criminal Procedure. All other FIRs in respect of the same incident constitute a clear abuse of process and must be quashed.

35. The Petitioner has sought, for reasons outlined earlier, the transfer of the investigation to CBI. Before we elucidate the law on the subject, we must emphasize at the outset that the transfer of FIR 238 of 2020 from the Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai was with the consent of the Petitioner and on his request. The reason why the investigation of the FIR was transferred to the NM Joshi Police Station in Mumbai was because that was the police station at which an earlier FIR had been lodged by the Petitioner in respect of the incident when he and his spouse were allegedly obstructed by two political activists on their way home at midnight on 23 April 2020. Having accepted the transfer of the investigation from Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai, the Petitioner now seeks to question that very investigation by the Mumbai police.

36. The transfer of an investigation to the CBI is not a matter of routine. The precedents of this Court emphasise that this is an "extraordinary power" to be used "sparingly" and "in exceptional circumstances". Speaking for a Constitution Bench in State of West Bengal v. Committee for

Protection of Democratic Rights, West Bengal MANU/SC/0121/2010 : (2010) 3 SCC 571 ("CPDR, West Bengal"), Justice DK Jain observed:

70. ...despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self- imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

(Emphasis supplied)

This principle has been reiterated in K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai MANU/SC/0842/2013 : (2013) 12 SCC 480. Dr. Justice B.S. Chauhan, speaking for a three judge Bench of this Court held:

13. ...This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instill confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies.

Elaborating on this principle, this Court observed:

17. ...the Court could exercise its constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to

influence the investigation, and further that it is so necessary to do justice and to instill confidence in the investigation or where the investigation is prima facie found to be tainted/biased.

The Court reiterated that an investigation may be transferred to the CBI only in "rare and exceptional cases". One factor that courts may consider is that such transfer is "imperative" to retain "public confidence in the impartial working of the State agencies." This observation must be read with the observations by the Constitution Bench in CPDR, West Bengal that mere allegations against the police do not constitute a sufficient basis to transfer the investigation.

37. In Romila Thapar v. Union of India MANU/SC/1098/2018 : (2018) 10 SCC 753, Justice AM Khanwilkar speaking for a three judge Bench of this Court (one of us, Dr Justice DY Chandrachud, dissenting) noted the dictum in a line of precedents laying down the principle that the Accused "does not have a say in the matter of appointment of investigating agency". In reiterating this principle, this Court relied upon its earlier decisions in Narmada Bai v. State of Gujarat MANU/SC/0371/2011 : (2011) 5 SCC 79, Sanjiv Rajendra Bhatt v. Union of India MANU/SC/1156/2015 : (2016) 1 SCC 1, E Sivakumar v. Union of India MANU/SC/0591/2018 : (2018) 7 SCC 365 and Divine Retreat Centre v. State of Kerala MANU/SC/1150/2008 : (2008) 3 SCC 542. This Court observed:

30. ...the consistent view of this Court is that the Accused cannot ask for changing the investigating agency or to do investigation in a particular manner including for court- monitored investigation.

38. The principle of law that emerges from the precedents of this Court is that the power to transfer an investigation must be used "sparingly" and only "in exceptional circumstances". In assessing the plea urged by the Petitioner that the investigation must be transferred to the CBI, we are guided by the parameters laid down by this Court for the exercise of that extraordinary power. It is necessary to address the grounds on which the Petitioner seeks a transfer of the investigation. The grounds urged for transfer are:

(i) The length of the interrogation which took place on 27 April 2020;

(ii) The nature of the inquiries which were addressed to the Petitioner and the CFO and the questions addressed during interrogation;

(iii) The allegations leveled by the Petitioner against the failure of the State government to adequately probe the incident at Palghar involving an alleged lynching of two persons in the presence of police and forest department personnel;

(iv) Allegations which have been made by the Petitioner on 28 April 2020 in regard to CP, Mumbai; and

(v) Tweets on the social media by activists of the INC and the interview by the complainant to a representative of R Bharat.

39. As we have observed earlier, the Petitioner requested for and consented to the transfer of the investigation of the FIR from the Police Station Sadar, District Nagpur City to the NM Joshi Marg Police Station in Mumbai. He did so because an earlier FIR lodged by him at that police station was under investigation. The Petitioner now seeks to preempt an investigation by the Mumbai police. The basis on which the Petitioner seeks to achieve this is untenable. An Accused person does not have a choice in regard to the mode or manner in which the investigation should be carried out or in regard to the investigating agency. The line of interrogation either of the Petitioner or of the CFO cannot be controlled or dictated by the persons under investigation/interrogation. In P Chidambaram v. Directorate of Enforcement MANU/SC/1209/2019 : (2019) 9 SCC 24, Justice R Banumathi speaking for a two judge Bench of this Court held that:

66. ...there is a well- defined and demarcated function in the field of investigation and its subsequent adjudication. It is not the function of the court to monitor the investigation process so long as the investigation does not violate any provision of law. It must be left to the discretion of the investigating agency to decide the course of investigation. If the court is to interfere in each and every stage of the investigation and the interrogation of the Accused, it would affect the normal course of investigation. It must be left to the investigating agency to proceed in its own manner in interrogation of the Accused, nature of questions put to him and the manner of interrogation of the Accused.

(Emphasis supplied)

This Court held that so long as the investigation does not violate any provision of law, the investigation agency is vested with the discretion in directing the course of investigation, which includes determining the nature of the questions and the manner of interrogation. In adopting this view, this Court relied upon its earlier decisions in State of Bihar v. P.P. Sharma MANU/SC/0542/1992 : 1992 Supp. (1) SCC 222 and Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria MANU/SC/0872/1998 : (1998) 1 SCC 52 in which it was held that the investigating agency is entitled to decide "the venue, the timings and the questions and the manner of putting such questions" during the course of the investigation.

40. In Director, Central Bureau of Investigation v. Niyamavedi represented by its Member K Nandini, Advocate MANU/SC/2247/1995 : (1995) 3 SCC 601, Justice Sujata V. Manohar, speaking for a three judge Bench of this Court held that the High Court should have:

4. ...refrained from making any comments on the manner in which investigation was being conducted by the CBI, looking to the fact that the investigation was far from complete.

This Court observed that:

4. ...Any observations which may amount to interference in the investigation, should not be made. Ordinarily the Court should refrain from interfering at a premature stage of the investigation as that may derail the investigation and demoralise the investigation. Of late, the tendency to interfere in the investigation is on the increase and courts should be wary of its possible consequences.

This Court adopted the position that courts must refrain from passing comments on an ongoing investigation to extend to the investigating agencies the requisite liberty and protection in conducting a fair, transparent and just investigation.

41. The contention of the Petitioner that the length of the investigation or the nature of the questions addressed to him and the CFO during the interrogation must weigh in transferring the investigation cannot be accepted. The investigating agency is entitled to determine the nature of the questions and the period of questioning. The Petitioner was summoned for investigation on one day. Furthermore, the allegation of the Petitioner that there is a conflict of interest arising out of the criticism by him of the alleged failure of the State government to adequately probe the incident at Palghar is not valid. The investigation of the Palghar incident is beyond the territorial jurisdiction of the Mumbai police.

42. The Petitioner has then sought to rely upon the allegations which he has leveled against the CP, Mumbai. The Petitioner was interrogated on 27 April 2020. The allegations which he leveled against the CP, Mumbai were in the course of a television programme on 28 April 2020 ("Poochta hai Bharat") relayed on R Bharat at 1900 hrs. As we have noted earlier, this Court has, in CPDR, West Bengal held that no transfer of investigation can be ordered "merely because a party has levelled some allegations against the local police." Accordingly, we do not find that leveling such allegations would by and itself constitute a sufficient ground for the transfer of the investigation.

43. The interview given by the complainant to a representative of R Bharat does not furnish a valid basis in law for an inference that the investigation is tainted or as warranting a transfer of investigation to the CBI. The Government of Maharashtra has moved an application before this

Court (affirmed by the DCP, Zone- 3) seeking appropriate directions to insulate the investigating agency "from any pressure, threat or coercion from the Petitioner" and to enable it to discharge its lawful duties in a fair and transparent manner. Based on the views tweeted by R Bharat on social media, it is the Maharashtra police which is now claiming a restraining order against the Petitioner. We are unable to accede to the submission of the Solicitor General that the contents of the IA filed by the State would make it necessary to transfer the investigation to the CBI. The investigating agency has placed on the record what it believes is an attempt by the Petitioner to discredit the investigation by taking recourse to the social media and by utilizing the news channels which he operates. Social media has become an overarching presence in society. To accept the tweets by the Petitioner and the interview by the complainant as a justification to displace a lawfully constituted investigation agency of its jurisdiction and duty to investigate would have far- reaching consequences for the federal structure. We are disinclined to do so.

44. In assessing the contention for the transfer of the investigation to the CBI, we have factored into the decision- making calculus the averments on the record and submissions urged on behalf of the Petitioner. We are unable to find any reason that warrants a transfer of the investigation to the CBI. In holding thus, we have applied the tests spelt out in the consistent line of precedent of this Court. They have not been fulfilled. An individual under investigation has a legitimate expectation of a fair process which accords with law. The displeasure of an Accused person about the manner in which the investigation proceeds or an unsubstantiated allegation (as in the present case) of a conflict of interest against the police conducting the investigation must not derail the legitimate course of law and warrant the invocation of the extraordinary power of this Court to transfer an investigation to the CBI. Courts assume the extraordinary jurisdiction to transfer an investigation in exceptional situations to ensure that the sanctity of the administration of criminal justice is preserved. While no inflexible guidelines are laid down, the notion that such a transfer is an "extraordinary power" to be used "sparingly" and "in exceptional circumstances" comports with the idea that routine transfers would belie not just public confidence in the normal course of law but also render meaningless the extraordinary situations that warrant the exercise of the power to transfer the investigation. Having balanced and considered the material on record as well as the averments of and submissions urged by the Petitioner, we find that no case of the nature which falls within the ambit of the tests enunciated in the precedents of this Court has been established for the transfer of the investigation.

45. A final aspect requires elaboration. Section 199 of the Code of Criminal Procedure stipulates prosecution for defamation. Sub- section (1) of Section 199 stipulates that no court shall take cognisance of an offence punishable under Chapter XXI of the Penal Code, 1860 except upon a complaint made by some person aggrieved by the offence. However, where such a person is under the age of eighteen years, or suffers from a mental illness or from sickness or infirmity rendering the person unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf. Sub- section (2) states that when any offence is alleged against a person who is the President of India, Vice- President of India, Governor of a State, Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of their conduct in the discharge of public functions, a Court of

Session may take cognisance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor. Sub- section (3) states that every complaint referred to in Sub- section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the Accused of the offence alleged to have been committed. Sub- section (4) mandates that no complaint Under Sub- section (2) shall be made by the Public Prosecutor except with the previous sanction of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government or any other public servant employed in connection with the affairs of the State and of the Central Government, in any other case. Sub- section (5) bars the Court of Sessions from taking cognisance of an offence Under Sub- section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed. Sub- section (6) states that nothing in this Section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognisance of the offence upon such complaint.18

46. Interpreting this provision, a two judge Bench of this Court in Subramanian Swamy v. Union of India, Ministry of Law MANU/SC/0621/2016 : (2016) 7 SCC 221 ("Subramanian Swamy") held that neither can an FIR be filed nor can a direction be issued Under Section 156(3) of the Code of Criminal Procedure and it is only a complaint which can be instituted by a person aggrieved. This Court held:

207. Another aspect required to be addressed pertains to issue of summons. Section 199 Code of Criminal Procedure envisages filing of a complaint in court. In case of criminal defamation neither can any FIR be filed nor can any direction be issued Under Section 156(3) Code of Criminal Procedure. The offence has its own gravity and hence, the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process, as has been held in Rajindra Nath Mahato v. T. Ganguly [Rajindra Nath Mahato v. T. Ganguly, MANU/SC/0167/1971 : (1972) 1 SCC 450 : 1972 SCC (Cri.) 206], is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant. In Punjab National Bank v. Surendra Prasad Sinha [Punjab National Bank v. Surendra Prasad Sinha, MANU/SC/0345/1992 : 1993 Supp (1) SCC 499 : 1993 SCC (Cri.) 149] it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the Accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded, then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. In Pepsi Foods Ltd. v. Special Judicial Magistrate [Pepsi Foods Ltd. v. Special Judicial Magistrate, MANU/SC/1090/1998 : (1998) 5 SCC 749 : 1998 SCC (Cri.) 1400], a two- Judge Bench has held that summoning of an Accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.

47. In view of the clear legal position, Mr. Kapil Sibal, learned Senior Counsel appearing on behalf of the State of Maharashtra has fairly stated that the FIR which is under investigation at the NM Joshi Marg Police Station in Mumbai does not and cannot cover any alleged act of criminal defamation. We will clarify this in our final directions.

48. Before we conclude, it is necessary to advert to the interim order of this Court dated 24 April 2020. By the interim order, the Petitioner has been granted liberty to move the competent court in order to espouse the remedies available under the Code of Criminal Procedure. Hence, we clarify that this Court has not in the present judgment expressed any opinion on the FIR which is under investigation at the NM Joshi Marg Police Station in Mumbai.

49. We hold that it would be inappropriate for the court to exercise its jurisdiction Under Article 32 of the Constitution for the purpose of quashing FIR 164 of 2020 under investigation at the NM Joshi Marg Police Station in Mumbai. In adopting this view, we are guided by the fact that the checks and balances to ensure the protection of the Petitioner's liberty are governed by the Code of Criminal Procedure. Despite the liberty being granted to the Petitioner on 24 April 2020, it is an admitted position that the Petitioner did not pursue available remedies in the law, but sought instead to invoke the jurisdiction of this Court. Whether the allegations contained in the FIR do or do not make out any offence as alleged will not be decided in pursuance of the jurisdiction of this Court Under Article 32, to quash the FIR. The Petitioner must be relegated to the pursuit of the remedies available under the Code of Criminal Procedure, which we hereby do. The Petitioner has an equally efficacious remedy available before the High Court. We should not be construed as holding that a petition Under Article 32 is not maintainable. But when the High Court has the power Under Section 482, there is no reason to by- pass the procedure under the Code of Criminal Procedure, we see no exceptional grounds or reasons to entertain this petition Under Article 32. There is a clear distinction between the maintainability of a petition and whether it should be entertained. In a situation like this, and for the reasons stated hereinabove, this Court would not like to entertain the petition Under Article 32 for the relief of quashing the FIR being investigated at the NM Joshi Police Station in Mumbai which can be considered by the High Court. Therefore, we are of the opinion that the Petitioner must be relegated to avail of the remedies which are available under the Code of Criminal Procedure before the competent court including the High Court.

50. By the order of this Court dated 24 April 2020, the Petitioner was protected against coercive steps for a period of three weeks. The period which was due to expire on 14 May 2020 was extended, when judgment was reserved on 11 May 2020, pending the decision of this Court. We are inclined to extend that protection for a further period of three weeks, particularly having regard to the outbreak of Covid- 19, so as to leave adequate time to the Petitioner to pursue his remedies before the competent forum.

51. As we have noted earlier, multiple FIRs and complaints have been filed against the Petitioner in several states and in the Union Territories of Jammu and Kashmir. By the interim order of this Court dated 24 April 2020, further steps in regard to all the complaints and FIRs, save and except for the investigation of the FIR lodged at Police Station Sadar, District Nagpur City were stayed. The FIR at Police Station Sadar, District Nagpur City has been transferred to NM Joshi Marg Police Station in Mumbai. We find merit in the submission of Mr. Kapil Sibal, learned Senior Counsel that fairness in the administration of criminal justice would warrant the exercise of the jurisdiction Under Article 32 to quash all other FIRs (save and except for the one under investigation in Mumbai). However, we do so only having regard to the principles which have been laid down by this Court in TT Antony. The filing of multiple FIRs arising out of the same telecast of the show hosted by the Petitioner is an abuse of the process and impermissible. We clarify that the quashing of those FIRs would not amount to the expression of any opinion by this Court on the merits of the FIR which is being investigated by the NM Joshi Marg Police Station in Mumbai.

52. We find no reason to entertain the subsequent Writ Petition19 which has been filed by the Petitioner in respect of the FIR lodged at Pydhonie Police Station (FIR 137 of 2020 dated 2 May 2020). The basis on which the jurisdiction of this Court was invoked in the first Writ Petition- the filing of multiple FIRs in various states- is absent in the subsequent Writ Petition (Crl.) Diary No. 11189 of 2020. The Petitioner would be at liberty to pursue his remedies under the law in respect of the FIR. Any recourse to such a remedy shall be considered on its own merits by the competent court.

Directions

1. Writ Petition (Crl.) No. 130 of 2020

53. Amendments as proposed are allowed. The amendments shall be carried out within one week.

(i) The prayer for transfer of the investigation to the CBI is rejected;

(ii) The interim order of this Court dated 24 April 2020 by which FIR 238 of 2020 dated 22 April 2020 was transferred from the Police Station Sadar, District Nagpur City to NM Joshi Marg Police Station in Mumbai is confirmed. The FIR which has now been numbered as 164 of 2020 shall be investigated by the NM Joshi Marg Police Station in Mumbai;

(iii) We decline to entertain the prayer for quashing FIR 164 of 2020 (earlier FIR 238 of 2020) Under Article 32 of the Constitution. The Petitioner would be at liberty to pursue such remedies as are

available in law under the Code of Criminal Procedure before the competent forum. Any such application shall be considered on its own merits by the competent court;

(iv) In view of the law laid down by this Court in Subramanian Swamy, we clarify that the above FIR does not cover the offence of criminal defamation Under Section 499 of the Indian Penal Code which offence will not form the subject matter of the investigation. Hence, it is not necessary to address the prayer for dealing with the constitutional challenge to the validity of the said provision in these proceedings;

(v) The following FIRs/complaints are quashed, following the decision of this Court in TT Antony (explained subsequently) that successive FIRs/complaints founded on the same cause of action are not maintainable:

• FIR No. 245 of 2020, dated 22 April 2020, registered at Police Station Supela, District Durg, Chhattisgarh, Under Sections 153- A, 295- A and 505(2) of the Indian Penal Code 1860.

• FIR No. 180 of 2020, dated 23 April 2020, registered at Police Station Bhilal Nagar, District Durg, Chhattisgarh, Under Sections 153- A, 188, 290 and 505(1) of the Indian Penal Code 1860.

• FIR No. 176 of 2020, dated 22 April 2020, registered at Police Station Civil Lines, District Raipur, Chhattisgarh, Under Sections 153- A, 295- A and 505(2) of the Indian Penal Code 1860.

• Complaint dated 21 April 2020 by District Congress Committee- Antagrah, Kanker, Chhattisgarh.

• Complaint dated 22 April 2020 by Pritam Deshmukh (adv.), Durg District Congress Committee- to SHO city PS Durg, Chhattisgarh.

• Complaint dated 22 April 2020 by Suraj Singh Thakur, State Vice President, Indian Youth Congress- to Sr. Police Officer, Chirag Nagar, Ghatkopar East, Mumbai.

• Complaint dated 22 April 2020- Pankaj Prajapti (party worker of INC and ex- spokesperson NSUI) through counsel Anshuman Shrivastavas- Superintendent of Police, Crime Branch, Indore, Madhya Pradesh.

• Complaint dated 22 April 2020- Balram Jakhad (adv.)- to PS Shyam Nagar- Under Section 153, 188, 505, 120B in Jaipur.

• Complaint by Jaswant Gujar- to SHO Bajaj Nagar PS, Jaipur.

• Complaint dated 22 April 2020 by Fundurdihari, Ambikapur, District Sarguja, Chhattisgarh- Rajesh Dubey, Chhattisgarh State Congress Committee- to SHO Gandhi Nagar, Ambikapur- Under Section 153, 153A, 153B, 504, 505.

• Complaint dated 22 April 2020 in Telangana by Anil Kumar Yadav, State President of Telangana Youth Congress- to SHO Hussaini Alam- Under Section 117, 120B, 153, 153A, 295A, 298, 500, 504, 505 and 506. Also 66A of the IT Act.

• Complaint dated 23 April 2020 by Anuj Mishra before Kotwali, Urai, Tulsi Nagar.

• Complaint dated 22 April 2020 by Kumar Raja, VP, Youth Congress, Jharkhand Congress Committee before Kotwali Police Station, Upper Bazar, Ranchi.

• Complaint dated 22 April 2020 by Madhya Pradesh Youth Congress.

(vi) The quashing of the FIRs and complaints listed out in (v) above shall not amount to any expression of opinion by this Court on the merits of the FIR which is under investigation by the NM Joshi Marg Police Station in Mumbai;

(vii) No other FIR or, as the case may be, complaint shall be initiated or pursued in any other forum in respect of the same cause of action emanating from the broadcast on 21 April 2020 by the Petitioner on R Bharat. Any other FIRs or complaints in respect of the same cause of action emanating from the broadcast on 21 April 2020, other than the FIRs or complaints referred to in (v) above are also held to be not maintainable; and

(viii) Liberty to the complainants to move this Court for directions if it becomes necessary to do so.

2. Writ Petition (Crl.) Diary No. 11189 of 2020

54. The Writ Petition is dismissed with liberty to the Petitioner to pursue such remedies as are available in accordance with law.

3. (i) The protection granted to the Petitioner on 24 April 2020 in Writ Petition (Crl.) Diary No. 11006 of 202020 against coercive steps is extended for a period of three weeks from the date of this judgment to enable the Petitioner to pursue the remedies available in law;

(ii) The CP, Mumbai shall consider the request of the Petitioner for the provision of security at the residence of the Petitioner and at the business establishment in Mumbai, in accordance with law. Based on the threat perception, police protection may be provided if it is considered appropriate and for the period during which the threat perception continues; and

(iii) Nothing contained in the present judgment shall be construed as an expression of opinion on the merits of the allegations contained in the FIRs.

55. Writ Petition (Crl.) No. 130 of 2020 shall stand disposed of. Writ Petition (Crl.) Diary No. 11189 of 2020 shall stand dismissed with the liberty which has been granted in the above segment. IA 48588 of 2020 filed by the state government is dismissed, leaving it open to the investigating agency to urge its submissions before the competent court. All other interim applications are disposed of in view of the above directions.

56. Pending application(s), if any, shall stand disposed of.

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