



**Second Semester
LL.B. II Term**

**Law of Crimes-II
(The Bharatiya Nagarik Suraksha Sanhita, 2023)**

Paper No. LB-203

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LL.B. - II Term

The Bharatiya Nagarik Suraksha Sanhita, 2023

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The Bharatiya Nagarik Suraksha Sanhita, 2023 lays down the procedural law on Crimes in India. It replaces the Code of Criminal Procedure, 1973. BNSS provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected person, and the imposition of suitable punishment on the guilty. It is further aimed at trying to provide a balance between the needs of the investigating and adjudicatory bodies to detect crime, maintain law and order and the rights of the accused. With the increasing complaints regarding abuse of powers of arrest by the police, custodial torture and death, denial of bail, etc., the course particularly focuses on investigation, arrest, bail and principles of fair trial.

The primary objectives of this course are to:-

- To familiarise the students with the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) that has replaced the Code of Criminal Procedure, 1973 (CrPC).
- To highlight the key changes introduced in the BNSS in order to ensure a criminal justice system with simple procedures, forensic investigation for serious offences, reduced pendency of cases, improvement in conviction rates, use of technology to facilitate access to justice and specified timelines for justice delivery.
- To discuss the procedure for investigation and trial of offences (like initiation of criminal cases, powers and duties of police during investigation of offences, stages of criminal trial, functions, duties, and powers of criminal courts) under the BNSS while highlighting how these procedures are different from the CrPC.
- To compare the coverage of critical issues in administration of criminal justice like protection of human rights of accused, victims and the principles of fair trial in the BNSS and the CrPC.

Learning Outcomes:

At the end of the course, the students will be able to:

1. Identify the key changes introduced in the BNSS as compared to the CrPC.

2. Explain the powers, functions and duties of police and criminal courts under the BNSS.
3. To critically analyse the significance of the new provisions in the BNSS.
4. Employ and promote adoption of humane and just practices in administration of criminal justice with emphasis on protection (*suraksha*) of the citizen.
5. Be equipped with an understanding of the legal landscape to navigate through and contribute effectively to the evolving legal system.

Prescribed Legislation:

The Bharatiya Nagarik Suraksha Sanhita, 2023

Prescribed Books:

1. Saurabh Kansal, Vageshwari Deswal, Shruti Goyal, *Bharatiya Nagarik Suraksha Sanhita 2023 Law and Practice*, (Taxmann Publications Private Limited, April 2024).
2. K.N.Chandrsekharan Pillai (Rev.), R. V. Kelkar's *Criminal Procedure*, (7th ed., 2021).
3. K.N.Chandrsekharan Pillai (Rev.), R. V. Kelkar's *Lectures on Criminal Procedure*, (6th ed., 2017).

Topics

1. Introduction to BNSS

- a. Importance of Criminal Procedure
- b. Comparative Table - BNSS *vis a vis* Cr PC.
- c. Stakeholders and Functionaries in the Criminal Justice Administration System
- d. Hierarchy, powers and duties of Criminal Courts
- e. Definitions- Sections 2(1)(a), 2 (1)(i), 2(1)(k), 2(1)(l), 2(1)(x), 2(1)(y), and 2(1)(z)

2. Initiation of Criminal Case

Section 2 (1)(g), Section 2 (1)(h), Section 2 (1)(o), Section 2 (1)(t), Section 2 (1)(u), Sections 173 to 175, Sections 179 – 184, Section 187, Section 193, Section 196.

In the scheme of the BNSS, 2023, for the purposes of setting criminal investigation machinery into motion, offences are classified into two categories: (i) cognizable offences and (ii) non-cognizable offences. In case of cognizable offences, a police officer can arrest an accused without a warrant but in case of non-cognizable offences he cannot arrest or investigate into such an offence without authorization in this behalf by the magistrate. In case of cognizable offences, an F.I.R forms the basis for putting the investigative machinery into motion. A general overall view of investigation will be given to the students with special emphasis on the essentials of F.I.R, kinds of F.I.R and its evidentiary value, police officer's powers to investigate cognizable cases, procedure for investigation, police officer's powers to require attendance of witnesses, examination of witnesses by the police, recording of confessions and statements and report of police officer on completion of investigation.

Cases:

Lalita Kumari v. Govt. of Uttar Pradesh, 2008 (11) SCALE 154
Lalita Kumari v. Govt. of Uttar Pradesh, 2008 (11) SCALE 157
Lalita Kumari v. Govt. of Uttar Pradesh, 2013 (13) SCALE 559
Lalita Kumari v. Govt. of Uttar Pradesh, CrI.M.P. no.5029 of 2014 in
Writ Petition (CrI.) No.68 of 2008
Youth Bar Association of India v. Union of India, (2016) 9 SCC
473
State of Orissa v. Sharat Chandra Sahu, (1996) 6 SCC 435
Madhu Bala v. Suresh Kumar, (1997) 8 SCC 476
Sakiri Vasu v. State of Uttar Pradesh, (2008) 2 SCC 409

**Vinubhai Haribhai Malaviya v. State of Gujarat*, 2019 SCC OnLine
SC 1346

3. Investigation

Sections 176, 35 – 38, 43-44, 96, 47-48, 49 -51, 52, 53 -54, 56-58, 62.

- a. Procedure for Investigation
- b. Arrest – procedure and rights of arrested person
- c. Search and seizure (Sections 185, 186 read with Sections 103 and 105)

Cases:

D.K.Basu v. State of West Bengal, (1997) 6 SCC 642
State of Haryana v. Dinesh Kumar, (2008) 3SCC 222
Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273

4. Bail

Sections 2(1)(b), 2(1)(c), 2(1)(d), 2(1)(e), 478 – 483.

Criminal offences are further classified under the BNSS into bailable and non-bailable offences. In case of bailable offences, an accused is entitled to bail as a matter of right on furnishing of surety. In case of non-bailable offences, bail is a matter of discretion with the courts and the discretion becomes narrower depending upon the severity of the punishment that an offence entails. How this discretion is to be exercised and what are the principles governing grant of bail in such cases is discussed in the cases given below. The concept of anticipatory bail and the principles governing its grant are also a subject matter of study here. Further, principles governing cancellation of bail are also discussed here.

- a. Grant of Bail, including anticipatory bail
- b. Cancellation of Bail
- c. Compulsory release

Cases:

State v. Captain Jagjit Singh, (1962) 3 SCR 622
Moti Ram v. State of M.P., (1978) 4 SCC 47
Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118
Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40
Shri Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565
Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1
State (Delhi Administration) v. Sanjay Gandhi, (1978) 2 SCC 411
**Gautam Navlakha v. National Investigation Agency*, 2021 SCC OnLine SC 382

5. Pre-Trial Proceedings

Sections 210, 213, 222, 223, 225, 227, 232-247, 251.

- a. Cognizance of Offences
- b. Committal Proceedings
- c. Framing of Charges

Cases:

Mohan Singh v. State of Bihar, (2011)9 SCC 272

Ajay Kumar Parmar v. State of Rajasthan, (2012) 9 SCALE 542

6. Trial

Sections 2(1)(x), 2(1)(y), 2(1)(z), 248-249, 253-254, 256-257, 265-267, 274, 283, 285, 360 and 530.

- a. Differences among warrant, summons, and summary trials
- b. Production of Witnesses - Summons and warrants
- c. Withdrawal of Prosecution

Cases:

Abdul Karim v. State of Karnataka, (2000) 8 SCC 710

7. Rights of Accused and Victims

- a) Features of Fair Trial – Sections 308, 337, 340-341, 351, 354, 355, 358, 360, 366, 446, 449; Articles 20 (1) (3), 22(1), 39A of the Constitution
- b) Rights of Victims – Sections 395, 396, 397, and proviso to s.413
- c) Witness Protection -Section 398
- d) Guidelines of the High Court of Delhi for recording of Evidence of Vulnerable Witnesses. (2024)
- e) Witness Protection Scheme 2018

Cases:

Zahira Habibulla H. Shiekh v. State of Gujarat,(2004) 4 SCC 158

Mohammed Hussain v. State (Govt. of NCT Delhi),(2012) 9 SCC 408

Mohd. Ajmal Amir Kasab v. State of Maharashtra,(2012) 9 SCC 1

Hardeep Singh v. State of Punjab,(2014) 3 SCC 92

Mehmood Nayyar Azam v. State of Chhattisgarh,

(2012) 8 SCC 1

**Smruti Tukaram Badade v. State of Maharashtra* (2022)

**Mahender Chawla v. Union of India Ministry of Home Affairs*, AIR
2018 SC (Supp) 2561

8. Judgment

Sections 250, 252, 255, 258, 262, 264, 269, 271, 275, 287, 288, 392, and 393.

- a. Discharge and acquittal
- b. Conviction
- c. Hearing on sentence
- d. Content of judgments.

Cases:

Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra,
(2012) 8 SCC 43

9. Other Means of Disposal of Cases

- a. Plea Bargaining
 - Chapter XXIII- Plea Bargaining (Sections 289-300)
- b. Compounding of cases: Section 359
- c. Probation: Sections 401-402

10. Appeals, Inherent Powers of the High Court

Sections 413, 415-417, and 528.

Cases:

Gian Singh v. State of Punjab, (2012) 10 SCC 303

State of M.P. v. Deepak, (2014) 10 SCC 285

**Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur. v. State of Gujarat*,
(2017) 9 SCC 641

Important note –

1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up to date and consult the latest editions of books.

Lalita Kumari v. Govt. of Uttar Pradesh

2008(11) SCALE 154

B.N. AGRAWAL AND G.S. SINGHVI, JJ.

ORDER

3. The grievance in the present writ petition is that the occurrence had taken place in the month of May and, in that very month, on 11th May, 2008, the written report was submitted by the petitioner before the Officer In-charge of the concerned Police Station, who sat tight over the matter. Thereafter, when the Superintendent of Police was moved, a First Information Report (for short "F.I.R.") was registered. Even thereafter, steps were not taken either for apprehending the accused or recovery of the minor girl child. It is a matter of experience of one of us (B.N. Agrawal, J.) while acting as Judge of Patna High Court, Chief Justice of Orissa High Court and Judge of this Court that in spite of law laid down by this Court, the concerned police authorities do not register F.I.Rs unless some direction is given by the Chief Judicial Magistrate or the High Court or this Court. Further experience shows that even after orders are passed by the concerned courts for registration of the case, the police does not take the necessary steps and when matters are brought to the notice of the Inspecting Judges of the High Court during the course of inspection of Courts and Superintendents of Police are taken to task, then only F.I.Rs are registered. In large number of cases investigations do not commence even after registration of F.I.Rs and in case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable despatch. At times it has been found that when harsh orders are passed by the Members of the Judiciary in a State, the police becomes hostile to them; for instance in Bihar when a bail petition filed by a police personnel, who was accused was rejected by a member of Bihar Superior Judicial Service, he was assaulted in the Court room for which contempt proceeding was initiated by Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.
4. On the other hand, there are innumerable cases that where the complainant is a practical person, F.I.Rs are registered immediately, copies thereof are made over to the complainant on the same day, investigation proceeds with supersonic jet speed, immediate steps are taken for apprehending the accused and recovery of the kidnapped persons and the properties which were subject matter of theft or dacoity. In the case before us allegations have been made that the Station House Officer of the concerned Police Station is pressurising the complainant to withdraw the complaint, which, if true, is a very disturbing state of affairs. We do not know there may be innumerable such instances.
5. In view of the above, we feel that it is high time to give directions to Governments of all the States and Union Territories besides their Director Generals of Police/Commissioners of Police as the case may be to the effect that if steps are not taken for registration of F.I.Rs immediately and copies thereof are not made over to the complainants, they may move the concerned Magistrates by filing complaint petitions to give direction to the police to register case immediately upon receipt/production of copy of the orders and make over copy of the F.I.Rs to the complainants, within twenty four hours of receipt/production of copy of such

orders. It may further give direction to take immediate steps for apprehending the accused persons and recovery of kidnapped/abducted persons and properties which were subject matter of theft or dacoity. In case F.I.Rs are not registered within the aforementioned time, and/or aforementioned steps are not taken by the police, the concerned Magistrate would be justified in initiating contempt proceeding against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment like sentence of imprisonment against them inasmuch as the Disciplinary Authority would be quite justified in initiating departmental proceeding and suspending them in contemplation of the same.

6. Keeping in mind these facts, we are of the view that notices should be issued to Government of all the States and Union Territories besides Director Generals of Police/Commissioners of Police as the case may be.
7. Issue notice to the Chief Secretaries of all the States and Union Territories and the Director Generals of Police/Commissioners of Police, as the case may be, to show cause as to why aforesaid directions be not given by this Court.
8. Notices may be sent to the parties by Fax and it should be mentioned therein that the order has been put on the Website of the Supreme Court of India so that they may file response without loss of time.
9. Let the Registry place this order on the Website immediately on receipt of the file so that the concerned authorities know about the same and that the person concerned may file response within the time granted hereunder .
10. Three weeks' time is allowed to file response.
11. Place this matter on 8th August, 2008.

* * * * *

Lalita Kumari v. Govt. of Uttar Pradesh

2008(11) SCALE 157

B.N. AGRAWAL AND G.S. SINGHVI, JJ. :

ORDER

1. By order dated 14th July, 2008, we issued notices to the Chief Secretaries of all the States and Union Territories and Director Generals of Police / Commissioners of Police, as the case may be, to show cause as to why the directions enumerated therein be not given by this Court. Notices were sent to the aforesaid authorities by the Supreme Court Registry by fax and it was mentioned in the notices that the order has been put on the website of the Supreme Court of India so that they may file responses without loss of time. The order was put on the website of the Supreme Court of India, as directed by this Court.
2. It appears that notices have been served upon the Chief Secretaries of all the States and Union Territories and all the Generals of Police / Commissioners of Police, as the case may be, but, in spite of that, it is pathetic state of affairs that only two States, viz., States of Uttar Pradesh and Arunachal Pradesh, have responded and the other States did not bother to file their responses. Some of them have simply engaged their counsel, who are appearing in court, and, as usual, they have made prayer for time to file responses.
3. In spite of the order passed on 14th July, 2008, that we intend to give certain directions enumerated therein, it is unfortunate that neither the Director Generals of Police / Commissioners of Police, as the case may be, nor the Superintendents of Police has taken any steps by giving suitable directions to the officers in-charge of the police stations. In view of this, we direct the Chief Secretaries of all the States and Union Territories and Director Generals of Police / Commissioners of Police, as the case may be, to see that the police officers posted in every police station throughout the country should act in accordance with the order dated 14th July, 2008, treating the proposed directions therein given by this Court to be the interim ones and, in case there is any failure on the part of any police officer, the concerned authority shall take immediate action against that officer.
4. In any view of the matter, we grant two weeks' time by way of last chance to the Chief Secretaries of all the States and Union Territories, except Chief Secretaries and Director Generals of Police of the States of Uttar Pradesh and Arunachal Pradesh, as well as Directors Generals of Police / Commissioners of Police, as the case may be, to file responses failing which they shall have to appear in court in-person on the next date fixed in this case. As all the States and Union Territories are represented before this Court, it was not necessary for the Registry to communicate this order to the Chief Secretaries or Directors Generals of Police / Commissioners of Police, as the case may be. Nonetheless, the Registry is directed to communicate this order by fax as well to the Chief Secretaries of all the States and Union Territories and all the Director Generals of Police / Commissioners of Police, as the case may be,
5. Let order dated 14th July, 2008 and this order be put on the website of the Supreme Court of India so that the people of India may know what directions have been given by this Court

and they may take appropriate steps in case of any inaction on the part of the concerned officer of the police station in instituting a case and the Chief Judicial Magistrate / Chief Metropolitan Magistrate, as the case may be, shall take action in a case of inaction upon filing of complaint petition and give direction to institute the case within the time directed in the said order failing which the Chief Judicial Magistrate / Chief Metropolitan Magistrate, as the case may be, shall not only initiate action against the delinquent police officer but punish them suitably by sending them to jail, in case the cause shown is found to be unsatisfactory. Apart from this, the Chief Judicial Magistrate / Chief Metropolitan Magistrate, as the case may be, shall report the matter to the disciplinary authority at once by fax as well upon receipt of which the disciplinary authority shall suspend the concerned police officer immediately in contemplation of departmental proceeding.

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Lalita Kumari v. Govt. of U.P.
2013(13) SCALE 559

P. Sathasivam, CJI.: 1) The important issue which arises for consideration in the referred matter is whether “a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short ‘the Code’) or the police officer has the power to conduct a “preliminary inquiry” in order to test the veracity of such information before registering the same?”

2) The present writ petition, under Article 32 of the Constitution, has been filed by one Lalita Kumari (minor) through her father, viz., Shri Bhola Kamat for the issuance of a writ of Habeas Corpus or direction(s) of like nature against the respondents herein for the protection of his minor daughter who has been kidnapped. The grievance in the said writ petition is that on 11.05.2008, a written report was submitted by the petitioner before the officer in-charge of the police station concerned who did not take any action on the same. Thereafter, when the Superintendent of Police was moved, an FIR was registered. According to the petitioner, even thereafter, steps were not taken either for apprehending the accused or for the recovery of the minor girl child.

3) A two-Judge Bench of this Court in, ***Lalita Kumari v. Government of Uttar Pradesh*** [(2008) 7 SCC 164] after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.

4) Pursuant to the above directions, when the matter was heard by the very same Bench in ***Lalita Kumari v. Government of Uttar Pradesh*** [(2008) 14 SCC 337] Mr. S.B. Upadhyay, learned senior counsel for the petitioner, projected his claim that upon receipt of information by a police officer in-charge of a police station disclosing a cognizable offence, it is imperative for him to register a case under Section 154 of the Code and placed reliance upon two-Judge Bench decisions of this Court in ***State of Haryana v. Bhajan Lal*** [1992 Supp (1) SCC 335], ***Ramesh Kumari v. State (NCT of Delhi)*** [(2006) 2 SCC 677] and ***Parkash Singh Badal v. State of Punjab*** [(2007) 1 SCC 1]. On the other hand, Mr. Shekhar Naphade, learned senior counsel for the State of Maharashtra submitted that an officer in-charge of a police station is not obliged under law, upon receipt of information disclosing commission of a cognizable offence, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. In support of his submission, he placed reliance upon two-Judge Bench decisions of this Court

in *P. Sirajuddin v. State of Madras* [(1970) 1 SCC 595], *Sevi v. State of Tamil Nadu* [1981 Supp SCC 43], *Shashikant v. Central Bureau of Investigation* [(2007) 1 SCC 630], and *Rajinder Singh Katoch v. Chandigarh Admn.* [(2007) 10 SCC 69]. In view of the conflicting decisions of this Court on the issue, the said bench, vide order dated 16.09.2008, referred the same to a larger bench.

5) Ensuing compliance to the above direction, the matter pertaining to Lalita Kumari was heard by a Bench of three-Judges in *Lalita Kumari v. Government of Uttar Pradesh* [(2012) 4 SCC 1] wherein, this Court, after hearing various counsel representing Union of India, States and Union Territories and also after adverting to all the conflicting decisions extensively, referred the matter to a Constitution Bench while concluding as under:-

“97. We have carefully analysed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue: whether under Section 154 CrPC, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the FIR.

98. The learned counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of *Santosh Kumar* and *Suresh Gupta* where preliminary inquiry had been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary inquiry before registering the FIR.

99. The issue which has arisen for consideration in these cases is of great public importance. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned-the courts, the investigating agencies and the citizens.

100. Consequently, we request the Hon'ble the Chief Justice to refer these matters to a Constitution Bench of at least five Judges of this Court for an authoritative judgment.”

6) Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also.

22) The issues before the Constitution Bench of this Court arise out of two main conflicting areas of concern, viz.,

- (i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and
- (ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused.

86) The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure ‘judicial oversight’. Section 157(1)

deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

87) The Code contemplates two kinds of FIRs. The duly signed FIR under Section 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.

88) The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

- a) It is the first step to 'access to justice' for a victim.
- b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.
- c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.
- d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR.

92) According to the Statement of Objects and Reasons, protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.

93) The Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath also noticed the plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The Committee observed:-

"7.19.1 According to the Section 154 of the Code of Criminal Procedure, the office incharge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non-registration of cases is a serious complaint against the police. The National Police Commission in its 4th report lamented that the police "evade registering cases for taking up investigation where specific complaints are lodged at the police stations". It referred to a study conducted by the Indian Institute of Public Opinion, New Delhi regarding "Image of the Police in India" which observed that over 50% of the respondents mention non-registration of complaints as a common practice in police stations. 7.19.2 The Committee recommends that all complaints should be registered promptly, failing which appropriate action should be taken. This would necessitate change in the mind - set of the political executive and that of senior officers.

7.19.4 There are two more aspects relating to registration. The first is minimization of offences by the police by way of not invoking appropriate sections of law. We disapprove

of this tendency. Appropriate sections of law should be invoked in each case unmindful of the gravity of offences involved. The second issue is relating to the registration of written complaints. There is an increasing tendency amongst the police station officers to advise the informants, who come to give oral complaints, to bring written complaints. This is wrong. Registration is delayed resulting in valuable loss of time in launching the investigation and apprehension of criminals. Besides, the complainant gets an opportunity to consult his friends, relatives and sometimes even lawyers and often tends to exaggerate the crime and implicate innocent persons. This eventually has adverse effect at the trial. The information should be reduced in writing by the SH, if given orally, without any loss of time so that the first version of the alleged crime comes on record.

7.20.11 It has come to the notice of the Committee that even in cognizable cases quite often the Police officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non-cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer.”

94) It means that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes.

95) Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society.

96) Therefore, reading Section 154 in any other form would not only be detrimental to the Scheme of the Code but also to the society as a whole. It is thus seen that this Court has repeatedly held in various decided cases that registration of FIR is mandatory if the information given to the police under Section 154 of the Code discloses the commission of a cognizable offence.

Is there a likelihood of misuse of the provision?

97) Another, stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.

98) While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against

arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for “anticipatory bail” under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the Court.

99) It is also relevant to note that in *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260], this Court has held that arrest cannot be made by police in a routine manner. Some important observations are reproduced as under:-

“20...No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.”

100) The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that “merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation” and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.

101) This can also be seen from the fact that Section 151 of the Code allows a police officer to arrest a person, even before the commission of a cognizable offence, in order to prevent the commission of that offence, if it cannot be prevented otherwise. Such preventive arrests can be valid for 24 hours. However, a Maharashtra State amendment to Section 151 allows the custody of a person in that State even for up to a period of 30 days (with the order of the Judicial Magistrate) even before a cognizable offence is committed in order to prevent commission of such offence. Thus, the arrest of a person and registration of FIR are not directly and/or irreversibly linked and they are entirely different concepts operating under entirely different parameters. On the other hand, if a police officer misuses his power of arrest, he can be tried and punished under Section 166.

102) Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The Section itself states that a police officer can start investigation when he has a 'reason to suspect the commission of an offence'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

103) Likewise, giving power to the police to close an investigation, Section 157 of the Code also acts like a check on the police to make sure that it is dispensing its function of investigating cognizable offences. This has been recorded in the 41st Report of the Law Commission of India on the Code of Criminal Procedure, 1898 as follows:

“14.1.....If the offence does not appear to be serious and if the station-house officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.”

“14.2. A noticeable feature of the scheme as outlined above is that a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.”

Therefore, the Scheme of the Code not only ensures that the time of the police should not be wasted on false and frivolous information but also that the police should not intentionally refrain from doing their duty of investigating cognizable offences. As a result, the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature.

104) It is the stand of Mr. Naphade, learned senior counsel for the State of Maharashtra that when an innocent person is falsely implicated, he not only suffers from loss of reputation but also from mental tension and his personal liberty is seriously impaired. He relied on the *Maneka Gandhi* (*supra*), which held the proposition that the law which deprives a person of his personal liberty must be reasonable both from the stand point of substantive as well as procedural aspect is now firmly established in our Constitutional law. Therefore, he pleaded for a fresh look at Section 154 of the Code, which interprets Section 154 of the Code in conformity with the mandate of Article 21.

105) It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

Exceptions:

106) Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

107) In the context of medical negligence cases, in *Jacob Mathew (supra)*, it was held by this Court as under:

“51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam⁹ test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

108) In the context of offences relating to corruption, this Court in *P. Sirajuddin (supra)* expressed the need for a preliminary inquiry before proceeding against public servants.

109) Similarly, in *Tapan Kumar Singh (supra)*, this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

110) Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/Directions:

111) In view of the aforesaid discussion, we hold:

- i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
- ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
- iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
- iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:
 - a) Matrimonial disputes/family disputes
 - b) Commercial offences
 - c) Medical negligence cases
 - d) Corruption cases
 - e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

112) With the above directions, we dispose of the reference made to us. List all the matters before the appropriate Bench for disposal on merits.

Lalita Kumari v. Govt. of Uttar Pradesh

CRL.M.P. NO.5029 OF 2014 IN WRIT PETITION (CRL.) NO.68 OF 2008

ORDER

After hearing him and in the light of the grievance expressed in the present criminal miscellaneous petition filed in the writ petition, we modify clause (vii) of paragraph 111 of our judgment dated 12th November, 2013, in the following manner:

"(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry."

To this extent, clause (vii) of paragraph 111 of the judgment is modified. Criminal miscellaneous petition is, accordingly, disposed of.

Youth Bar Association of India v. Union of India
(2016) 9 SCC 473

DIPAK MISRA AND C. NAGAPPAN, JJ.

ORDER

2. In this writ petition, preferred under Article 32 of the Constitution of India, the petitioner, Youth Bar Association of India, has prayed for issue of a writ in the nature of mandamus, directing the Union of India and the States to upload each and every First Information Report registered in all the police stations within the territory of India in the official website of the police of all States, as early as possible, preferably within 24 hours from the time of registration.

3. After the writ petition was entertained by this Court, notices were issued to the Union of India and the States.

4. It is submitted by Mr. Sanpreet Singh Ajmani, learned counsel appearing for the petitioner that after registration of the First Information Report if it is uploaded in the official website of police, that will solve many unnecessary problems faced by the accused persons and their family members. Learned counsel would contend that when the criminal law is set in motion and liberty of an individual is at stake, he should have the information so that he can take necessary steps to protect his liberty. In this context, he has drawn our attention to a passage from the judgment rendered in *State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others* (2010) 3 SCC 571, wherein it has been observed:-

“Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.”

5. In *Som Mittal vs. Government of Karnataka* (2008) 3 SCC 753, the Court has ruled thus:- “The right to liberty under Article 21 of the Constitution is a valuable right, and hence should not be lightly interfered with. It was won by the people of Europe and America after tremendous historical struggles and sacrifices. One is reminded of Charles Dickens novel ‘A Tale of Two Cities’ in which Dr. Manette was incarcerated in the Bastille for 18 years on a mere lettre de cachet of a French aristocrat, although he was innocent.”

6. In *D.K. Basu vs. State of West Bengal* AIR 1997 SC 610 it has been opined that:-

“The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the

functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.”

7. Learned counsel for the petitioner has also drawn our attention to a Division Bench decision of Delhi High Court rendered in Court on its Own Motion through **Mr. Ajay Chaudhary vs. State** (2010) 175 DLT (DB).

8. On being asked, Mr. Tushar Mehta, learned Additional Solicitor General appearing for the Union of India, has submitted that the directions issued by the High Court of Delhi can be applied with certain modifications. Learned Additional Solicitor General has also drawn our attention to paragraph 4 of the affidavit filed in an interlocutory application in the present writ petition. The said paragraph reads as under:-

“4. That is it respectfully submitted that Central Government is supporting all the states to set up a mechanism for online filing of complaints under the protect 'Crime & Criminal Tracking Network & Systems (CCTNS)'.”

9. Mr. Saurabh Trivedi, learned counsel appearing for the State of Uttarakhand has submitted that the First Information Report in respect of certain offences which are registered, like sexual offences and the offences registered under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), may be difficult to be put on the website.

10. Mr. Ranjan Mukherjee, Mr. Shikhar Garg, and Mr. Yusuf Khan, learned counsel appearing for the States of Meghalaya, Mizoram and Sikkim respectively, have submitted that insurgency would be a sensitive matter and, that apart, it may not be possible on the part of the said States to upload the First Information Reports within 24 hours.

11. Mr. Uddiyam Mukherji, learned counsel appearing for the State of Odisha has submitted that whether a matter is sensitive or not, the Court may say no reasons should be given because the allegation in the F.I.R. shall speak for itself.

12. Having heard learned counsel for the parties, we think it appropriate to record the requisite conclusions and, thereafter, proceed to issue the directions:-

(a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.

(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.

(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

(d) The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the First Information Report so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

(e) The decision not to upload the copy of the FIR on the website shall not be taken by an officer below the rank of Deputy Superintendent of Police or any person holding equivalent post. In case, the States where District Magistrate has a role, he may also assume the said authority. A decision taken by the concerned police officer or the District Magistrate shall be duly communicated to the concerned jurisdictional Magistrate.

(f) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive.

(g) If an FIR is not uploaded, needless to say, it shall not enure per se a ground to obtain the benefit under Section 438 of the Cr.P.C.

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(i) The competent authority referred to hereinabove shall constitute the committee, as directed herein-above, within eight weeks from today.

(j) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative/parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned Court qqqqqqnot beyond three days of the submission of the application.

(k) The directions for uploading of FIR in the website of all the States shall be given effect from 15th November, 2016.

13. Let a copy of this order be sent to all the Home Secretaries and the Director Generals of Police of the States concerned.

14. The writ petition is, accordingly, disposed of.

State of Orissa v. Sharat Chandra Sahu
(1996) 6 SCC 435

S. SAGHIR AHMAD, J. - Respondent 1 is the husband of Respondent 2 who made a complaint in writing to the Women's Commission setting out therein that Respondent 1 had contracted a second marriage and had thus committed an offence punishable under Section 494 IPC. It was also alleged that ever since the marriage with her, he had been making demands for money being paid to him which amounted to her harassment and constituted the offence punishable under Section 498-A IPC for which Respondent 1 was liable to be punished.

2. The Women's Commission sent the complaint to the police station where GR Case No. 418 of 1993 was registered against Respondent 1. The police investigated the case and filed a charge-sheet in the Court of Sub-Divisional Judicial Magistrate, Anandpur, who, after perusal of the charge-sheet, framed charges against Respondent 1 under Section 498-A as also under Section 494 IPC.

3. Aggrieved by the framing of the charge by the Sub-Divisional Judicial Magistrate, Anandpur, Respondent 1 filed a petition (Criminal Miscellaneous Case No. 1169 of 1994) under Section 482 of the Code of Criminal Procedure (for short, the Code) in the Orissa High Court for quashing the proceedings and the charges framed against him. The High Court by its impugned judgment dated 3-5-1995 partly allowed the petition with the findings that since Respondent 2 had not herself personally filed the complaint under Section 494 IPC, its cognizance could not have been taken by the Magistrate in view of the provisions contained in Section 198(1)(c) of the Code. Consequently, the charge framed by the Magistrate under Section 494 IPC was quashed but the charge under Section 498-A IPC was maintained and the petition under Section 482 Criminal Procedure Code to that extent was dismissed.

5. The judgment of the High Court so far as it relates to the quashing of the charge under Section 494 IPC, is wholly erroneous and is based on complete ignorance of the relevant statutory provisions. The first Schedule appended to the Code indicates that the offence under Section 494 IPC is non-cognizable and bailable. It is thus obvious that the police could not take cognizance of this offence and that a complaint had to be filed before a Magistrate.

8. These provisions set out the prohibition for the court from taking cognizance of an offence punishable under Chapter XX of the Indian Penal Code. The cognizance, however, can be taken only if the complaint is made by the person aggrieved by the offence. Clause (c) appended to the proviso to sub-section (1) provides that where a person aggrieved is the wife, a complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or other relations mentioned therein who are related to her by blood, marriage or adoption.

9. The High Court relied upon the provisions contained in clause (c) and held that since the wife herself had not filed the complaint and Women's Commission had complained to the police, the Sub-Divisional Judicial Magistrate, Anandpur could not legally take cognizance of the offence. In laying down this proposition, the High Court forgot that the other offence namely, the offence under Section 498-A IPC was a cognizable offence and the police was entitled to take cognizance of the offence irrespective of the person who gave the first information to it.

10. Sub-section (4) of Section 155 clearly provides that where the case relates to two offences of which one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offence or offences are non-cognizable.

11. Sub-section (4) creates a legal fiction and provides that although a case may comprise of several offences of which some are cognizable and others are not, it would not be open to the police to investigate the cognizable offences only and omit the non-cognizable offences. Since the whole case (comprising of cognizable and non-cognizable offences) is to be treated as cognizable, the police had no option but to investigate the whole of the case and to submit a charge-sheet in respect of all the offences, cognizable or non-cognizable both, provided it is found by the police during investigation that the offences appear, *prima facie*, to have been committed.

12. Sub-section (4) of Section 155 is a new provision introduced for the first time in the Code in 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in the language employed in sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-section (4) provides that even a non-cognizable case shall, in that situation, be treated as cognizable.

13. This Court in **Pravin Chandra Mody v. State of A.P.** [AIR 1965 SC 1185] has held that while investigating a cognizable offence and presenting a charge-sheet for it, the police are not debarred from investigating any non-cognizable offence arising out of the same facts and including them in the charge-sheet.

14. The High Court was thus clearly in error in quashing the charge under Section 494 IPC on the ground that the trial court could not take cognizance of that offence unless a complaint was filed personally by the wife or any other near relation contemplated by clause (c) of the proviso to Section 198(1).

15. The judgment of the High Court being erroneous has to be set aside. The appeal is consequently allowed. The judgment and order dated 3-5-1995 passed by the Orissa High Court insofar as it purports to quash the charge under Section 494 IPC and the proceedings relating thereto is set aside with the direction to the Magistrate to proceed with the case and dispose of it expeditiously.

* * * * *

Madhu Bala v. Suresh Kumar
(1997) 8 SCC 476

M. K. MUKHERJEE, J. - On 18-2-1988, the appellant filed a complaint against the three respondents, who are her husband, father-in-law and mother-in law respectively, before the Chief Judicial Magistrate, Kurukshetra alleging commission of offences under Sections 498-A and 406 of the Indian Penal Code (IPC for short) by them. On that complaint the learned Magistrate passed an order under Section 156(3) of the Code of Criminal Procedure ("Code" for short) directing the police to register a case and investigate into the same. Pursuant to the said direction Thanewar Police Station registered a case being FIR No. 61 of 1988 and on completion of investigation submitted charge-sheet (police report) against the three respondents under Sections 498-A and 406 IPC. The learned Magistrate took cognizance of the said charge-sheet and thereafter framed charge against the three respondents under Section 406 IPC only as, according to the learned Magistrate, the offence under Section 498-A IPC was allegedly committed in the district of Karnal. Against the framing of the charge the respondents moved the Sessions Judge in revision, but without success.

3. Thereafter on 29-1-1994 the appellant filed another complaint against the respondents under Section 498-A IPC before the Chief Judicial Magistrate, Karnal and on this complaint the learned Magistrate passed a similar order under Section 156(3) of the Code for registration of a case and investigation. In compliance with the order, FIR No. 111 of 1994 was registered by the Karnal Police Station and on completion of investigation charge-sheet was submitted against the three respondents under Section 498-A IPC. On that charge-sheet the learned Magistrate took cognizance of the above offence and later on framed charge against them in accordance with Section 240 of the Code.

4. While the above two cases were being tried, the respondents filed petitions under Section 482 of the Code before the Punjab and Haryana High Court for quashing of their proceedings on the ground that the orders passed by the Chief Judicial Magistrates of Kurukshetra and Karnal directing registration of cases in purported exercise of their power under Section 156(3) of the Code were patently wrong and consequently all actions taken pursuant thereto were illegal. The contention so raised found favour with the High Court, and by the impugned judgement it quashed the orders of the Chief Judicial Magistrates of Kurukshetra and Karnal dated 18-2-1988 and 29-1-1994 respectively, pursuant to which cases were registered by the police on the complaints of the appellant, and the entire proceedings of the two cases arising therefrom. According to the High Court, under Section 156(3) of the Code a Magistrate can only direct investigation by the police but he has no power to direct "registration of a case." In drawing the above conclusion, it relied upon the judgements of this Court in ***Gopal Das Sindhi v. State of Assam*** [AIR 1961 SC 986] and ***Tula Ram v. Kishore Singh*** [AIR 1977 SC 2401] and some judgments of the Punjab and Haryana High Court which, according to it, followed the above two decisions of this Court.

5. In our considered view, the impugned judgment is wholly unsustainable as it has not only failed to consider the basic provisions of the Code but also failed to notice that the judgments in ***Gopal Das*** and ***Tula Ram*** have no relevance whatsoever to the interpretation or

purport of Section 156(3) of the Code. The earlier judgments of the Punjab and Haryana High Court, which have been followed in the instant case also suffer from the above two infirmities.

6. Coming first to the relevant provisions of the Code, Section 2(d) defines “complaint” to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Under Section 2(c) “cognizable offence” means an offence for which, and “cognizable case” means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, *inter alia*, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

7. On completion of investigation undertaken under Section 156(1) the officer in charge of the police station is required under Section 173(2) to forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government containing all the particulars mentioned therein. Chapter XIV of the Code lays down the conditions requisite for initiation of proceedings by the Magistrate. Under sub-section (1) of Section 190 appearing in that Chapter any Magistrate of the First Class and any Magistrate of the Second Class specially empowered may take cognizance of any offence (a) upon receiving a “complaint” of facts which constitutes such offence; (b) upon a “police report” of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed. Chapter XV prescribes the procedure the Magistrate has to initially follow if it takes cognizance of an offence on a complaint under Section 190(1) (a).

8. From a combined reading of the above provisions it is abundantly clear that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1) (a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate police station under Section 156(3) for investigation. Once such a direction is given under subsection (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a “police report” in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1) (b) - but not under 190(1) (a). Since a complaint filed before a Magistrate cannot be a “police report” in view of the definition of “complaint” referred to earlier and since the investigation of a “cognizable case” by the police under Section 156(1) has to culminate in a “police report” the “complaint” - as soon as an order under Section 156(3) is passed thereon - transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the first information report (FIR). As

under Section 156(1), the police can only investigate a cognizable “case”, it has to formally register a case on that report.

9. The mode and manner of registration of such cases are laid down in the Rules framed by the different State Governments under the Indian Police Act, 1861. The other requirements of the said Rules need not be detailed as they have no relevance to the point at issue.

10. From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a “complaint” the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to “register a case” makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable “case” and the Rules framed under the Indian Police Act, 1861 it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be “to register a case at the police station treating the complaint as the first information report and investigate into the same.”

11. Adverting now to the two cases of this Court on which reliance has been placed by the High Court we find that in the case of Gopal Das' the facts were that on receipt of a complaint of commission of offences under Sections 147, 323, 342 and 448 of the Indian Penal Code, the Additional District Magistrate made the following endorsement: “To Shri C. Thomas, Magistrate 1st Class, for disposal.” On receiving the complaint Mr. Thomas directed the officer in charge of the Gauhati Police Station to register a case, investigate and if warranted submit a charge-sheet. After investigation police submitted a charge-sheet under Section 448 of the Indian Penal Code and on receipt thereof the Additional District Magistrate forwarded it to Shri R. Goswami, Magistrate for disposal. Shri Goswami framed a charge under Section 448 of the Indian Penal Code against the accused therein and 1 aggrieved thereby the accused first approached the revisional court and, having failed there, the High Court under Article 227 of the Constitution of India. Since the petition before the High Court was also dismissed they moved this Court. The contention that was raised before this Court was that Mr. Thomas acted without jurisdiction in directing the police to register a case to investigate it and thereafter to submit a charge-sheet, if warranted. The steps of reasoning for the above contention were that since the Additional District Magistrate had transferred the case to Mr. Thomas for disposal under Section 192 of the Code it must be said that the former had already taken cognizance thereupon under Section 190(1) (a) of the Code. Therefore, he (Mr. Thomas) could not pass any order under Section 156(3) of the Code as it related to a pre-cognizance stage; and he could deal with the same only in accordance with Chapter XVI. In negating this contention this Court held that the order of the Additional District Magistrate transferring the case to Mr. Thomas on the face of it did not show that the former had taken cognizance of any offence in the complaint. According to this Court the order was by way of an administrative action, presumably because Mr. Thomas was the Magistrate before whom ordinarily complaints were

to be filed. The case of **Gopal Das** has, therefore, no manner of application in the facts of the instant case. It is interesting to note that the order that was passed under Section 156(3) therein also contained a direction to the police to register a case.

12. In **Tula Ram** case, the only question that was raised before this Court was whether or not a Magistrate after receiving a complaint and after directing investigation under Section 155(3) of the Code and on receipt of the "police report" from the police can issue notice to the complainant, record his statement and the statements of other witnesses and then issue process under Section 204 of the Code. From the question itself it is apparent that the said case related to a stage after the police report under Section 173(2) of the Code was submitted pursuant to an order under Section 156(3) of the Code and not to the nature of the order that can be passed thereunder Section 156(3). The cases of the Punjab and Haryana High Court referred to by the learned Judge in the impugned judgement need not be discussed in detail for they only lay down the proposition that under Section 156(3) a Magistrate can only direct investigation but cannot direct registration of a case for no such power is given to him under that section. We repeat and reiterate that such a power inheres in Section 156(3), for investigation directed thereunder can only be in the complaint filed before the Magistrate on which a case has to be formally registered in the police station treating the same as the FIR. If the reasoning of the Punjab and Haryana High Court is taken to its logical conclusion it would mean that if a Magistrate issues a direction to submit a report under Section 173(2) of the Code after completion of investigation while passing an order under Section 156(3) it would be equally bad for the said section only "directs investigation" and nothing more. Needless to say, such a conclusion would be fallacious, for while with the registration of a case by the police on the complaint, the investigation directed under Section 156(3) commences, with the submission of the "police report" under Section 173(2) it culminates.

13. On the conclusions as above we set aside the impugned judgement and orders of the High Court and direct the Magistrates concerned to proceed with the cases in accordance with law. The appeals are accordingly allowed.

* * * * *

Sakiri Vasu v. State of U.P.
(2008) 2 SCC 409

MARKANDEY KATJU, J.: 4. The son of the appellant was a Major in the Indian Army. His dead body was found on 23.8.2003 at Mathura Railway Station. The G.R.P, Mathura investigated the matter and gave a detailed report on 29.8.2003 stating that the death was due to an accident or suicide.

5. The Army officials at Mathura also held two Courts of Inquiry and both times submitted the report that the deceased Major S. Ravishankar had committed suicide at the railway track at Mathura junction. The Court of Inquiry relied on the statement of the Sahayak (domestic servant) Pradeep Kumar who made a statement that “deceased Major Ravishankar never looked cheerful; he used to sit on a chair in the verandah gazing at the roof with blank eyes and deeply involved in some thoughts and used to remain oblivious of the surroundings”. The Court of Inquiry also relied on the deposition of the main eye-witness, gangman Roop Singh, who stated that Major Ravishankar was hit by a goods train that came from Delhi.

6. The appellant who is the father of Major Ravishankar alleged that in fact it was a case of murder and not suicide. He alleged that in the Mathura unit of the Army there was rampant corruption about which Major Ravishankar came to know and he made oral complaints about it to his superiors and also to his father. According to the appellant, it was for this reason that his son was murdered.

7. The first Court of Inquiry was held by the Army which gave its report in September, 2003 stating that it was a case of suicide. The appellant was not satisfied with the findings of this Court of Inquiry and hence on 22.4.2004 he made a representation to the then Chief of the Army Staff, General N.C. Viji, as a result of which another Court of Inquiry was held. However, the second Court of Inquiry came to the same conclusion as that of the first inquiry namely, that it was a case of suicide.

8. Aggrieved, a writ petition was filed in the High Court which was dismissed by the impugned judgment. Hence this appeal.

9. The petitioner (appellant herein) prayed in the writ petition that the matter be ordered to be investigated by the Central Bureau of Investigation (in short “CBI”). Since his prayer was rejected by the High Court, hence this appeal by way of special leave.

10. It has been held by this Court in ***CBI v. Rajesh Gandhi*** [(1996) 11 SCC 253] that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person

to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

12. Thus in *Mohd. Yousuf v. Afaq Jahan* [(2006) 1 SCC 627] this Court observed:

“11. The clear position therefore is that any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigating under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.”

13. The same view was taken by this Court in *Dilawar Singh v. State of Delhi* [(2007) 12 SCC 641]. We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) Cr.P.C., and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order orders as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) Cr.P.C.

14. Section 156 (3) states:

“Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.”

The words “as abovementioned” obviously refer to Section 156 (1), which contemplates investigation by the officer in charge of the Police Station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order re-opening of the investigation even after the police submits the final report, vide *State of Bihar v. J.A.C. Saldanha* [(1980) 1 SCC 554].

17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a

Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd edn. page 267):-

“...If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission.”

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein.

21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in ***ITO v. M.K. Mohammad Kunhi*** [AIR 1969 SC 430] this Court held that the income tax appellate tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

22. Similar examples where this Court has affirmed the doctrine of implied powers are ***Union of India v. Paras Laminates*** [(1990) 4 SCC 453], ***RBI v. Peerless General Finance and Investment Co. Ltd.*** [(1996) 1 SCC 642], ***CEO & Vice-Chairman Gujarat Maritime Board v. Haji Daud Haji Harun Abu*** [1996 (11) SCC 23], ***J.K. Synthetics Ltd. v. CCE*** [(1996) 6 SCC 92], ***State of Karnataka v. Vishwabharati House Building Coop Society*** [(2003) (2) SCC 412] etc.

23. In ***Savitri v. Govind Singh Rawat*** [(1985) 4 SCC 337] this Court held that the power conferred on the Magistrate under Section 125 Cr.P.C. to grant maintenance to the wife implies the power to grant interim maintenance during the pendency of the proceeding, otherwise she may starve during this period.

24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., we are of

the opinion that they are implied in the above provision.

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr.P.C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 Cr.P.C. simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the concerned police officers, and if that is of no avail, under Section 156(3) Cr.P.C. before the Magistrate or by filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under Section 482 Cr.P.C.

28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere.

29. In *Union of India v. Prakash P. Hinduja* [(2003) 6 SCC 1950], it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156(3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in-charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate).

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation has not been made by the officer-in-charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station and such superior officer can, if he

so wishes, do the investigation vide **CBI v. State of Rajasthan** [(2001) 3 SCC 333] **R.P. Kapur v. Sardar Pratap Singh Kairon** [AIR 1961 SC 1117]. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide **State of Bihar v. A.C. Saldanna**.

31. No doubt the Magistrate cannot order investigation by the CBI vide **CBI v. State of Rajasthan**, but this Court or the High Court has power under Article 136 or Article 226 to order investigation by the CBI. That, however should be done only in some rare and exceptional case, otherwise, the CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them.

32. In the present case, there was an investigation by the G.R.P., Mathura and also two Courts of Inquiry held by the Army authorities and they found that it was a case of suicide. Hence, in our opinion, the High Court was justified in rejecting the prayer for a CBI inquiry.

33. In **Secy., Minor Irrigation & Rural Engineering Services U.P. v. Sahngoo Ram Arya** [2002 (5) SCC 521] this Court observed that although the High Court has power to order a CBI inquiry, that power should only be exercised if the High Court after considering the material on record comes to a conclusion that such material discloses prima facie a case calling for investigation by the CBI or by any other similar agency. A CBI inquiry cannot be ordered as a matter of routine or merely because the party makes some allegation.

34. In the present case, we are of the opinion that the material on record does not disclose a prima facie case calling for an investigation by the CBI. The mere allegation of the appellant that his son was murdered because he had discovered some corruption cannot, in our opinion, justify a CBI inquiry, particularly when inquiries were held by the Army authorities as well as by the G.R.P. at Mathura, which revealed that it was a case of suicide.

35. It has been stated in the impugned order of the High Court that the G.R.P. at Mathura had investigated the matter and gave a detailed report on 29.8.2003. It is not clear whether this report was accepted by the Magistrate or not. If the report has been accepted by the Magistrate and no appeal/revision was filed against the order of the learned Magistrate accepting the police report, then that is the end of the matter. However, if the Magistrate has not yet passed any order on the police report, he may do so in accordance with law and in the light of the observations made above.

36. With the above observations, this appeal stands dismissed.

37. Let a copy of this judgment be sent by the Secretary General of this Court to the Registrar Generals/Registrars of all the High Courts, who shall circulate a copy of this Judgment to all the Hon'ble Judges of the High Courts.

Dilip K. Basu v. State of West Bengal
(1997) 6 SCC 642

Dr. A.S. Anand and K.T. Thomas, JJ.

ORDER

1. On 18-12-1996 in *D.K. Basu v. State of West Bengal* [(1997) 1 SCC 416] this Court laid down certain basic “requirements” to be followed in all cases of arrest or detention till legal provisions are made in that behalf as a measure to prevent custodial violence. The requirements read as follows:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The ‘Inspection Memo’ must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all *tehsils* and districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.”

2. This Court also opined that failure to comply with the above requirements, apart from rendering the official concerned liable for departmental action, would also render him liable to be punished for contempt of court and the proceedings for contempt of court could be instituted in any High Court of the country, having territorial jurisdiction over the matter. This Court further observed:

39. The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the National Network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

3. More than seven months have elapsed since the directions were issued. Through these petitions, Dr Singhvi, the learned *amicus curiae*, who had assisted the Court in the main petition, seeks a direction, calling upon the Director General of Police and the Home Secretary of every State/Union Territory to report to this Court compliance of the above directions and the steps taken by All India Radio and the National Network of Doordarshan for broadcasting the requirements.

4. We direct the Registry to send a copy of this application, together with a copy of this order to Respondents 1 to 31 to have the report/reports from the Director General of Police and the Home Secretary of the State/Union Territory concerned, sent to this Court regarding the compliance of the above directions concerning arrestees. The report shall indicate, in a tabular form, as to which of the “requirements” have been carried out and in what manner, as also, which are the “requirements” which still remain to be carried out and the steps being taken for carrying out those.

5. Report shall also be obtained from the Directors of All India Radio and Doordarshan regarding broadcasts made.

6. The notice on Respondents 1 to 31, in addition, may also be served through the standing counsel of the respective States/Union Territories in the Supreme Court. After the reports are received, copies of the same shall be furnished to the Advocate-on-Record for Dr Singhvi, Ms. Suruchi Aggrawal, Advocates.

7. The reports shall be submitted to this Court in the terms, indicated above, within six weeks from today. The matters shall be put up on board for monitoring, after seven weeks.

* * * * *

State of Haryana v. Dinesh Kumar
(2008) 3 SCC 222

ALTAMAS KABIR, J.: These two appeals have been taken up for hearing and disposal together, in as much as, the issues to be decided in these appeals are common to both, but have been decided differently by two co-ordinate benches of the same High Court giving rise to a question of law which is of great public importance. In these appeals we are called upon to decide what constitutes arrest and custody in relation to a criminal proceeding and the decision in respect thereof may have a bearing on the fate of the respondent in this appeal and that of the appellants in the other appeal in relation to their recruitment as Constable-Drivers in the Haryana Police.

3. The respondent in the first of these two appeals and the appellants in the other appeal applied for appointment as Constable-Drivers under the Haryana Police and submitted their respective application forms, which contained two columns, namely, 13(A) and 14, which read as follows:-

13(A): Have you ever been arrested?

14: Have you ever been convicted by the Court of any offence?

4. As far as the respondent in SLP(C) No. 1840 of 2007, Dinesh Kumar, is concerned, he answered the said two queries in the negative. Subsequently, during verification of the character and antecedents of the said respondent, it was reported that he had been arrested in connection with a case arising out of FIR No. 168 of 13th October, 1994, registered at Kalanaur Police Station under Sections 323/324/34 Indian Penal Code. He and his family members were ultimately acquitted of the charges framed against them on 6th January, 1998, by the Judicial Magistrate, Ist Class, Rohtak. The appellant, however, alleged that the respondent had concealed these facts from the Selection Committee and had not correctly furnished the information in columns 13(A) and 14 of the application form submitted by him for recruitment to the post in question.

5. Since, according to the appellants, the respondent had failed to disclose the aforesaid criminal case, which had been registered against all his family members, he was not offered any appointment. The appeal filed by the respondent was rejected by the Director General of Police, Haryana, by his order dated 18th November, 2005.

6. Before the High Court, it was contended by the respondent that in connection with the aforesaid FIR No. 168 dated 13th October, 1994, he had been granted bail on 17th October, 1994 without having been arrested. It was, therefore, contended on his behalf that since he had not been actually arrested and the case against him having ended in acquittal, it must be deemed that no case had ever been filed against him and hence he had not suppressed any information by replying in the negative to the questions contained in columns 13(A) and 14.

7. The rejection of the respondent's claim for appointment as Constable-Driver on the above mentioned ground was challenged by him before the Punjab and Haryana High Court in Civil Writ Petition No. 18 of 2006. Taking the view that the appellant had not suppressed any material while filling up the said columns 13(A) and 14, the High Court quashed the order of rejection by the Director General of Police, Haryana on 18th November, 2005 and directed the appellants herein to take steps to issue an appointment letter to the respondent subject to fulfillment of other conditions by him.

8. In order to arrive at the aforesaid conclusion, the High Court held that since the petitioner had been acquitted from the criminal case in question, he had quite truthfully answered the query in column 14 by stating that he had never been convicted by any Court for any offence. The High Court also held that even column 13(A) had been correctly answered because the High Court was of the view that the appellant had never been arrested, though he had obtained bail in connection with the said case.

9. In the other writ petition filed by Lalit Kumar and Bhupinder, a co-ordinate Bench of the same High Court took a different view. In the said matter the appellants had been involved in a criminal case, being FIR No.212 dated 3rd November, 2000, registered at Police Station Sadar, Narwana, for offences punishable under Sections 148/149/307/325/323 of the Indian Penal Code, but they had been subsequently acquitted of the said charges on 10th September, 2001. On behalf of the State, the same stand was taken that the aforesaid piece of information had been withheld by the writ petitioners while filling column 14 of the application form. The High Court was of the view that since the writ petitioners had withheld important information it clearly disentitled them to appointment, as it revealed that they could not be trusted to perform their duties honestly. The High Court, accordingly, dismissed the writ petitions as being without merit.

10. In the first of the two appeals, the respondent had not surrendered to the police but had appeared before the Magistrate with his lawyer of his own volition and was immediately granted bail. Admittedly, therefore, the respondent had not surrendered to the police but had voluntarily appeared before the Magistrate and had prayed for bail and was released on bail, so that as per the respondent's understanding, at no point of time was he taken into custody or arrested.

11. As to the second of the two appeals, the appellants in response to the query in column 14, had quite truthfully answered that they had not been convicted by any Court of any offence, since they had been acquitted of the charges brought against them. With regard to column 13(A), the appellants who had been implicated in FIR 108 dated 26th May 2002 under Sections 323/324/34 Indian Penal Code of Police Station Nangal Chaudhary, Mahendergarh, appeared before the Ilaka Magistrate on 7th June, 2002, and were released on their personal bonds without being placed under arrest or being taken into custody. The information disclosed by them was held to be suppression of the fact that they had been involved in a criminal case though the tenor of the query was not to that effect and was confined to the question as to whether they had been arrested.

12. One of the common questions which, therefore, need to be answered in both these appeals is whether the manner in which they had appeared before the Magistrate and had been released without being taken into formal custody, could amount to arrest for the purpose of the query in Column 13A. As mentioned hereinbefore, the same High Court took two different views of the matter. While, on the one hand, one bench of the High Court held that since the accused had neither surrendered nor had been taken into custody, it could not be said that he had actually been arrested, on the other hand, another bench of the same High Court dismissed similar writ petitions filed by Lalit Kumar and Bhupinder, without examining the question as to whether they had actually been arrested or not. The said bench decided the writ petitions against the writ petitioners upon holding that they had withheld important information regarding their prosecutions in a criminal case though ultimately they were acquitted.

13. In order to resolve the controversy that has arisen because of the two divergent views, it will be necessary to examine the concept of arrest and custody in connection with a criminal case. The expression arrest has neither been defined in the Code of Criminal Procedure (hereinafter referred to as the Code) nor in the Indian Penal Code or any other enactment dealing with criminal offences. The only indication as to what would constitute arrest may perhaps be found in Section 46 of the Code which reads as follows:-

46. Arrest how made (1) In making an arrest the police officer or other person making the same 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.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

14. We are concerned with sub-sections (1) and (2) of Section 46 of the Code from which this much is clear that in order to make an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be submission to the custody by word or action.

15. Similarly, the expression custody has also not been defined in the Code.

16. The question as to what would constitute arrest and custody has been the subject matter of decisions of different High Courts, which have been referred to and relied upon by Mr. Patwalia appearing for Dinesh Kumar, respondent in the first of the two appeals. This Court has also had occasion to consider the said question in a few cases, which we will refer to shortly. Reliance was also placed on the dictionary meaning of the two expressions which will also be relevant to our decision.

17. Mr. Anoop Chaudhary, learned senior advocate, who appeared for the State of Haryana, in both the appeals, submitted that when the respondent in the first appeal and the appellants in the second appeal had appeared before the Magistrates and prayed for bail, it must be understood that they had surrendered to the custody of the court, as otherwise, the provisions of Section 439 of the Code would not have had application. Mr. Chaudhary also submitted that it did not matter as to whether the accused persons had been arrested and detained in custody by the police or not, the very fact that they voluntarily appeared before the Magistrate and prayed for bail amounted to arrest of their movements, since thereafter they were confined to the Court room and were no longer free to leave the court premises of their own choice.

18. Mr. Chaudhary submitted that the ordinary dictionary meaning of arrest is to legally restrain a person's movements for the purpose of detaining a person in custody by authority of law. He submitted that in Dinesh Kumar's writ petition the High Court had erred in coming to a finding that he had never been arrested since he had voluntarily appeared before the Magistrate and had been granted bail immediately.

19. Opposing Mr. Chaudhary's submission, Mr. Patwalia, relying on various decisions of different High Courts and in particular a Full Bench decision of the Madras High Court in the case of **Roshan Beevi v. Joint Secretary to the Govt. of Tamil Nadu**, [1984 Cr.L.J 134], submitted that although technically the appearance of the accused before the Magistrate might amount to surrender to judicial custody, in actuality no attempt had been made by anyone to restrict the movements of the accused which may have led him to believe that he had never been arrested. It is on a layman's understanding of the principle of arrest and custody that prompted the respondent in the first of the two appeals and the appellants in the second appeal to mention in column 13(A) that they had never been arrested in connection with any criminal offence.

20. Mr. Patwalia referred to certain decisions of the Allahabad High Court, the Punjab High Court and the Madras High Court which apparently supports his submissions. Of the said decisions, the one in which the meaning of the two expressions arrest and custody have been considered in detail is that of the Full Bench of the Madras High Court in **Roshan Beevi's case** (*supra*). The said decision was, however, rendered in the context of Sections 107 and 108 of the Customs Act, 1962. Sections 107 and 108 of the Customs Act authorises a Customs Officer empowered in that behalf to require a person to attend before him and produce or deliver documents relevant to the enquiry or to summon such person whose attendance is considered necessary for giving evidence or production of a document in connection with any enquiry being undertaken by such officer under the Act. In such context the Full Bench of the Madras High Court returned a finding that custody and arrest are not synonymous terms and observed that it is true that in every arrest there is a custody but not vice-versa. A custody may amount to arrest in certain cases, but not in all cases. It is in the aforesaid circumstances that the Full Bench came to the conclusion that a person who is taken by the Customs Officer either for the purpose of enquiry or interrogation or investigation cannot be held to have come into the custody and detention of the Customs Officer and he cannot be deemed to have been arrested from the moment he was taken into custody.

21. In coming to the aforesaid conclusion, the Full Bench had occasion to consider in detail the meaning of the expression arrest. Reference was made to the definition of arrest in various legal dictionaries and **Halsbury's Laws of England** as also the **Corpus Juris Secundum**. In paragraph 16 of the judgment it was observed as follows:

16. From the various definitions which we have extracted above, it is clear that the word arrest when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested. In this connection, a debatable question that arises for our consideration is whether the mere taking into custody

of a person by an authority empowered to arrest would amount to arrest of that person and whether the terms arrest and custody are synonymous.

22. Faced with the decision of this Court in *Niranjan Singh v. Prabhakar* (AIR 1980 SC 785) the Full Bench distinguished the same on an observation made by this Court that equivocal quibbling that the police have taken a man into informal custody but have not arrested him, have detained him in interrogation but have not taken him into formal custody, were unfair evasion of the straightforwardness of the law. This Court went on to observe further that there was no necessity of dilating on the shady facet as the Court was satisfied that the accused had physically submitted before the Sessions Judge giving rise to the jurisdiction to grant bail. Taking refuge in the said observation, the Full Bench observed that the decision rendered by this Court could not be availed of by the learned counsel in support of his contentions that the mere taking of a person into custody would amount to arrest. The Full Bench observed that mere summoning of a person during an enquiry under the Customs Act did not amount to arrest so as to attract the provisions of Article 22(2) of the Constitution of India and the stand taken that the persons arrested under the Customs Act should be produced before a Magistrate without unnecessary delay from the moment the arrest is effected, had to fail.

23. We are unable to appreciate the views of the Full Bench of the Madras High Court and reiterate the decision of this Court in *Niranjan Singh* case. In our view, the law relating to the concept of arrest or custody has been correctly stated in *Niranjan Singh* case (*supra*). Paragraphs 7, 8 and the relevant portion of paragraph 9 of the decision in the said case states as follows:-

7. When is a person in custody, within the meaning of Section 439 Cr. P.C.? When he is, in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocal quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439, (we are not, be noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court.

9. He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions Sections 107 and 108 of the Customs Act do not contemplate immediate arrest of a person being summoned in connection with an enquiry, but only contemplates surrendering to the custody of the Customs Officer which could subsequently lead to arrest and detention.

24. We also agree with Mr. Anoop Chaudhary's submission that unless a person accused of an offence is in custody, he cannot move the Court for bail under Section 439 of the Code, which provides for release on bail of any person accused of an offence and in custody. The precondition, therefore, to applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move for bail. This aspect of the matter was considered in *Niranjan Singh* case where it was held that a person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

25. It is no doubt true that in the instant case the accused persons had appeared before the concerned Magistrates with their learned advocates and on applying for bail were granted bail without being taken into formal custody, which appears to have swayed one of the benches of the Punjab and Haryana High Court to take a liberal view and to hold that no arrest had actually been effected. The said view, in our opinion, is incorrect as it goes against the very grain of Sections 46 and 439 of the Code. The interpretation of arrest and custody rendered by the Full Bench in *Roshan Bevi* case (*supra*) may be relevant in the context of Sections 107 and 108 of the Customs Act where summons in respect of an enquiry may amount to custody but not to arrest, but such custody could subsequently materialize into arrest. The position is different as far as proceedings in the court are concerned in relation to enquiry into offences under the Indian Penal Code and other criminal enactments. In the latter set of cases, in order to obtain the benefit of bail an accused has to surrender to the custody of the Court or the police authorities before he can be granted the benefit thereunder. In Vol.11 of the 4th Edition of *Halsbury's Laws of England* the term arrest has been defined in paragraph 99 in the following terms:-

99 Meaning of arrest. Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion.

26. The aforesaid definition is similar in spirit to what is incorporated in Section 46 of the Code of Criminal Procedure. The concept was expanded by this Court in *State of Uttar Pradesh v. Deomen* [AIR 1960 SC 1125] wherein it was *inter alia* observed as follows:-

Section 46, Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody. Submission to the custody by words of mouth or action by a person is sufficient. A person directly giving a police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer.

27. The sequatur of the above is that when a person, who is not in custody, approaches the police officer and provides information, which leads to the discovery of a fact, which could be used against him, it would be deemed that he had surrendered to the authority of the investigating agency.

28. It must, therefore, be held that the views expressed by the High Court in Dinesh Kumar's writ petition regarding arrest were incorrect, while the views expressed in the writ petitions filed by Lalit Kumar and Bhupinder correctly interpreted the meaning of the expressions arrest and custody. However, how far the same would apply in the ultimate analysis relating to the filling up of column 13(A) is another matter altogether.

29. In our view, the reasoning given in **Dinesh Kumar** case in that context is a possible view and does not call for interference under Article 136 of the Constitution. Conversely, the decision rendered in the writ petitions filed by Lalit Kumar and Bhupinder has to be reversed to be in line with the decision in **Dinesh Kumar** case. When the question as to what constitutes arrest has for long engaged the attention of different High Courts as also this Court, it may not be altogether unreasonable to expect a layman to construe that he had never been arrested on his appearing before the Court and being granted bail immediately. The position would have been different, had the person concerned not been released on bail. We would, in the facts of these cases, give the benefit of a mistaken impression, rather than that of deliberate and wilful misrepresentation and concealment of facts, to the appellants in the second of the two appeals as well, while affirming the view taken by the High Court in **Dinesh Kumar** case.

30. Accordingly, although, we are of the view that the legal position as to what constitutes arrest was correctly stated in the writ petitions filed by Lalit Kumar and Bhupinder, we confirm the order passed in **Dinesh Kumar** case and extend the same benefit to Lalit Kumar and Bhupinder also.

31. In the result, the Civil Appeal arising out of SLP(C) No. 1840 of 2007 is dismissed, while the Civil Appeal arising out of SLP(C) No.14939 of 2007 is allowed. The judgment of the High Court dated 22nd September, 2005, impugned in the said appeal, is set aside and the concerned respondents are directed to take steps to issue appointment letters to the appellants in the said appeals subject to fulfillment of other conditions by them. It is also made clear that the appellants will be deemed to have been appointed as Constable-Drivers with effect from the date, persons lower in merit to them were appointed. However, while they will be entitled to the notional benefits of such continuous appointment, they will be entitled to salary only from the date of this judgment on the basis of such notional benefits.

32. The appeals are disposed of accordingly.

* * * * *

Arnesh Kumar v. State of Bihar

(2014) 8 SCC 273

CHANDRAMAULI KR. PRASAD, J.— The petitioner apprehends his arrest in a case under Section 498-A of the Penal Code, 1860 (hereinafter called as “IPC”) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A IPC is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

2. The petitioner happens to be the husband of Respondent 2, Sweta Kiran. The marriage between them was solemnized on 1-7-2007. His attempt to secure anticipatory bail has failed [*Arnesh Kumar v. State of Bihar*, Criminal Misc. No. 30041 of 2013, order dated 8-10-2013 (Pat)] and hence he has knocked the door of this Court by way of this special leave petition. Leave granted.

3. In sum and substance, allegation levelled by the wife against the appellant is that demand of rupees eight lakhs, a Maruti car, an air conditioner, television set, etc. was made by her mother-in-law and father-in-law and when this fact was brought to the appellant's notice, he supported his mother and threatened to marry another woman. It has been alleged that she was driven out of the matrimonial home due to non-fulfilment of the demand of dowry. Denying these allegations, the appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

4. There is a phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A IPC is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bedridden grandfathers and grandmothers of the husbands, their sisters living abroad for decades are arrested. “Crime in India 2012 Statistics” published by the National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for the offence under Section 498-A IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under the Penal Code. It accounts for 4.5% of total crimes committed under different sections of the Penal Code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498-A IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

5. Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in

exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasised the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from the power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short “CrPC”), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest.

7. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b) CrPC which is relevant for the purpose reads as follows:

“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)***

(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)***

(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.”

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 CrPC.

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 CrPC 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 CrPC. 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 CrPC, 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 CrPC 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. Another provision i.e. Section 41-A CrPC aimed to avoid unnecessary arrest or threat of arrest looming large on the accused requires to be vitalised. Section 41-A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), which is relevant in the context reads as follows:

“41-A. 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.”

The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, 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 CrPC 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 CrPC 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 CrPC 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 IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

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 CrPC 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 IPC 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.

13. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

14. By order dated 31-10-2013 [*Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 469], this Court had granted provisional bail to the appellant on certain conditions. We make this order absolute.

15. In the result, we allow this appeal, making our aforesaid order dated 31-10-2013 [*Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 469] absolute; with the directions aforesaid.

State v. Captain Jagjit Singh
(1962) 3 SCR 622

K.N. WANCHOO, J. - The respondent Jagjit Singh along with two others was prosecuted for conspiracy and also under Sections 3 and 5 of the Indian Official Secrets Act, (19 of 1923,) (hereinafter called the Act). The respondent is a former captain of the Indian Army and was at the time of his arrest in December, 1960, employed in the delegation in India of a French company. The other two persons were employed in the Ministry of Defence and the Army Headquarters, New Delhi. The case against the three persons was that they in conspiracy had passed on official secrets to a foreign agency.

2. The respondent applied for bail to the Sessions Judge; but his application was rejected by the Additional Sessions Judge, Delhi. Thereupon the respondent applied under Section 498 of the Code of Criminal Procedure to the High Court, and the main contention urged before the High Court was that on the facts disclosed the case against the respondent could only be under Section 5 of the Act, which is bailable and not under Section 3 which is non bailable. The High Court was of the view that it was hardly possible at that stage to go into the question whether Section 3 or Section 5 applied; but that there was substance in the suggestion on behalf of the respondent that the matter was arguable. Consequently the High Court took the view that as the other two persons prosecuted along with the respondent had been released on bail, the respondent should also be so released, particularly as it appeared that the trial was likely to take a considerable time and the respondent was not likely to abscond. The High Court, therefore, allowed bail to the respondent. Thereupon the State made an application for special leave which was granted. The bail granted to the respondent was cancelled by an interim order by this Court, and the matter has now come up before us for final disposal.

3. There is in our opinion a basic error in the order of the High Court. Whenever an application for bail is made to a court, the first question that it has to decide is whether the offence for which the accused is being prosecuted is bailable or otherwise. If the offence is bailable, bail will be granted under Section 436 of the Code of Criminal Procedure without more ado; but if the offence is not bailable, further considerations will arise and the court will decide the question of grant of bail in the light of those further considerations. The error in the order of the High Court is that it did not consider whether the offence for which the respondent was being prosecuted was a bailable one or otherwise. Even if the High Court thought that it would not be proper at that stage, where commitment proceedings were to take place, to express an opinion on the question whether the offence in this case fell under Section 5 which is bailable or under Section 3 which is not bailable, it should have proceeded to deal with the application on the assumption that the offence was under Section 3 and therefore not bailable. The High Court, however, did not deal with the application for bail on this footing, for in the order it is said that the question whether the offence fell under Section 3 or Section 5 was arguable. It follows from this observation that the High Court thought it possible that the offence might fall under Section 5. This, in our opinion, was the basic error into which the High Court fell in dealing with the application for bail before it, and it should have considered the matter even if it did not consider it proper at that stage to decide the question whether the offence was under Section 3 or Section 5, on the assumption that the case fell under Section 3 of the Act. It should

then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with the larger interests of the public or the State, and similar other considerations, which arise when a court is asked for bail in a non-bailable offence. It is true that under Section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence. This, the High Court does not seem to have done, for it proceeded as if the offence for which the respondent was being prosecuted might be a bailable one.

4. The only reasons which the High Court gave for granting bail in this case were that the other two persons had been granted bail, that there was no likelihood of the respondent absconding, he being well-connected, and that the trial was likely to take considerable time. These are however not the only considerations which should have weighed with the High Court if it had considered the matter as relating to a non-bailable offence under Section 3 of the Act.

5. The first question therefore that we have to decide in considering whether the High Court's order should be set aside is whether this is a case which falls *prima facie* under Section 3 of the Act. It is, however, unnecessary now in view of what has transpired since the High Court's order to decide that question. It appears that the respondent has been committed to the Court of Session along with the other two persons under Section 120-B of the Indian Penal Code and under Sections 3 and 5 of the Act read with Section 120-B. *Prima facie* therefore, a case has been found against the respondent under Section 3, which is a non-bailable offence. It is in this background that we have now to consider whether the order of the High Court should be set aside. Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure. Now Section 3 of the Act erects an offence which is prejudicial to the safety or interests of the State and relates to obtaining, collecting, recording or publishing or communicating to any other person any secret official code or password or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy. Obviously, the offence is of a very serious kind affecting the safety or the interests of the State. Further where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment, or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, it is punishable with fourteen years imprisonment. The case against the respondent is in relation to the military affairs of the Government, and *prima facie*, therefore, the respondent if convicted would be liable upto fourteen years' imprisonment. In these circumstances considering the nature of the offence, it seems to us that this is not a case where discretion, which undoubtedly vests in the court, under Section 498 of the Code of Criminal Procedure, should have been exercised in favour of the respondent. We advisedly say no more as the case has still to be tried.

6. It is true that two of the persons who were prosecuted along with the respondent were released on bail prior to the commitment order; but the case of the respondent is obviously distinguishable from their case in as much as the prosecution case is that it is the respondent who is in touch with the foreign agency and not the other two persons prosecuted along with him. The fact that the respondent may not abscond is not by itself sufficient to induce the court to grant him bail in a case of this nature. Further, as the respondent has been committed for trial to the Court of Session, it is not likely now that the trial will take a long time. In the circumstances we are of opinion that the order of the High Court granting bail to the respondent is erroneous and should be set aside. We therefore allow the appeal and set aside the order of the High Court granting bail to the respondent. As he has already been arrested under the interim order passed by this Court, no further order in this connection is necessary. We, however, direct that the Sessions Judge will take steps to see that as far as possible the trial of the respondent starts within two months of the date of this order.

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Moti Ram v. State of M.P.
(1978) 4 SCC 47

V.R. KRISHNA IYER, J. – “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread,” lampooned Anatole France. The reality of this caricature of equal justice under the law, whereby the poor are priced out of their liberty in the justice market, is the grievance of the petitioner. His criminal appeal pends in this Court and he has obtained an order for bail in his favour “to the satisfaction of the Chief Judicial Magistrate”. The direction of this Court did not spell out the details of the bail, and so, the magistrate ordered that a surety in a sum of Rs 10,000 be produced which, in actual impact, was a double denial of the bail benefit. For one thing the miserable mason, the petitioner before us, could not afford to procure that huge sum or manage a surety of sufficient prosperity. Affluents do not befriend indigents. For another, the magistrate made an odd order refusing to accept the surety ship of the petitioner’s brother because he and his assets were in another district.

2. If mason and millionaire were treated alike, egregious illegality is an inevitability. Likewise, geographic allergy at the judicial level makes mockery of equal protection of the laws *within the territory of India*. India is one and not a conglomeration of districts, untouchably apart.

3. When this Court’s order for release was thus frustrated by magisterial intransigence the prisoner moved this Court again to modify the original order “to the extent that petitioner be released on furnishing surety to the tune of Rs 2,000 or *on executing a personal bond* or pass any other order or direction as this Hon’ble Court may deem fit and proper”. From this factual matrix three legal issues arise (1) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond *without sureties*, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave? (2) If the Court decides to grant bail *with sureties*, what criteria should guide it in quantifying the amount of bail, and (3) Is it within the power of the Court to reject a surety because he or his estate is situate in a different district or State?

4. This formulation turns the focus on an aspect of liberty bearing on bail jurisprudence. The victims, when suretyship is insisted on or heavy sums are demanded by way of bail or local bailors alone are *persona grata*, may well lie the weaker segments of society like the proletariat, the linguistic and other minorities and distant denizens from the far corners of our country with its vast diversity. In fact the grant of bail can be stultified or made impossibly inconvenient and expensive if the Court is powerless to dispense with surety or to receive an Indian bailor across the district borders as good or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom *vis-a-vis* the lowly. This poignant import of the problem persuaded the Chamber Judge - to invite the Supreme Court Bar Association and the Citizens for Democracy to assist the Court in decoding the Code and its provisions regarding bail. The Kerala State Bar Federation was permitted to intervene and counsel for the parties also made submissions. We record our appreciation of the *amicus curiae* for their services and proceed to discuss the triple issues formulated above.

5. There is already a direction for grant of bail by this Court in favour of the petitioner and so the merits of that matter do not have to be examined now. It is a sombre reflection that many little Indians are forced into long cellular servitude for little offences because trials never conclude and bailors are beyond their meagre means. The new awareness about human rights imparts to what might appear to be a small concern relating to small men a deeper meaning. That is why we have decided to examine the question from a wider perspective bearing in mind prisoner's rights in an international setting and informing ourselves of the historical origins and contemporary trends in this branch of law. Social Justice is the signature tune of our Constitution and the little man in peril of losing his liberty is the consumer of social justice.

6. There is no definition of bail in the Code although offences are classified as bailable and non-bailable. The actual sections which deal with bail, as we will presently show, are of blurred semantics. We have to interdict judicial arbitrariness deprivatory of liberty and ensure "fair procedure" which has a creative connotation after *Maneka Gandhi* [(1978) 1 SCC 248].

7. Before we turn to the provisions of the Code and dwell on the text of the sections we may as well remember what Justice Frankfurter said: "there is no surer way to misread a document than to read it literally".

8. Speaking generally, we agree with the annotation of the expression 'bail' given in the *American Jurisprudence* (2nd Edn. Vol. 8, Article 2, p. 783):

The term 'bail bond' and 'recognizance' are used interchangeably in many bail statutes, and quite generally without distinction by the courts, and are given a practically identical effect.

According to the *American Jurisprudence* Article 6, p. 785, there is power in the court to release the defendant without bail or on his own recognizance. Likewise, the definition of bail as given in *Webster's Third Year International Dictionary*: "The process by which a person is released from custody".

9. The concept of bail has a long history briefly set out in the publication on '*Programme in Criminal Justice Reform*':

The concept of bail has a long history and deep roots in English and American law. In medieval England, the custom grew out of the need to free untried prisoners from disease-ridden jails while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered, to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appear, his bailor would stand trial in his place.

Eventually it became the practice for property owners who accepted responsibility for accused persons to forfeit money when their charges failed to appear for trial. From this grew the modern practice of posting a money bond through a commercial bondsman who receives a cash premium for his service, and usually demands some collateral as well. In the event of non-appearance the bond is forfeited, after a grace period of a number of days during which the bondsman may produce the accused in court.

10. It sounds like a culture of bonded labour, and yet are we to cling to it. Of course, in the United States, since then, the bondsman emerged as a commercial adjunct to the processes of

criminal justice, which, in turn, bred abuses and led to reform movements like the Manhattan Bail Project. This research project spurred the National Bail Conference, held in 1964, which in its crucial chain reaction provided the major impetus to a reform of bail law across the United States. The seminal statutory outcome of this trend was the enactment of the Bail Reform Act of 1966 signed into law by President Lyndon B. Johnson. It is noteworthy that Chief Justice Earl Warren, Attorney General Robert Kennedy and other legal luminaries shared the view that bail reform was necessary. Indeed, this legislative scenario has a lesson for India where a much later Criminal Procedure Code, 1973 has largely left untouched ancient provisions on this subject, incongruous with the Preamble to the Constitution.

11. An aside. Hopefully, one wishes that socio-legal research projects in India were started to examine our current bail system. Are researchers and jurists speechless on such issues because pundits regard these small men's causes not worthwhile? Is the art of academic monitoring of legislative performance irrelevant for India?

12. The American Act of 1966 has stipulated, *inter alia*, that release should be granted in non-capital cases where there is reasonable assurance the individual will reappear when required; that the Courts should make use of a variety of release options depending on the circumstances; that information should be developed about the individual on which intelligent selection of alternatives should be based.

13. The Manhattan Bail Project, conducted by the Vera Foundation [*Vera Institute of Justice Ten-year Report 1961-71*, p. 20] and the Institute of Judicial Administration at New York University School of Law, found that about sixty-five per cent of all felony defendants interviewed could be recommended for release *without bail*. Of 2,195 defendants released in this way *less than one per cent failed to appear, when required*. In short, risk of financial loss is an insubstantial deterrent to flight for a large number of defendants whose ties with the community are sufficient to bring them to court.

14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

15. It is interesting that American criminological thinking and research had legislative response and the Bail Reforms Act, 1966 came into being. The then President, Lyndon B. Johnson made certain observations at the signing ceremony:

“Today, we join to recognize 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 ensure 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 the *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. . . .”(emphasis added)

16. Coming to studies made in India by knowledgeable Committees we find the same connotation of bail as including release on one's own bond being treated as implicit in the provisions of the Code of Criminal Procedure. The Gujarat Committee from which we quote extensively, dealt with this matter in depth:

“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 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.*” (emphasis added)

17. The vice of the system is brought out in the Report:

The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences, namely: (1) though presumed innocent he is subjected to the psychological and physical deprivations of jail life; (2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributing to the preparation of his defence; and (4) the public exchequer has to bear the cost of maintaining him in the jail.

18. The *Encyclopaedia Britannica* brings out the same point even in more affluent societies:

Bail, procedure by which a judge or magistrate sets at liberty one who has been arrested or imprisoned, upon receipt of security to ensure the released prisoner's later appearance in court for further proceedings. . . . Failure to consider financial ability has generated much controversy in recent years, for bail requirements may discriminate against poor people and certain minority groups who are thus deprived of an equal opportunity to secure their freedom pending trial. Some courts now give special consideration to indigent accused persons who, because of their community standing and past history, are considered likely to appear in court.

19. A latter Committee with Judges, lawyers, members of Parliament and other legal experts, came to the same conclusion and proceeded on the assumption that release on bail included release on the accused's own bond:

We think that a liberal policy of conditional release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the care of his relatives or releasing him on supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused is too poor to find sureties, there will be no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence.

19A. Again:

We should suggest that the Magistrate must always bear in mind that monetary bail is not a necessary element of the criminal process and even if risk of monetary loss is a deterrent against fleeing from justice, it is not the only deterrent and there are other factors which are sufficient deterrents against flight. The Magistrate must abandon the antiquated concept under which pre-trial release could be ordered only against monetary Bail. That concept is out-dated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has now been developed in socially advanced countries and particularly the United States should now inform the decisions of the Magistrates in regard to pre-trial release. Every other feasible method of pre-trial release should be exhausted before resorting to monetary bail. The practice which is now being followed in the United States is that the accused should ordinarily be released on order to appear or on his own recognizance unless it is shown that there is substantial risk of non-appearance or there are circumstances justifying imposition of conditions on release. . . . If a Magistrate is satisfied after making an enquiry into the condition and background of the accused that the accused has his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognizance. . .

20. Thus, the legal literature, Indian and Anglo-American, on bail jurisprudence lends countenance to the contention that bail, loosely used, is comprehensive enough to cover release on one's own bond with or without sureties.

21. We have explained later that the power of the Supreme Court to enlarge a person during the pendency of a Special Leave Petition or of an appeal is very wide, as Order 21 Rule 27 of the Supreme Court Rules discloses. In that sense, a consideration of the question as to whether

the High Court or the subordinate courts have powers to enlarge a person on his own bond without sureties may not strictly arise. Even so, the guidelines which prevail with the Supreme Court when granting suspension of sentence must, in a broad sense, have relevance to what the Code indicates except where special circumstances call for a different course. Moreover, the advocates who participated—many of them did—covered the wider area of release under the Code, whether with or without sureties, and that is why we consider the relevant provisions of the Code in some detail.

22. Let us now examine whether there is anything in the provisions of the Code which make this meaning clearly untenable.

23. A semantic smog overlays the provisions of bail in the Code and prisoners' rights, when cast in ambiguous language become precarious. Where doubts arise the Gandhian talisman becomes a tool of interpretation:

“Whenever you are in doubt. . . apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.” Law, at the service of life, must respond interpretatively to raw realities and make for liberties.

24. Primarily Chapter XXXIII is the nidus of the law of bail. Section 436 of the Code speaks of bail but the proviso makes a contradistinction between ‘bail’ and ‘own bond without sureties’. Even here there is an ambiguity, because even the proviso comes in only if, as indicated in the substantive part, the accused in a bailable offence ‘is prepared to give bail’. Here, ‘bail’ suggests ‘with or without sureties’. And, ‘bail bond’ in Section 436(2) covers own bond. Section 437(2) blandly speaks of bail but speaks of release on bail of persons below 16 years of age, sick or infirm people and women. It cannot be that a small boy or sinking invalid or *pardanashin* should be refused release and suffer stress and distress in prison unless sureties are hauled into a far-off court with obligation for frequent appearance: ‘Bail’ there suggests release, the accent being on undertaking to appear when directed, not on the production of sureties. But Section 437(2) distinguishes between bail and bond without sureties.

25. Section 445 suggests, especially when read with the marginal note, that deposit of money will do duty for bond ‘*with or without sureties*’. Section 441(1) of the Code may appear to be a stumbling block in the way of the liberal interpretation of bail as covering own bond with and without sureties. Superficially viewed, it uses the words ‘bail’ and ‘own bond’ as antithetical, if the reading is literal. Incisively understood, Section 441(1) provides for both the bond of the accused and the undertaking of the surety being conditioned in the manner mentioned in the sub-section. To read ‘bail’ as including only cases of release *with* sureties will stultify the sub-section; for then, an accused released on his own bond without bail, i.e. surety, cannot be conditioned to attend at the appointed place. Section 441(2) uses the word ‘bail’ to include ‘own bond’ loosely as meaning one or the other or both. Moreover, an accused in judicial custody, actual or potential, may be released by the court to further the ends of justice and nothing in Section 441(1) compels a contrary meaning.

26. Section 441(2) and (3) use the word ‘bail’ generically because the expression is intended to cover bond with or without sureties.

27. The slippery aspect is dispelled when we understand the import of Section 389(1) which reads:

389(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.

The court of appeal may release a convict on his own bond without sureties. Surely, it cannot be that an under-trial is worse off than a convict or that the power of the court to release increases when the guilt is established. It is not the court's status but the applicant's guilt status that is germane. That a guilty man may claim judicial liberation, *pro tempore* without sureties while an undertrial cannot is a *reductio ad absurdum*.

28. Likewise, the Supreme Court's powers to enlarge a prisoner, as the wide words of Order 21 Rule 27 (Supreme Court Rules) show, contain no limitation based on sureties. Counsel for the State agrees that this is so, which means that a murderer, concurrently found to be so, may theoretically be released on his own bond without sureties while a suspect, presumed to be innocent, cannot. Such a strange anomaly could not be, even though it is true that the Supreme Court exercises wider powers with greater circumspection.

29. The truth, perhaps, is that indecisive and imprecise language is unwittingly used, not knowing the draftsman's golden rule:

In drafting it is not enough to gain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.

30. If sureties are obligatory even for juveniles, females and sickly accused while they can be dispensed with, after being found guilty, if during trial when the presence to instruct lawyers is more necessary, an accused must buy release *only* with sureties while at the appellate level, surety ship is expendable, there is unreasonable restriction on personal liberty with discrimination writ on the provisions. The hornet's nest of Part III need not be provoked if we read 'bail' to mean that it popularly does, and lexically and in American Jurisprudence is stated to mean, viz. a generic expression used to describe judicial release from *custodia juris*. Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents's rights, we hold that bail covers both—release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

31. Even so, poor men - Indians are, in monetary terms, indigents - young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances - put whatever reasonable conditions you may.

32. It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs 10,000. The magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker and the candlestick maker - shall we add, the bonded labour and pavement dweller.

33. To add insult to injury, the magistrate has demanded sureties from his own district! (We assume the allegation in the petition). What is a Malayalee, Kannadiga, Tamil or Telugu to do if arrested for alleged misappropriation or theft or criminal trespass in Bastar, Port Blair, Pahalgam or Chandni Chowk? He cannot have sureties owning properties in these distant places. He may not know any one there and might have come in a batch or to seek a job or in a *morcha*. Judicial disruption of Indian unity is surest achieved by such provincial allergies. What law prescribes surety is from outside or non-regional language applications? What law prescribes the geographical discrimination implicit in asking for sureties from the court district? This tendency takes many forms, sometimes, geographic, sometimes linguistic, sometimes legalistic. Article 14 protects all Indians *qua* Indian, within the territory of India. Article 350 sanctions representation to any authority, including a court, for redress of grievances in any language used in the Union of India. Equality before the law implies that even a *vakalat* or affirmation made in any State language according to the law in that State must be accepted everywhere in the territory of India save where a valid legislation to the contrary exists. Otherwise, an *adivasi* will be unfree in free India, and likewise many other minorities. This divagation has become necessary to still the judicial beginnings, and to inhibit the process of making Indians aliens in their own homeland. *Swaraj* is made of *united* stuff.

34. We mandate the magistrate to release the petitioner on his own bond in a sum of Rs 1,000.

An afterword

35. We leave it to Parliament to consider whether in our socialist republic, with social justice as its hallmark, monetary superstition, not other relevant considerations like family ties, roots in the community, membership of stable organisations, should prevail for bail bonds to ensure that the 'bailee' does not flee justice. The best guarantee of presence in court is the reach of the law, not the money tag. A parting thought. If the indigents are not to be betrayed by the law including bail law, re-writing of many processual laws is an urgent desideratum; and the judiciary will do well to remember that the geo-legal frontiers of the Central Codes cannot be disfigured by cartographic dissection in the name of language or province.

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Gurcharan Singh v. State (Delhi Admn.)

(1978) 1 SCC 118 : AIR 1978 SC 179

P.K. GOSWAMI, J. -These two appeals by Special Leave are directed against the judgment and order of the Delhi High Court cancelling the orders of bail of each of the appellants passed by the learned Sessions Judge, Delhi. They were all arrested in pursuance of the First Information Report lodged by the Superintendent of Police, CBI on June 10, 1977 in what is now described as the “Sunder Murder Case”. The report at that stage did not disclose names of accused persons and referred to the involvement of “some Delhi Police personnel”. Sunder was said to be a notorious dacoit who was wanted in several cases of murder and dacoity alleged to have been committed by him in Delhi and elsewhere. It is stated- that by May, 1976 Sunder became a “security risk for Mr Sanjay Gandhi”. It appears Sunder was arrested at Jaipur on August 31, 1976 and was in police custody in Delhi between November 2, 1976 and November 26, 1976 under the orders of the Court of the Additional Chief Metropolitan Magistrate, Shahdara, Delhi.

2. It is alleged that the appellants ranging from the Deputy Inspector General of Police and the Superintendent of Police at the top down to some police constables were a party to a criminal conspiracy to kill Sunder and caused his death by drowning him in the Yamuna in pursuance of the conspiracy. According to the prosecution, the alleged murder took place on the night of November 24, 1976.

3. The appellants were arrested in connection with the above case between June 10, 1977 and July 12, 1977 and the Magistrate declined to release them on bail. Thereafter, they approached the learned Sessions Judge under Section 439 (2) [*sic* (1)], Criminal Procedure Code, 1973 (briefly the new Code) and secured release on bail of the four appellants, namely, Gurcharan Singh (Superintendent of Police), P.S. Bhinder (D.I.G. of Police), Amarjit Singh (Inspector) and Constable Paras Ram on August 1, 1977 and of the eight other police personnel on August 11, 1977.

4. Charge-sheet was submitted on August 9, 1977 against 13 accused including all the appellants under Section 120B read with Section 302, IPC and under other sections. The thirteenth accused who was also a policeman has been evading arrest.

5. The Delhi Administration moved the High Court under Section 439(2), Cr. P.C. against the orders of the learned Sessions Judge for cancellation of the bail. On September 19, 1977 the High Court set aside the orders of the Sessions Judge dated August 1, 1977 and August 11, 1977 and the bail bonds furnished by the appellants were cancelled and they were ordered to be taken into custody forthwith. Hence these appeals by Special Leave which were argued together and will be disposed of by this judgment.

6. In order to appreciate the submissions, on behalf of the appellants, of Mr Mulla followed by Mr Mukherjee it will be appropriate to briefly advert to certain relevant facts.

7. On the allegations, this is principally a case of criminal conspiracy to murder a person in police custody be he a bandit. The police personnel from the Deputy Inspector General of Police to police constables are said to be involved as accused.

8. Before the FIR was lodged on June 10, 1977, there had been a preliminary inquiry conducted by the CBI between April 6, 1977 and June 9, 1977 bearing upon the death of Sunder. Fifty-three witnesses were examined in that inquiry and six of them were said to be eye-witnesses. These eye-witnesses were all police personnel. During this preliminary inquiry, all the six alleged eye-witnesses did not support the prosecution case, but gave statements in favour of the accused. However, as stated earlier, the FIR was lodged on June 10, 1977 and investigation proceeded in which statements of witnesses were recorded under Section 161, Cr.P.C. The appellants were also arrested and suspended during the period between June 10, 1977 and July 12, 1977. During the course of the investigation, seven witnesses including six persons already examined during the preliminary inquiry, gave statements implicating the appellants in support of the theory of prosecution. The witnesses were also forwarded to the Magistrate for recording their statements under Section 164, Cr.P.C. All the seven witnesses, it is stated, continued to support the prosecution case to their statements on oath recorded under Section 164, Cr.P.C. Six eye-witnesses who made such discrepant statements and had supported the defence version at one stage, explained that some of the accused, namely, D.S.P. R. K. Sharma and Inspector Harkesh had exercised pressure on them to make such statements in favour of the defence. The seventh eye-witness A.S.I. Gopal Das, who had not been examined earlier, made statements under Section 164, Cr.P.C. in favour of the prosecution.

9. It is in the above background that the Delhi Administration moved the High Court for cancellation of the bail granted by the Sessions Judge alleging that there was grave apprehension of the witnesses being tampered with by the accused persons on account of their position and influence which they wielded over the witnesses. The learned Sessions Judge advertent to this aspect had, while granting bail, observed as follows:

The argument of the learned Public Prosecutor that if released on bail, the petitioner will misuse their freedom to tamper with the witnesses is not quite convincing. After all, there is little to gain by tampering with the witnesses who have, themselves, already tampered with their evidence by making contradictory statements in respect of the same transaction.

10. The learned Sessions Judge ended his long discussion as follows:

To sum up, after reviewing the entire material including the inquest proceedings held by the Sub-Divisional Magistrate, statements recorded by the CBI during the preliminary enquiry and under Section 161, Cr.P.C. and the statements recorded under Section 164, Cr.P.C. and having regard to the inordinate delay in registering this case and to the circumstances that there is little probability of the petitioners flying from justice or tampering with the witnesses, and also having regard to the character of evidence, I am inclined to grant bail to the petitioners.

11. The High Court, on the other hand, set aside the orders of the Sessions Judge observing as follows:

Considering the nature of the offence, character of the evidence, including the fact that some of the witnesses during preliminary inquiry did not fully support the prosecution case, the reasonable apprehension of witnesses being tampered with and all other factors relevant for consideration, while considering the application for grant or refusal of bail in a non-bailable offence punishable with death or imprisonment for life, I have no option but to

cancel the bail. I am of the considered view that the learned Sessions Judge did not exercise his judicial discretion on relevant well-recognised principles and factors which ought to have been considered by him.

12. Section 437 of the new Code corresponds to Section 497 of the Code of Criminal Procedure, 1898 (briefly the old Code) and Section 439 of the new Code corresponds to Section 498 of the old Code. Since there is no direct authority of this Court with regard to Section 439, Cr.P.C of the new Code, Counsel for both sides drew our attention to various decisions of the High Courts under Section 498, Cr.P.C of the old Code.

13. Mr Mulla drew our particular attention to some change in the language of Section 437(1), Cr.P.C. (new Code) compared with Section 497(1) of the old Code. Mr Mulla points out that while Section 497(1), Cr.P.C of the old Code, in terms, refers to an accused being “brought before a Court”, Section 437(1), Cr.P.C uses the expression “brought before a Court other than the High Court or a Court of Session”. From this, Mr Mulla submits that limitations with regard to the granting of bail laid down under Section 497 (1) to the effect that the accused “shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life” are not in the way of the High Court or the Court of Session in dealing with bail under Section 439 of the new Code. It is, however, difficult to appreciate how the change in the language under Section 437(1) affects the true legal position. Under the new as well as the old Code an accused after being arrested is produced before the Court of a Magistrate. There is no provision in the Code whereby the accused is for the first time produced after initial arrest before the Court of Session or before the High Court. Section 437(1), Cr.P.C, therefore, takes care of the situation arising out of an accused being arrested by the police and produced before a Magistrate. What has been the rule of production of accused person after arrest by the police under the old Code has been made explicitly clear in Section 437(1) of the new Code by excluding the High Court or the Court of Session.

14. From the above change of language it is difficult to reach a conclusion that the Sessions Judge or the High Court need not even bear in mind the guidelines which the Magistrate has necessarily to follow in considering bail of an accused. It is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life. Since the Sessions Judge or the High Court will be approached by an accused only after refusal of bail by the Magistrate, it is not possible to hold that the mandate of the law of bail under Section 437, Cr.P.C for the Magistrate will be ignored by the High Court or by the Sessions Judge.

16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may

cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498 (2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code, a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session *vis-a-vis* the High Court.

17. It is significant to note that under Section 397, Cr.P.C of the new Code while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under sub-section (3) of that section that when an application under that section has been made by any person to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. Similar was the position under Section 435(4), Cr.P.C of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although, under Section 435(1) Cr.P.C of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent powers of revision, the High Court's jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under Section 439(2), Cr.P.C to cancel bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain the application under Section 439(2), Cr.P.C for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail. There is, therefore, no force in the submission of Mr Mukherjee to the contrary.

18. Chapter XXXIII of the new Code contains provisions in respect of bail bonds. Section 436, Cr.P.C, with which this Chapter opens makes an invariable rule for bail in case of bailable offences subject to the specified exception under sub-section (2) of that section. Section 437, Cr.P.C provides as to when bail may be taken in case of non-bailable offences. Sub-section (1) of Section 437, Cr.P.C makes a dichotomy in dealing with non-bailable offences. The first category relates to offences punishable with death or imprisonment for life and the rest are all other non-bailable offences. With regard to the first category. Section 437(1), Cr.P.C imposes

a bar to grant of bail by the Court or the officer incharge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing that he has been so guilty. Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the Court to believe that there are no reasonable grounds for believing that the person accused of or suspected of the commission of such an offence has been guilty of the same, there is a ban imposed under Section 437(1), Cr.P.C. against granting of bail. On the other hand, if to either the officer in-charge of the police station or to the Court there appear to be reasonable grounds to believe that the accused has been guilty of such an offence there will be no question of the Court or the officer granting bail to him. In all other non-bailable cases judicial discretion will always be exercised by the Court in favour of granting bail subject to sub-section (3) of Section 437, Cr.P.C with regard to imposition of conditions, if necessary. Under sub-section (4) of Section 437, Cr.P.C. an officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) of that section is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

19. Section 437, Cr.P.C. deals, *inter alia* with two stages during the initial period of the investigation of a non-bailable offence. Even the officer in-charge of the police station may, by recording his reasons in writing, release a person accused of or suspected of the commission of any non-bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence. Quick arrests by the police may be necessary when there are sufficient materials for the accusation or even for suspicion. When such an accused is produced before the Court, the Court has a discretion to grant bail in all non-bailable cases except those punishable with death or imprisonment for life if there appear to be reasons to believe that he has been guilty of such offences. The Courts over-see the action of the police and exercise judicial discretion in granting bail always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer. After the Court releases a person on bail under sub-section (1) or sub-section (2) of Section 437, Cr.P.C it may direct him to be arrested again when it considers necessary so to do. This will be also in exercise of its judicial discretion on valid grounds.

20. Under the first proviso to Section 167(2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same. This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail. This proviso is an innovation in the new Code and is intended to speed up investigation by the police so that a person does not have to languish unnecessarily in prison facing a trial. There is a similar provision under sub-section (6) of Section 437, Cr. P.C which corresponds to Section 497 (3A) of the old Code. This provision is again intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs. We may also notice in this connection sub-section (7) of Section 437 which provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgment is delivered, the Court

is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody, on the execution of him of a bond without sureties for his appearance to hear the judgment. The principle underlying Section 437 is, therefore, towards granting of bail except in cases where there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.

21. Section 437, Cr.P.C is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session. The language of Section 437(1) may be contrasted with Section 437(7) to which we have already made a reference. While under sub-section (1) of Section 437, Cr. P.C the words are: "If there appear to be reasonable grounds for believing that he has been guilty", sub-section (7) says: "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Whereas after submission of charge-sheet or during trial for such an offence the Court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Court to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody. At that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits.

22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437, Cr.P.C if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1), Cr.P.C and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

23. By an amendment in 1955 in Section 497, Cr.P.C of the old Code the words “or suspected of the commission of were for the first time introduced. These words were continued in the new Code in Section 437(1), Cr.P.C. It is difficult to conceive how if a police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life (Section 41, Cr.P.C of the new Code) and forwards him to a Magistrate [Section 167(1), Cr.P.C of the new Code] the Magistrate at that stage will have reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the proviso to Section 437(1), Cr.P.C bail appears to be out of the question. The only limited inquiry may then relate to the materials for the suspicion. The position will naturally change as investigation progresses and more facts and circumstances come to light.

24. Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr.P.C against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The over-riding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr.P.C of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

25. The question of cancellation of bail under Section 439(2), Cr.P.C of the new Code is certainly different from admission to bail under Section 439(1), Cr.P.C. The decisions of the various High Courts cited before us are mainly with regard to the admission to bail by the High Court under Section 498, Cr.P.C (old). Power of the High Court or of the Sessions Judge to admit persons to bail under Section 498, Cr.P.C (old) was always held to be wide without any express limitations in law. In considering the question of bail justice to both sides governs the judicious exercise of the Court's judicial discretion. The only authority cited before us where this Court cancelled bail granted by the High Court is that of *The State v. Captain Jagjit Singh* [AIR 1962 SC 253]. The Captain was prosecuted along with others for conspiracy and also under Sections 3 and 5 of the Indian Official Secrets Act, 1923 for passing on official secrets to a foreign agency. This Court found a basic error in the order of the High Court in treating the case as falling under Section 5 of the Official Secrets Act which is a bailable offence when the High Court ought to have proceeded on the assumption that it was under Section 3 of that Act which is a non-bailable offence. It is because of this basic error into which the High Court fell that this Court interfered with the order of bail granted by the High Court.

26. In the present case the Sessions Judge having admitted the appellants to bail by recording his reasons we will have to see whether that order was vitiated by any serious infirmity for which it was right and proper for the High Court, in the interest of justice, to interfere with his discretion in granting the bail.

27. Ordinarily the High Court will not exercise its discretion to interfere with an order of bail granted by the Sessions Judge in favour of an accused.

28. We have set out above the material portions of the order of the Sessions Judge from which it is seen that he did not take into proper account the grave apprehension of the prosecution that there was a likelihood of the appellants tampering with the prosecution witnesses. In the peculiar nature of the case revealed from the allegations and the position of the appellants in relation to the eyewitnesses it was incumbent upon the Sessions Judge to give proper weight to the serious apprehension of the prosecution with regard to tampering with, the eyewitnesses, which was urged before him in resisting the application for bail. The matter would have been different if there was absolutely no basis for the apprehension of the prosecution with regard to tampering of the witnesses and the allegation rested only on a bald statement. The manner in which the above plea was disposed of by the Sessions Judge was very casual and even the language in the order is not clear enough to indicate what he meant by observing that "the witnesses ... themselves already tampered with their evidence by making contradictory statements ...". The learned Sessions Judge was not alive to the legal position that there was no substantive evidence yet recorded against the accused until the eyewitnesses were examined in the trial which was to proceed unimpeded by any vicious probability. The witnesses stated on oath under Section 164, Cr.P.C that they had made the earlier statements due to pressurisation by some of the appellants. Where the truth lies will be determined at the trial. The High Court took note of this serious infirmity of approach of the Sessions Judge as also the unwarranted manner bordering on his prematurely commenting on the merits of the case by observing that "such deposition cannot escape a taint of unreliability in some measure or other". The only question which the Sessions Judge was required to consider at that stage was whether there was *prima facie* case made out, as alleged, on the statements of the witnesses and on other materials. There appeared at least nothing at that stage against the statement of ASI Gopal Das who had made no earlier contradictory statement. "The taint of unreliability" could not be attached to his statement even for the reason given by the learned Sessions Judge. Whether his evidence will ultimately be held to be trustworthy will be an issue at the stage of trial. In considering the question of bail of an accused in a non-bailable offence punishable with death or imprisonment for life, it is necessary for the Court to consider whether the evidence discloses a *prima facie* case to warrant his detention in jail besides the other relevant factors referred to above. As a link in the chain of criminal conspiracy the prosecution is also relying on the conduct of some of the appellants in taking Sunder out of police lockup for making what is called a false discovery and it is but fair that the *Panch* witness in that behalf be not allowed to be got at.

29. We may repeat the two paramount considerations, *viz.* likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper weight should be bestowed on these

two factors apart from others. 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 dealing with the question of bail under Section 498 of the old Code under which the High Court in that case had admitted the accused to bail, this Court in ***The State v. Captain Jagjit Singh***, while setting aside the order of the High Court granting bail, made certain general observations with regard to the principles that should govern in granting bail in a non-bailable case as follows:

It (the High Court) should then have taken into account the various considerations, such as. nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a Court is asked for bail in a non-bailable offence. It is true that under Section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted, in a non-bailable offence.

We are of the opinion that the above observations equally apply to a case under Section 439 of the new Code and the legal position is not different under the new Code.

31. We are satisfied that the High Court has correctly appreciated the entire position and the Sessions Judge did not at the stage the case was before him. We will not, therefore, be justified under Article 136 of the Constitution in interfering with the discretion exercised by the High Court in cancelling the bail of the appellants in this case.

32. Before closing, we should, however, make certain things clear. We find that the case is now before the committing Magistrate. We are also informed that all documents have been furnished to the accused under Section 207, Cr.P.C. of the new Code. The Magistrate will, therefore, without loss of further time pass an appropriate order under Section 209, Cr.P.C. The Court of Session will, thereafter, commence trial at an early date and examine all the eye-witnesses first and such other material witnesses thereafter as may be produced by the prosecution as early as possible. Trial should proceed *de die in diem* as far as practicable at least so far as the eyewitnesses and the above referred to *Panch* witness are concerned. We have to make this order as both Mr Mulla and Mr Mukherjee submitted that trial will take a long time as the witnesses cited in the charge-sheet are more than 200 and it will be a punishment to keep the appellants in detention pending the trial. We have, therefore, thought it fit to make the above observation to which the learned Additional Solicitor General had readily and very fairly agreed. After the statements of the eye-witnesses and the said *Panch* witness have been recorded, it will be open to the accused to move the Sessions Judge for admitting them to bail, pending further hearing. The appeals are dismissed with the above observations. The stay orders stand vacated.

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Sanjay Chandra v. Central Bureau of Investigation
(2012) 1 SCC 40

H.L. DATTU, J.: 1) Leave granted in all the Special Leave Petitions.

2) These appeals are directed against the common Judgment and Order of the learned Single Judge of the High Court of Delhi, dated 23rd May 2011 in Bail Application No. 508/2011, Bail Application No. 509/2011 & CrI. M.A. 653/2011, Bail Application No. 510/2011, Bail Application No. 511/2011 and Bail Application No. 512/2011, by which the learned Single Judge refused to grant bail to the accused-appellants. These cases were argued together and submitted for decision as one case.

3) The offence alleged against each of the accused, as noticed by the Ld. Special Judge, CBI, New Delhi, who rejected bail applications of the appellants, vide his order dated 20.4.2011, is extracted for easy reference :

Sanjay Chandra (A7) in CrI. Appeal No. 2178 of 2011 [arising out of SLP (CrI) No. 5650 of 2011]:

“6. The allegations against accused Sanjay Chandra are that he entered into criminal conspiracy with accused A. Raja, R.K. Chandolia and other accused persons during September 2009 to get UAS licence for providing telecom services to otherwise an ineligible company to get UAS licences. He, as Managing Director of M/s Unitech Wireless (Tamil Nadu) Limited, was looking after the business of telecom through 8 group companies of Unitech Limited. The first-come-first-served procedure of allocation of UAS Licences and spectrum was manipulated by the accused persons in order to benefit M/s Unitech Group Companies. The cutoff date of 25.09.2007 was decided by accused public servants of DoT primarily to allow consideration of Unitech group applications for UAS licences. The Unitech Group Companies were in business of realty and even the objects of companies were not changed to ‘telecom’ and registered as required before applying. The companies were ineligible to get the licences till the grant of UAS licences. The Unitech Group was almost last within the applicants considered for allocation of UAS licences and as per existing policy of first-come-first-served, no licence could be issued in as many as 10 to 13 circles where sufficient spectrum was not available. The Unitech companies got benefit of spectrum in as many as 10 circles over the other eligible applicants. Accused Sanjay Chandra, in conspiracy with accused public servants, was aware of the whole design of the allocation of LOIs and on behalf of the Unitech group companies was ready with the drafts of Rs. 1658 crores as early as 10th October, 2007.”

Vinod Goenka (A5) in CrI. Appeal No. 2179 of 2011 [arising out of SLP (CrI) No. 5902 of 2011] :

“5. The allegations against accused Vinod Goenka are that he was one of the directors of M/s Swan Telecom (P) Limited in addition to accused Shahid Usman Balwa w.e.f. 01.10.2007 and acquired majority stake on 18.10.2007 in M/s Swan Telecom (P) Limited (STPL) through DB Infrastructure (P) Limited. Accused Vinod Goenka carried forward the fraudulent applications of STPL dated 02.03.2007 submitted by previous management despite knowing the fact that STPL was ineligible company to get UAS licences by virtue of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of accused

Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P) Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to DoT regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles.

12. Investigation Has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.

13. Investigation has disclosed that accused Shahid Balwa and Vinod Goenka joined M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. as directors on 01.10.2007 and DB group acquired the majority stake in TTPL/ M/s Swan Telecom Pvt. Ltd. (STPL) on 18.10.2007. On 18.10.2007 a fresh equity of 49.90 lakh shares was allotted to M/s DB Infrastructure Pvt. Ltd. Therefore on 01.10.2007, and thereafter, accused Shahid Balwa and Vinod Goenka were in- charge of, and were responsible to, the company M/s Swan Telecom Pvt. Ltd. for the conduct of business. As such on this date, majority shares of the company were held by D.B. Group.”

Gautam Doshi (A9), Surendra Pipara (A10) and Hari Nair (A 11) in Crl. Appeal Nos.2180, 2182 & 2181 of 2011 [arising out of SLP (Crl) Nos. 6190, 6315 & 6288 of 2011] :

“7. It is further alleged that in January-February, 2007 accused Gautam Doshi, Surendra Pipara and Hari Nath in furtherance of their common intention to cheat the Department of Telecommunications, structured/created net worth of M/s Swan Telecom Pvt. Ltd., out of funds arranged from M/s Reliance Telecom Ltd. or its associates, for applying to DoT for UAS Licences in 13 circles, where M/s Reliance Telecom Ltd. had no GSM spectrum, in a manner that its associations with M/s Reliance Telecom Ltd. may not be detected, so that DOT could not reject its application on the basis of clause 8 of the UASL Guidelines dated 14.12.2005.

8. In pursuance of the said common intention of accused persons, they structured the stake-holding of M/s Swan Telecom Pvt. Ltd. in a manner that only 9.9% equity was held by M/s Reliance Telecom Ltd. (RTL) and rest 90.1% was shown as held by M/s Tiger Traders Pvt. Ltd. (later known as M/s Tiger Trustees Pvt. Ltd. – TTPL), although the entire company was held by the Reliance ADA Group of companies through the funds raised from M/s Reliance Telecom Ltd. etc.

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited / M/s Reliance Telecom Limited, having existing UAS Licences

in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate company of Reliance ADA Group. Both the companies have no business history and were activated solely for the purpose of applying for UAS Licences in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications / M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

10. Investigations about the holding structure of M/s Tiger Traders Pvt. Ltd. has revealed that the aforesaid accused persons also structured two other companies i.e. M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited. Till April, 2007, by when M/s Swan Telecom Pvt. Ltd. applied for telecom licences, 50% shares of M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited, were purchased by M/s Tiger Traders Pvt. Ltd. Similarly, 50% of equity shares of M/s Parrot Consultants Private Limited & M/s Tiger Traders Private Limited were purchased by M/s Zebra Consultancy Private Limited. Also, 50% of equity shares of M/s Zebra Consultancy Private Limited and M/s Tiger Traders Private Limited were purchased by M/s Parrot Consultants Private Limited. These 3 companies were, therefore, cross holding each other in an inter- locking structure w.e.f. March 2006 till 4th April, 2007.

11. It is further alleged that accused Gautam Doshi, Surendra Pipara and Hari Nair instead of withdrawing the fraudulent applications preferred in the name of M/s Swan Telecom (P) Limited, which was not eligible at all, allowed the transfer of control of that company to the Dynamix Balwa Group and thus, enabled perpetuating and (sic.) illegality. It is alleged that TRAI in its recommendations dated 28.08.2007 recommended the use of dual technology by UAS Licensees. Due to this reason M/s Reliance Communications Limited, holding company of M/s Reliance Telecom Limited, became eligible to get GSM spectrum in telecom circles for which STPL had applied. Consequently, having management control of STPL was of no use for the applicant/accused persons and M/s Reliance Telecom Limited. Moreover, the transfer of management of STPL to DB Group and sale of equity held by it to M/s Delphi Investments (P) Limited, Mauritius, M/s Reliance Telecom Limited has earned a profit of around Rs. 10 crores which otherwise was not possible if they had withdrawn the applications. M/s Reliance Communications Limited also entered into agreement with M/s Swan Telecom (P) Limited for sharing its telecom infrastructure. It is further alleged that the three accused persons facilitated the new management of M/s Swan Telecom (P) Limited to get UAS licences on the basis of applications filed by the former management. It is further alleged that M/s Swan Telecom (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore,

ineligible for UAS licences.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.”

4) The Special Judge, CBI, New Delhi, rejected Bail Applications filed by the appellants by his order dated 20.04.2011. The appellants moved the High Court by filing applications under Section 439 of the Code of Criminal Procedure (in short, “Cr. P.C.”). The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants are before us in these appeals.

5) Shri. Ram Jethmalani, Shri. Mukul Rohatgi, Shri Soli J. Sorabjee and Shri. Ashok H. Desai, learned senior counsel appeared for the appellants and Shri. Harin P. Raval, learned Additional Solicitor General, appears for the respondent-CBI.

6) Shri. Ram Jethmalani, learned senior counsel appearing for the appellant Sanjay Chandra, would urge that the impugned Judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri. Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail. The learned senior counsel would submit that the accused has cooperated with the investigation throughout and that his behavior has been exemplary. He would further submit that the appellant was not arrested during the investigation, as there was no threat from him of tampering with the witnesses. He would submit that the personal liberty is at a very high pedestal in our Constitutional system, and the same cannot be meddled with in a causal manner. He would assail the impugned Judgment stating that the Ld. Judge did not apply his mind, and give adequate reasons before rejecting bail, as is required by the legal norms set down by this Court. Shri. Jethmalani further contends that it was only after the appellants appeared in the Court in pursuance of summons issued, they were made to apply for bail, and, thereafter, denied bail and sent to custody. The learned senior counsel states that the trial Judge does not have the power to send a person, who he has summoned in pursuance of Section 87 Cr.P.C to judicial custody. The only power that the trial Judge had, he would contend, was to ask for a bond as provided for in Section 88 Cr.P.C. to ensure his appearance. Shri. Jethmalani submits that when a person appeared in pursuance of a bond, he was a free man, and such a free man cannot be committed to prison by making him to apply for bail and thereafter, denying him the same. Shri. Jethmalani further submits that if it was the intention of the Legislature to make a person, who appears in pursuance of summons to apply for bail, it would have been so legislated in Section 88 Cr.P.C. The learned senior counsel assailed the Judgment of the Delhi High Court in the ***Court on its own motion v. CBI*** [2004 I JCC 308] by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail

application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided for bail to be granted to the accused, except in the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a “rolled up charge”, as recognized by the **Griffiths’** case [*R v. Griffiths* (1966) 1 Q.B. 589]. Shri. Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

7) Shri. Mukul Rohatgi, learned senior counsel appearing for the appellant Vinod Goenka, while adopting the arguments of Shri. Jethmalani, would further supplement by arguing that the Ld. Trial Judge erred in making the persons, who appeared in pursuance of the summons, apply for bail and then denying the same, and ordering for remand in judicial custody. Shri. Rohatgi would further contend that the gravity of the offence charged with, is to be determined by the maximum sentence prescribed by the Statute and not by any other standard or measure. In other words, the learned senior counsel would submit that the alleged amount involved in the so-called Scam is not the determining factor of the gravity of the offence, but the maximum punishment prescribed for the offence. He would state that the only bar for bail pending trial in Section 437 is for those persons who are charged with offences punishable with life or death, and there is no such bar for those persons who were charged with offences with maximum punishment of seven years. Shri. Rohatgi also cited some case laws.

8) Shri. Ashok H. Desai, learned senior counsel appearing for the appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri. Jethmalani. In addition, Shri. Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri. Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri. Desai would further submit that the power of the High Court and this Court is not limited by the operation of Section 437. He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

9) Shri. Soli J. Sorabjee, learned senior counsel appearing for Gautam Doshi, adopted the principal arguments of Shri. Jethmalani. Shri. Sorabjee would assail the finding of the Learned Judge of the High Court in the impugned Judgment that the mere fact that the accused were not arrested during the investigation was proof of their influence in the society, and hence, there was a reasonable apprehension that they would tamper with the evidence if enlarged on bail. Shri. Sorabjee would submit that if this reasoning is to be accepted, then bail is to be denied in each and every criminal case that comes before the Court. The learned senior counsel also highlighted that the accused had no criminal antecedents.

10) Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric of the country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one

of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants. Shri. Raval would further urge that consistency is the norm of this Court and that there was no reason or change in circumstance as to why this Court should take a different view from the order of 20th June 2011 in **Sharad Kumar Etc. v. Central Bureau of Investigation** [in SLP (Crl) No. 4584-4585 of 2011] rejecting bail to some of the co-accused in the same case. Shri. Raval would further state that the investigation in these cases is monitored by this Court and the trial is proceeding on a day-to-day basis and that there is absolutely no delay on behalf of the prosecuting agency in completing the trial. Further, he would submit that the appellants, having cooperated with the investigation, is no ground for grant of bail, as they were expected to cooperate with the investigation as provided by the law. He would further submit that the test to enlarge an accused on bail is whether there is a reasonable apprehension of tampering with the evidence, and that there is an apprehension of threat to some of the witnesses. The learned ASG would further submit that there is more reason now for the accused not to be enlarged on bail, as they now have the knowledge of the identity of the witnesses, who are the employees of the accused, and there is an apprehension that the witnesses may be tampered with. The learned ASG would state that Section 437 of the Cr.P.C. uses the word “appears”, and, therefore, that the argument of the learned senior counsel for the appellants that the power of the trial Judge with regard to a person summoned under Section 87 is controlled by Section 88 is incorrect. Shri. Raval also made references to the United Nations Convention on Corruption and the Report on the Reforms in the Criminal Justice System by Justice Malimath, which, we do not think, is necessary to go into. The learned ASG also relied on a few decisions of this Court, and the same will be dealt with in the course of the judgment. On a query from the Bench, the learned ASG would submit that in his opinion, bail should be denied in all cases of corruption which pose a threat to the economic fabric of the country, and that the balance should tilt in favour of the public interest.

11) In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail – firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

12) Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused [**Sharad Kumar v. CBI**] and, therefore, there is no reason or change in the circumstance to take a different view in the case of the appellants who are also charge-sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present

proceedings and conclude that there are no changed circumstances and reject these petitions.

13) The appellants are facing trial in respect of the offences under Sections 420-B, 468, 471 and 109 of Indian Penal Code and Section 13(2) read with 13(i)(d) of Prevention of Corruption Act, 1988. Bail has been refused first by the Special Judge, CBI, New Delhi and subsequently, by the High Court. Both the courts have listed the factors, on which they think, are relevant for refusing the Bail applications filed by the applicants as seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with witnesses; the objection of the prosecuting authorities; possibility of absconding from justice.

14) 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 can be 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. 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 un-convicted 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. Apart from the question of prevention being the object of a 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 un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15) In the instant case, as we have already noticed that the "pointing finger of accusation" against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule

of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in **Kalyan Chandra Sarkar v. Rajesh Ranjan** [(2005) 2 SCC 42] observed that “under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so.”

16) This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of **State of Rajasthan v. Balchand** [(1977) 4 SCC 308] this Court opined:

“2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconson or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight.”

17) In the case of **Gudikanti Narasimhulu v. Public Prosecutor** [(1978) 1 SCC 240] V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus:

“3. What, then, is “judicial discretion” in this bail context? In the elegant words of Benjamin Cardozo:

“The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the

primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."

Even so it is useful to notice the tart terms of Lord Camden that "the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...." Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the great trust exercisable, not casually but judicially, with

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order

has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding—if that be so—of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be *ex facie* wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio- geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal.”

18) In **Gurcharan Singh v. State** [(1978) 1 SCC 118] this Court took the view:

“22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub- section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim

and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.”

19) In **Babu Singh v. State of U.P.** [(1978) 1 SCC 579] this Court opined:

“8. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit Court I had to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. 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.

16. Considering the likelihood of the applicant Interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice—to the individual involved and society affected.

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, “community roots” of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary suretyship disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly

sensible.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding—if that be so—of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be *ex facie* wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal.”

20) In ***Moti Ram v. State of M.P.*** [(1978) 4 SCC 47] this Court, while discussing pre-trial detention, held:

“14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

21) The concept and philosophy of bail was discussed by this Court in ***Vaman Narain Ghiya v. State of Rajasthan*** [(2009) 2 SCC 281] thus:

“6. “Bail” remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression “bail” denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb “bailer” which means to “give” or “to deliver”, although another view is that its derivation is from the Latin term “baiulare”, meaning “to bear a burden”. Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:

“... when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by lawailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.”

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See *A.K. Gopalan v. State of Madras*)

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.”

22) More recently, in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra*, [(2011) 1 SCC 694] this Court observed that “(j)ust as liberty is precious to an individual, so is the society’s interest in maintenance of peace, law and order. Both are equally important.” This Court further observed:

“116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.”

This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused [See *Babba v. State of Maharashtra* [(2005) 11 SCC 569] *Vivek Kumar v. State of U.P.* [(2000) 9 SCC 443] *Mahesh Kumar Bhawsinghka v. State of Delhi*, [(2000) 9 SCC 383].

23) The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in the case of *Prahlad Singh Bhati v. NCT* [(2001) 4 SCC 280] thus:

“The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of

bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”

24) In ***State of U.P. v. Amarmani Tripathi*** [(2005) 8 SCC 21] this Court held as under:

18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see ***Prahlad Singh Bhati v. NCT*** and ***Gurcharan Singh v. State***]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in ***Kalyan Chandra Sarkar v. Rajesh Ranjan***

“11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

- (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
- (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
- (c) Prima facie satisfaction of the court in support of the charge. (See ***Ram Govind Upadhyay v. Sudarshan Singh*** and ***Puran v. Rambilas***)”

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary.”

25) 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 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 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, forgery for the purpose of cheating using as genuine

a forged document. The punishment of the offence is punishment 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. 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. This Court in **Gurcharan Singh v. State** [AIR 1978 SC 179] observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

26) When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is : whether the same is possible in the present case. There are seventeen accused persons. Statement of the witnesses runs to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. This Court, in the case of **State of Kerala v. Raneef** [(2011) 1 SCC 784] has stated :-

“15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel *A Tale of Two Cities*, who forgot his profession and even his name in the Bastille.”

27) In ‘Bihar Fodder Scam’, this Court, taking into consideration the seriousness of the charges

alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

28) 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 jeopardize 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 allay the apprehension expressed by CBI.

29) In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties.

30) In the result, we order that the appellants be released on bail on their executing a bond with two solvent sureties, each in a sum of 5 lakhs to the satisfaction of the Special Judge, CBI, New Delhi on the following conditions :-

- a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.
- b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.
- c. They will not dispute their identity as the accused in the case.
- d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.
- e. We reserve liberty to the CBI to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

31) The appeals are disposed of accordingly.

Shri Gurbaksh Singh Sibbia v. State of Punjab

(1980) 2 SCC 565 : AIR 1980 SC 1632

Y.V. CHANDRACHUD, C.J. - 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 interest while determining the scope of Section 438 of the Code of Criminal Procedure, 1973 (Act 2 of 1974).

3. Criminal Appeal 335 of 1977 which is the first of the many appeals before us, arises out of a judgement dated September 13, 1977 of a Full Bench of the High Court of Punjab and Haryana [*Gurbaksh Singh Sibbia v. State of Punjab*, (AIR 1978 P & H 1)]. The appellant therein, 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 application to a Full Bench, which by its judgment dated September 13, 1977 dismissed them.

4. The Code of Criminal Procedure, 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 Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in paragraph 39.9 of its report (Volume I):

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 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 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 Code of Criminal Procedure, 1970 with a view to conferring as express power on the High Court and the Court of Session to grant anticipatory bail.

6. The Law Commission, in paragraph 31 of its *48th Report* (1972), made the following comments on the aforesaid clause:

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 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 Code of Criminal Procedure, 1973.

7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in the 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 the 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 recognisance, 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 Code of Criminal Procedure 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 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. The powerful processes of criminal law can 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"? 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*.

10. Shri V. M. Tarkunde, appearing on behalf of some of the appellants, 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 extraordinary 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 levelled.

- (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 allegations 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, IPC 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 circumstances.

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 which 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 provision which falls for consideration is designed to secure a valuable right like 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, insofar 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 restriction on the power of certain courts to grant bail.

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 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.

- (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.

The provisions of Sections 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 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 39.9 that it had "considered carefully the question of laying down in the statute certain condition 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 by upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on 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 cleared manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides 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, insofar 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.

13. 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 of it 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 condition 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.

14. 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 v. Rose* [1912 AC 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 expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. 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.

15. 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 guidelines and cannot compel blind adherence. 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.

16. A close look at some of the rules in the eight-point code formulated by the 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.

17. How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, if the applicant's conduct is painted in colours too 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 fides* are substantial and the accusation appears to be false and groundless.

Does this rule mean, and that is the argument of the learned Additional Solicitor-General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusation are *malafide*? 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 *malafide*. 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.

18. 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 case 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 there 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 fit" 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 rewriting 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 therefor 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.

19. 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 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 Nazir Ahmed** [AIR 1945 PC 18]:

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, . . .

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 561-A, 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 FIR. 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 subsection (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* [AIR 1960 SC 1125] 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 so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure 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.

20. 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 limitation are implicit in Section 438 but, with respect, no such implication arise or can be read into that section. The plenitude of the section must be given its full play.

21. The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for 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 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 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 hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. 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 extraordinary 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 limitation.

23. 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.

24. It will be appropriate at this stage to refer to a decision of this Court in **Balchand Jain v. State of Madhya Pradesh** [(1976) 4 SCC 572] on which the High Court has learned heavily in formulating its propositions. One of us, Bhagwati, J. who spoke for himself and A. C. Gupta, J. observed in that case that:

This 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 him, 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.

Fazal Ali, J. who delivered a separate judgment of concurrence also observed that: (SCC pp. 582-83, para 14)

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 bypassing 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 only in special cases."

25. We hold the decision in **Balchand Jain** 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 judgement 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 judgement, after adverting to Section 438

that Rule 184 is what the court was concerned with in the appeal. *The observations made in Balchand Jain 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 extraordinarily character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Section 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 observations made in Balchand Jain altogether different context on an altogether different point.*

26. 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 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* [*Maneka Gandhi v. Union of India* (1978) 1 SCC 248] 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 to be found therein.

27. It is not necessary to refer to decision, 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* (AIR 1924 Cal 476) 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 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* (AIR 1931 All 504) 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. Hutchinson* (AIR 1931 All 356) 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.

28. Coming nearer home, it was observed by Krishna Iyer, J., in ***Gudikanti Narasimhulu v. Public Prosecutor*** [(1978) 1 SCC 240] 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.

29. In ***Gurcharan Singh v. State (Delhi Administration)*** [(1978) 1 SCC 118] 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.

30. 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 judgement 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.

31. 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*; and, 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* (AIR 1962 SC 253), 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 purpose 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 condition which the court may think fit to impose, in consideration of the assurance that if arrested he shall be enlarged on bail.

32. 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* [(1978) 1 SCC 240], Lord Russel of Killowen said:

(I)t 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 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.

33. 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 ground 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.

34. This should be the end of the matter, but it is necessary to clarify a few points, which have given rise to certain misgivings.

35. 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 application for anticipatory bail 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 or all kinds of accusations, likely or unlikely.*

36. 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.

37. 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 FIR is not yet filed.

38. Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

39. 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, insofar 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.

40. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (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 in 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.

41. 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. 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.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the 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 time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period unit after the filing of an FIR 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 FIR 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.

43. 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 filling of the FIR 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.

44. 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.

* * * * *

State (Delhi Administration) v. Sanjay Gandhi
(1978) 2 SCC 411

Y.V. CHANDRACHUD, C.J. - The respondent is arraigned as accused No. 2 in a prosecution instituted by the Central Bureau of Investigation in the court of the learned Chief Metropolitan Magistrate, Delhi. Omitting details which are not necessary for the present purpose, the case of the prosecution is as follow:

2. One Shri Amrit Nahata had produced a film called 'Kissa Kursi Ka', which portrayed the story of the political doings of the respondent and his mother, Smt. Indira Gandhi, the former Prime Minister of India. The Board of Censors declined to grant a certificate for exhibition of the film whereupon, Shri Nahata filed a writ petition in this Court for a Writ of *mandamus*. On October 29, 1975, a direction was given by the Court that the film be screened on November 17 to enable the Judges to see whether the censorship certificate was refused rightly. In order to prevent this Court from exercising its constitutional jurisdiction and with a view to preventing the film from being publicly exhibited, the respondent and his co-accused Shri Vidya Charan Shukla, who was then the Minister for information and Broadcasting, entered into a conspiracy to take possession of the film and to destroy it. The Supreme Court was informed that it was not possible to screen the film for evaluation by the Judges. And the writ petition filed by Shri Nahata came to an abrupt end upon an affidavit being filed on March 22, 1976, by Ghose that the spools of the film had got mixed up with some other films received by the Government in connection with the International Film Festival.

3. After the emergency was lifted and the present Janata Government came into power, a certain information was received in consequence of which a raid was effected on the Gurgaon premises of the Maruti Limited. The raid yielded incriminating material to show that the 13 boxes which had been received from Bombay at the New Delhi Railway Station contained the spools of the film 'Kissa Kursi Ka' which were burnt and destroyed in the factory premises. R. B. Khedkar, a Security Officer of the Maruti Limited and his assistant, Kanwar Singh Yadav, who was the Security Supervisor of the company, were arrested on the very day of the raid. Yadav made a statement on the following day stating how the film was burnt in the premises of the factory. Yadav's confessional statement was recorded by the Chief Metropolitan Magistrate on June 3 and Khedkar's on June 4. They were granted pardon under Section 306 of the Code of Criminal Procedure on July 14, 1977.

4. After completion of the investigation, a charge-sheet was filed by the C.B.I. in the court of the Chief Metropolitan Magistrate citing 138 witnesses for proving charges under Section 120B read with Sections 409, 435 and 201 of the Penal Code as also for substantive offences under the last mentioned three sections of the Penal Code.

5. In certain proceedings for contempt and perjury which were filed in this Court against Shri Shukla, it was directed by the Court on January 2, 1978, that the Chief Metropolitan Magistrate shall commence the hearing of the case of February 15 and that the Sessions Court will commence the trial on March 20, 1978, and shall proceed with the hearing from day to day. By an order dated February 14, the Court extended the time limit by four days in each case.

6. The committal proceedings commenced in the court of the learned Chief Metropolitan Magistrate, Delhi, on February 20, 1978. Khedkar who was examined on that day supported the prosecution fully except that he admitted in his cross-examination that he had written two inland letters, which may tend to throw a cloud on his evidence. On February 21, the second approver Yadav was examined by the prosecution. He resiled both from the statement which he made to the police under Section 161 of the Code of Criminal Procedure as well as from his judicial confession. The recording of Yadav's evidence was over on the 22nd.

7. On February 27, 1978, an application was filed by the Delhi Administration, in the High Court of Delhi for cancellation of the respondent's bail. That application having been dismissed by a learned single Judge on April 11, 1978, the Administration has filed this appeal by special leave.

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11. We are not disposed to allow the State to rely on any new material which was not available to the High Court. True, that the additional data came into existence after the High Court gave its judgment but it would be unfair to the respondent to make use of that material without giving him an adequate opportunity to meet it. That will entail a fairly long adjournment which may frustrate the very object of the proceedings initiated by the State. Besides, though in appropriate cases the court has the power to take additional evidence, that power has to be exercised sparingly, particularly in appeals brought under Article 136 of the Constitution. The High Court, while dismissing the State's application for cancellation of bail, has reserved to it the liberty to approach it "if, at any time in future, the respondent abuses his liberty". The new developments could, if the prosecution is so advised, be brought to the High Court's attention for obtaining suitable relief. We cannot spend our time in scanning affidavits and sifting material for the first time for ourselves, for determining whether the new material can justify cancellation of bail. We propose, therefore, to limit ourselves to the facts and incidents which were before the High Court and on which it has pronounced.

13. *Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.* The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution.

Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent.

14. Before we go to the facts of the case, it is necessary to consider what precisely is the nature of the burden which rests on the prosecution in an application for cancellation of bail. Is it necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have turned hostile because they are won over by the accused ? We think not. The issue of cancellation of bail can only arise in criminal cases, but that does not mean that every incidental matter in a criminal case must be proved beyond a reasonable doubt like the guilt of the accused. Whether an accused is absconding and therefore his property can be attached under Section 83 of the Criminal Procedure Code, whether a search of person or premises was taken as required by the provisions of Section 100 of the Code, whether a confession is recorded in strict accordance with the requirements of Section 164 of the Code and whether a fact was discovered in consequence of information received from an accused as required by Section 27 of the Evidence Act are all matters which fall particularly within the ordinary sweep of criminal trials. But though the guilt of the accused in cases which involve the assessment of these facts has to be established beyond a reasonable doubt, these various facts are not required to be proved by the same rigorous standard. Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. *The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.*

15. Our task therefore is to determine whether, by the application of the test of probabilities, the prosecution has succeeded in proving its case that the respondent has tampered with its witnesses and that there is a reasonable apprehension that he will continue to indulge in that course of conduct if he is allowed to remain at large. Normally, the High Court's findings are treated by this Court as binding on such issues but, regretfully, we have to depart from that rule since the High Court has rejected incontrovertible evidence on hypertechnical considerations. If two views of the evidence were reasonably possible and the High Court had taken one view, we would have been disinclined to interfere therewith in this appeal under Article 136 of the Constitution. But the evidence points in one direction only, leaving no manner of doubt that the

respondent has misused the facility afforded to him by the High Court by granting anticipatory bail to him.

16. The sequence of events is too striking to fail to catch the watchful eye. But, we will not enter too minutely into the several incidents on which the appellant relies to prove its case. We will confine ourselves to some of the outstanding instances and show how the prosecution is justified in its apprehension.

17. Kanwar Singh Yadav was working at the relevant time as a Security Supervisor under R. B. Khedkar who was the Security officer of Maruti Ltd. Both of them were arrested and the very day of the raid, that is, on May 25, 1977. On the 26th, the police recorded Yadav's statement and on the 28th, he made a petition to the Chief Metropolitan Magistrate, expressing his willingness to confess.

18. The confessional statement was recorded on June 3 and Yadav was granted pardon on July 14, under section 306 of the Code of Criminal Procedure. Khedkar made a confession on June 4 and was granted pardon on July 14, 1977. The C.B.I. filed the chargesheet on 14th July itself. The committal proceedings were fixed by this Court by an order dated January 2, 1978 to begin peremptorily on February 15, 1978. The respondent obtained a modification of that order, by virtue of which the proceedings began on February 20.

19. One day before the proceedings were originally scheduled to begin, that is on 14th February, the two approvers, Yadav and Khedkar, appeared at the C.B.I. office and filed written complaints dated the 13th that the respondent was making repeated attempts to call Yadav to meet him by sending the car with Ram Chander, the driver of the respondent. One of these complaints is signed by Yadav and the other by Khedkar. Yadav turned hostile when he was examined on the 21st February before the Committing Magistrate. He went back on his police statement, resiled from his confession and risked his pardon. But he admitted in his cross-examination to the Public Prosecutor that he had given the complaint to the C.B.I. He explained it away by offering a series of excuses but we will only characterise that attempt as lame and unconvincing. A deeper probe into the matter and its critical analysis is likely to exceed the legitimate bounds of this proceeding and therefore we will stop with the observation that there is more than satisfactory proof of the respondent having attempted to suborn Yadav. Whether Yadav succumbed to the persuasion is not for us to say. The Sessions Judge shall have to decide that question uninfluenced by anything appearing herein. We are concerned with the respondent's conduct, not with Yadav's reaction or his motives. Khedkar stuck to the complaint.

20. That is in regard to the event of the 14th February. On the 17th Yadav and the respondent were seen together, the former leaving, the Maruti factory with the respondent in his car. This is supported by the affidavits of Sat Pal Singh, a constable of the Haryana Armed Constabulary who was on duty at the Factory, Ganpat Singh, a Postal Peon and Digambar Das, an Assistant Despatch Clerk in Maruti. It is undisputed that the respondent had gone for official work to the factory on the 17th. The High Court objects the incident firstly because it is not mentioned in the petition for cancellation of the respondent's bail. The affidavit of Ved Prakash, Inspector of Police, C.B.I., shows that information of the incident was received on the 24th whereas the petition was drafted on the 22nd February. That apart, we cannot understand the High Court to say that the affidavits of the three witnesses could not be accepted because the

verification clause of the affidavits was "most defective" as it could not be said "what part of the affidavit is true to the knowledge of the deponent and what part thereof is true to the belief of the deponent". This reason has been cited by the learned Judge for rejecting many an incident but then it was open to him to ask for better particulars of verification. The witnesses claim to have seen with their own eyes that Yadav drove away with the respondent. The incident consisted of one single event and there was no possibility of the witnesses' knowledge being mixed up with their belief. We find it impossible to endorse this part of the High Court's reasoning and are inclined to the view that the respondent ultimately succeeded in establishing contact with Yadav. Whether the respondent succeeded in achieving his ultimate object is beyond us to, say except that Yadav turned hostile in the Committing Magistrate's court on February 21.

21. The High Court has also rejected the affidavit of Sarup Singh that on February 28, 1978, while he was doing duty as an armed constable at the factory, he saw the respondent coming to the factory and heard him assuring Yadav that he need not worry. The verification clause of the affidavit was again thought to be defective. We are unable to agree with this part of the learned Judge's judgment for reasons already indicated.

22. We are also unable to agree with the High Court that the complaint filed by Charan Singh on July 12 in regard to the incident of July 5, 1977 and the complaint filed by A. K. Dangwal on July 9 in regard to the incident of July 7, 1977 are "irrelevant" since the prosecution did not even oppose the grant of bail to the respondent after the chargesheet was filed on July 14, 1977. It is true that it is not possible to accept Shri Jethmalani's explanation of the inactivity on the part of the prosecution even after receiving the two complaints showing that the respondent was trying to tamper with the witnesses. Concessions of benevolence cannot readily be made in favour of the prosecution. But it cannot be overlooked that Charan Singh did turn hostile, though that happened after the, High Court gave its judgment on April 11. The respondent knows that the witness turned hostile and significantly, though the witness refused to support the prosecution he made an important admission that he had submitted a written application or complaint to Inspector Ved Prakash on July 12, 1977 and that "whatever is mentioned in that application is correct". That application, which is really a complaint, contains the most flagrant allegation of attempted tampering with the witness by the respondent, through his driver Chattar Singh. Reference to this incident is not in the nature of Additional evidence properly so called because the witness was examined in the Sessions Court in the presence of the respondent and his advocates. They know what the witness stated in his open evidence and what explanation he gave for making the complaint on July 12, 1977. The Sessions Court will no doubt assess its value but for our limited purpose, the episode is difficult to dismiss as irrelevant.

23. Even excluding the last incident in regard to Charan Singh which is really first in point of time and though it is corroborated by an entry in the General Diary, we are of the opinion that (i) Yadav's complaint of the, 14th February, (ii) Khedkar's complaint of even date, (iii) Yadav's admission in his evidence that he did make the written complaint inspite of the fact that he had turned hostile (iv) the affidavits of Sat Pal Singh, Ganpat Singh and Digambar Das in regard to the incident of the 17th and (v) the affidavit of Sarup Singh regarding the incident of February 28, furnish satisfactory proof that the respondent has abused his liberty by

attempting to, suborn the prosecution witnesses. He has therefore forfeited his right to remain free.

24. *Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court to Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process. We might as well wind up the courts and bolt their doors against all than permit a few to ensure that justice shall not be done.*

25. The power to cancel bail was exercised by the Bombay High Court in **Madhukar Purshottam Mondkar v. Talab Haji Hussain** [AIR 1958 Bom 406] where the accused was charged with a bailable offence. The test adopted by that court was whether the material placed before the court was "such as to lead to the conclusion that there is a strong *prima facie* case that if the accused were to be allowed to be at large he would tamper with the prosecution witnesses and impede the course of justice". An appeal preferred by the accused against the judgment of the Bombay High Court was dismissed by this Court. In **Gurcharan Singh v. State (Delhi Administration)** [1978] 1 SCC 118, 128-129] *while confirming the order of the High Court cancelling the bail of the accused, this Court observed that the only question which the court had to consider at that stage was whether "there was prima facie case made out, as alleged, on the statements of the witnesses and on other materials", that "there was a likelihood of the appellants tampering with the prosecution witnesses". It is by the application of this test that we have come to the conclusion that the respondent's bail ought to be cancelled.*

26. But avoidance of undue hardship or harassment is the quintessence of judicial process. Justice, at all times and in all situations, has to be tempered by mercy, even as against persons who attempt to tamper with its processes. The apprehension of the prosecution is that 'Maruti witnesses' are likely to be won over. The instances discussed by us are also confined to the attempted tampering of Maruti witnesses like Yadav and Charan Singh, though we have excluded Charan Singh's complaint from our consideration. Since the appellant's counsel has assured us that the prosecution will examine the Maruti witnesses immediately and that their evidence will occupy no more than a month, it will be enough to limit the cancellation of respondent's bail to that period. We hope and trust that no unfair advantage will be taken of our order by stalling the proceedings or by asking for a stay on some pretext or the other. If that is done, the arms of law shall be long enough. Out of abundant caution, we reserve liberty to the State to apply to the High Court, if necessary, but only if strictly necessary. We are hopeful that the State too will take our order in its true spirit.

27. In the result, we allow the appeal partly, set aside the judgment of the High Court dated April 11, cancel the respondent's bail for a period of one month from today and direct that he be taken into custody. Respondent will, in the normal course, be entitled to be released on fresh bail on the expiry of the aforesaid period. The learned Sessions Judge will be at liberty to fix

the amount and conditions of bail. The order of anticipatory bail will stand modified to the extent indicated herein.

Mohan Singh v. State of Bihar
(2011)9 SCC 272

A.K.GANGULY, J.

1. This criminal appeal has been preferred from the judgment of the High Court in Criminal Appeal (DB) No. 1338 of 2007, dated 3.9.2008, whereby the High Court upheld the judgment and order of conviction passed by the learned Additional Sessions Judge, Fast Track Court-IV, Motihari, East Champaran in Sessions Trial No. 101/16 of 2006/2007. The learned Sessions Court held the appellant guilty of criminal 1 conspiracy for murder under sections 120B of IPC and of extortion under section 387 of IPC and sentenced him to undergo rigorous imprisonment for life and was fined for Rs.25,000/- for the offence of criminal conspiracy for murder under section 120B, in default of which he was to further undergo simple imprisonment for 1 year. He was further sentenced for seven years rigorous imprisonment under section 387 IPC and was fined Rs.5,000/-, in default of which to undergo simple imprisonment for six months.

2. The facts of the case are that the informant Shri Vikas Kumar Jha gave a fardbeyan to the effect that at about 5.00 P.M. on 23.7.2005, he had received a call on, inquiring about his elder brother Shri Anil Kumar Jha. The informant stated before the police that his elder brother, the owner of a medical store, on the said date had been out of town. He submitted that he had communicated the same to the caller. Upon such reply, the caller disclosed himself as Mohan Singh, the appellant herein, and asked the informant to send him Rs.50,000/-. The informant submitted that he had similar conversations with the caller three to four times in the past. However, he then received another telephone call on 25.7.2005 from a cell phone. The caller threatened him that since the demand of money had not been fulfilled, the informant should be ready to face the consequences. Upon his elder brother's return, the informant had narrated the events to him. However, his elder brother did not take the threat seriously.

3. On 3.8.2005, at about 9.00 P.M. when the informant was at a place called Balua Chowk, he had received a call from his driver Shri Dhanai Yadav on his cell phone to the effect that informant's elder brother and their father, Shri Sureshwar Jha, had been shot at while they were in their medical store, and that both of them had been rushed to Sadar Hospital. On 3 reaching Sadar Hospital, the informant saw the dead body of his elder brother. He was intimated by the people there that his father had been shifted to another hospital called Rahman's Nursing Home. He was also told that the shots had been fired by one Laxmi Singh and Niraj Singh. Having heard this, the informant rushed to Rahman's Nursing Home, where his injured father told him that while Niraj Singh cleared the medical store of all the other people, Laxmi Singh had fired shots at him and Anil Kumar Jha with an A.K. 47 rifle, before fleeing from the scene. After narrating such events, his father became unconscious.

4. The informant further stated that his family had actually known the appellant and Laxmi Singh from an earlier incident in 2004, when on the occasion of Durga Puja, the two had sent a messenger to Anil Kumar Jha's medical store, demanding Rs.50,000/- or to face death in the alternative. He submitted that pursuant to this, they had preferred a complaint before the police, and that the matter was sub judice. He further stated that he had actually met the appellant once prior to the telephone calls when the latter had asked for money, as contribution for celebrations of Sarswati Puja and Durga Puja. The informant thus stated that his father and brother had been attacked by Laxmi Singh and Niraj Singh at the instance of Mohan Singh for not having paid the extortion money. The informant said so on the identification of the voice of the telephone caller as that of the appellant. He, however, did not follow up the calls made on 23rd and 25th of July, 2005 either with the appellant in person, or with the authorities of Motihari jail where the appellant was in fact lodged at the time of the calls. These statements of the informant were supported by the informant's father Sureshwar Jha, and his other brother Sunil Kumar Jha.

5. On the basis of this fardbeyan, Motihari Town Police Station Case No.246/2005 was registered on 3.8.2005 against the appellant Mohan Singh, Laxmi Singh, Niraj Singh and others. The investigating officer submitted that he had known the appellant to have as many as seven criminal cases for murder, kidnapping for ransom and loot, pending against him. However, he submitted that he had received the phone number attributed to the appellant only from the informant. Though he submitted that as many as nine calls had been made between the phone numbers attributed to the appellant and Laxmi Singh, and that he had retrieved the records of calls made by the number attributed to the appellant and that of the informant, he had not been able to establish as to who were the registered owners of the SIM cards.

6. The learned Sessions Court in the course of trial took note of the fact that identities of the registered owners of the said SIM cards had not been established by the police, but it did not give much emphasis on this on the grounds that the informant's family had known the appellant and Laxmi Singh long enough and had known about their common intention to extort money. On these findings the learned Sessions Court found the appellant guilty.

7. On appeal the learned Division Bench upheld the conviction inter alia on the grounds that the informant himself and his family had known the appellant and Laxmi Singh from before.

8. Even though the High Court in the impugned judgment held that identification by voice and gait is risky, but in a case where the witness identifying the voice had previous acquaintance with the caller, the accused in this case, such identification can be relied upon. The High Court also held that direct evidence in a conspiracy is difficult to be obtained. The case of conspiracy has to be inferred from the conduct of the parties.

9. The High Court relied upon the evidence of the informant, PW.4 and on Exts. 9 and 10 where the conversation between PW.4 and the appellant was recorded. The High Court also relied upon the evidence of PW.1 Dhanai Yadav, who was sitting inside the medical store of the deceased Anil Kumar Jha at the time of the incident. PW.1 was a witness to the incident of Laxmi Singh firing shots at the deceased and his father Sureshwar Jha. The High Court also relied upon the evidence of PW.2 Surehswar Jha, the injured witness. The High Court found that the evidence of PW.2 and 4 is unblemished and their evidence cannot be discarded. The High Court also relied upon the evidence of PW.4 as having identified the voice of the appellant.

10. On appreciation of the aforesaid evidence, the High Court came to the conclusion that Mohan Singh was performing one part of the act, and Laxmi Singh performed another part, both performing their parts of the same act. Thus the case of conspiracy was made out.

11. Assailing such finding of the Sessions Court which has been affirmed by the High Court, the learned Counsel appearing for the appellant argued that the appellant cannot be convicted under section 120-B and given the sentence of rigorous imprisonment for life in view of the charges framed against the appellant.

12. In order to appreciate this argument, the charges framed against the appellant are set out below: "FIRST - That you, on or about the day of at about or during the period between 23.7.05 & 3.8.05 agreed with Laxmi Narain Singh, Niraj Singh & Pankaj Singh to commit the murder of Anil Jha, in the event of his not fulfilling your demand, as extortion of a sum of Rs.50,000/- and besides the above said agreement you did telephone from Motihari Jail to Vikash Jha in pursuance of the said agreement extending threat of dire consequences if the demand was not met and then on 3.8.05 the offence of murder punishable with death was committed by your companions Laxmi Narain Singh and Niraj Singh and you thereby committed the offence of criminal conspiracy to commit murder of Anil Jha and seriously injured Sureshwar Jha and thereby committed an offence punishable under Section 120-B of the Indian Penal Code, and within my cognizance.

SECONDLY - That you, during the period between 23.7.05 & 3.8.05 at Hospital gate Motihari P.S., Motihari Town Dist. East Champaran, Put Vikash Jha in fear of death and grievous hurt to him and his family members in order to commit extortion on telephone and thereby committed an offence punishable under Section 387 of the Indian Penal Code, and within my cognizance and I hereby direct that you be tried by me on the said the charge.

Charges were read over and explained in Hindi to the accused and the accused pleaded not guilty as charged. Let him be tried."

13. Admittedly, no complaint of any prejudice by the appellant was raised either before the trial Court or in the High Court or in the course of examination under Section 313 Cr.P.C. These points have been raised before this Court for the first time.

15. However, instead of refusing to consider the said grievance on the ground of not having been raised at an earlier stage of the proceeding, we propose to examine the same on its merits.

16. *The purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial. (See decision of a four-Judge Bench of this Court in V.C. Shukla v. State 1980 supp SCC 92 at page 150 and paragraph 110 of the report). Desai, J. delivering a concurring opinion, opined as above.*

17. But the question is how to interpret the words in a charge? In this connection, we may refer to the provision of Section 214 of the Code. Section 214 of the Code is set out below:

"214. Words in charge taken in sense of law under which offence is punishable. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable."

18. The other relevant provisions relating to charge may be noticed as under:

"211. Contents of charge- (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall be written in the language of the Court.

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact date and place of the previous conviction shall be stated in

the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.

215. Effect of errors- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

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

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

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

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

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

19. While examining the aforesaid provisions, we may keep in mind the principles laid down by Justice Vivian Bose in *Willie (William) Slaney v. State of MP* AIR1956 SC 116. At page 1165-66 of the report, the learned judge observed(AIRP.127,Para40)

40"We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent."

23. In *K. Prema S. Rao v. Yadla Srinivasa Rao* (2003) 1 SCC 217 this Court held that though the charge specifically under Section 306 IPC was not framed but all the ingredients constituting the offence were mentioned in the statement of charges and in paragraph 22 at page 226 of the report, a three-Judge Bench of this Court held that mere omission or defect in framing of charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. The learned Judges held that provisions of Section 221 Cr.P.C. takes care of such a situation and safeguards the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence

he could have been charged with such offence. The learned Judges have also referred to Section 215 of the Cr.P.C., set out above, in support of their contention.

24. Even in the case of *Dalbir Singh v. State of U.P.*, (2004) 5 SCC 334, a three-Judge Bench of this Court held that in view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict the accused for an offence for which no charge was framed unless the court is of the opinion that the failure of justice will occasion in the process. The learned Judges further explained that in order to judge whether there is a failure of justice the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

25. In *State of Uttar Pradesh v. Paras Nath Singh* (2009) 6 SCC 372 this Court, setting out Section 464 of Cr.P.C., further held that whether there is failure of justice or not has to be proved by the accused. In the instant case no such argument was ever made before the Trial Court or even in the High Court and we are satisfied from the materials on record that no failure of justice has been occasioned in any way nor has the appellant suffered any prejudice.

26. In *Annareddy Sambasiva Reddy v. State of AP* (2009) 12 SCC 546 this court again had occasion to deal with the same question and referred to Section 464 of Cr.P.C. In paragraph 55 at page 567 of the report, this Court came to the conclusion that if the ingredients of the section charged with are obvious and implicit, conviction under such head can be sustained irrespective of the fact whether the said section has been mentioned or not in the charge. The basic question is one of prejudice.

27. In view of such consistent opinion of this Court, we are of the view that no prejudice has been caused to the appellant for non-mentioning of Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. Apart from that, on overall consideration of the facts and circumstances of this case we do not find that the appellant suffered any prejudice nor has there been any failure of justice.

28. In the instant case, in the charge it has been clearly mentioned that the accused-appellant has committed the murder of Anil Jha. By mentioning that the accused has committed the murder of Anil Jha all the ingredients of the charge have been mentioned and the requirement of Section 211, sub-section (2) has been complied with. Therefore, we do not find any substance in the aforesaid grievance of the appellant.

29. Now the only other point on which argument has been made on behalf of the appellant is that in the instant case appellant was in jail at the time of the commission of the offence. It has been submitted that his involvement in the whole episode has been

argued for only on the evidence of PW.4 who 22 is said to have identified his voice on the basis of some telephone calls. These are essentially questions of fact and after a concurrent finding by two courts normally this Court in an appeal against such finding is slow and circumspect to upset such finding unless this Court finds the finding to be perverse.

30. However, on the legal issue one thing is clear that identification by voice has to be considered by this Court carefully and on this aspect some guidelines have been laid down by this Court in the case of *Kirpal Singh v. The State of UP* AIR 1965 SC 712. In dealing with the question of voice identification, construing the provisions of Section 9 of the Indian Evidence Act, this Court held (AIRp714, para4)

"...It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be some-what risky in a criminal trial. But the appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop...."

31. Relying on such identification by voice this Court held in *Kripal Singh* that it cannot come to the conclusion that the identification of the assailant by Rakkha Singh was so improbable that this Court would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to its credibility and also of the High Court which considered the evidence against the appellant and accepted the testimony (see para 4, page 714 of the report). The same principles will apply here.

34. The learned counsel for the appellant relied on some judgments in support of his contention that in the facts of this case voice identification cannot be accepted. The learned counsel relied on a judgment of this Court in the case of *Nilesh Dinkar Paradkar v. State of Maharashtra* (2011) 4 SCC 143. In that case the voice in the telephone was tapped and then the voice was recorded in a cassette and the cassette was then played to identify the voice. Therefore, there is a substantial factual difference with the facts in the case of Nilesh (supra) and the facts of the present case. Apart from that in *Nilesh*, the High Court acquitted A1 to A4 and this Court finds that the evidence against Nilesh was identical. Therefore, this Court held that the conclusion of the High Court in acquitting Accused 1, 2, 3 and 4 has virtually "destroyed the entire substratum of the prosecution case" (see para 28 of the report). Since that decision was passed on tape recorded version of the voice, the principles decided in that case, even though are unexceptionable, cannot be applied to the present case.

35. The other case on which reliance was placed by the learned counsel for the appellant was in the case of *Inspector of Police, Tamil Nadu v. Palanisamy alias Selvan* reported in (2008) 14 SCC 495. In that case this Court held that identification from voice is possible but in that case no evidence was adduced to show that witnesses were closely

acquainted with the accused to identify him from his voice and that too from very short replies. Therefore, this case factually stands on a different footing. In the instant case the evidence of PW.4 that he knows the 27 voice of the appellant was not challenged nor was it challenged that the mobile no. 9835273765 is not that of the appellant. Nor has the evidence of PW.8 been challenged that on 3.8.2005 eight calls were recorded between the mobiles of the appellant and his conspirator Laxmi Singh.

36. The next decision on which reliance was placed by the learned counsel for the appellant was rendered in the case of *Saju v. State of Kerala* (2001) 1 SCC 378. In *Saju* this Court explained the principles of Section 10 of the Evidence Act, as follows:-

Condition for applicability of the Indian Evidence Act, 1872 - Sec.10

Act or action of one of the accused cannot be used as evidence against the other. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the applicability of Section 10 of the Evidence Act, the court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other."

If we apply the aforesaid principles to the facts of the present case it is clear that there is enough evidence to furnish reasonable ground to believe that both the appellant and Laxmi Singh had conspired together for committing the offence. Therefore, the principles of this case do not help the appellant.

38. Reliance was also placed on the decision of this Court in the case of *S. Arul Raja v. State of Tamil Nadu* (2010) 8 SCC 233. In that case this Court held that mere circumstantial evidence to prove the involvement of the accused is not sufficient to meet the requirements of criminal conspiracy and meeting of minds to form a criminal conspiracy has to be proved by placing substantive evidence. In the instant case, as discussed above, substantive evidence was placed to prove the meeting of minds between the appellant and Laxmi Singh about the murder of the victim. In evidence which has 30 been noted hereinabove in the earlier part of the judgment it clearly shows that there is substantial piece of evidence to prove criminal conspiracy.

40. For the reasons discussed above, this Court does not find that there is any reason to interfere with the concurrent finding in the instant case. This Court, therefore, does not find any reason to take a view different from the one taken by the High Court. The appeal is dismissed and the conviction of the appellant under Section 120B of IPC for life imprisonment is affirmed.

Ajay Kumar Parmar v. State Of Rajasthan

2012 (9) SCALE 542

Dr. B.S.CHAUHAN, J.

1. This appeal has been preferred against the impugned judgment and order dated 9.1.2012 passed by the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 458 of 1998, by way of which, the High Court has upheld the judgment and order dated 25.7.1998, passed by the Sessions Judge in Revision Petition No. 5 of 1998. By way of the said revisional order, the court had reversed the order of discharge of the appellant for the offences under Sections 376 and 342 of the Indian Penal Code, 1860 (hereinafter referred to as the dated 25.3.1998, passed by the Judicial Magistrate, Sheoganj).

2. The facts and circumstances giving rise to this appeal are as follows:

A. An FIR was lodged by one Pushpa on 22.3.1997, against the appellant stating that the appellant had raped her on 10.3.1997. In view thereof, an investigation ensued and the appellant was medically examined. The prosecutrix's clothes were then also recovered and were sent for the preparation of FSL report. The prosecutrix was medically examined on 22.3.1997, wherein it was opined by the doctor that she was habitual to sexual intercourse, however, a final opinion regarding fresh intercourse would be given only after receipt of report from the Chemical Examiner.

B. The statement of the prosecutrix was recorded under Section 161 of Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C., by the Dy.S.P., wherein she narrated the incident as mentioned in the FIR, stating that she had been employed as a servant at the residence of one sister Durgi for the past six years. Close to the residence of sister Durgi, Dr. D.R. Parmar and his son Ajay Parmar were also residing. On the day of the said incident, Ajay Parmar called Pushpa, the prosecutrix home on the pretext that there was a telephone call for her. When she reached the residence of Ajay Parmar, she was raped by him and was restrained from going out for a long period of time and kept indoors without provision of any food or water. However, the next evening, she was pushed out surreptitiously from the back exit of the said house. She then tried to commit suicide but was saved by Prakash Sen and Vikram Sen and then, eventually, after a lapse of about 10 days, the complaint in question was handed over to the SP, Sirohi. Subsequently, she herself appeared before the Chief Judicial Magistrate, Sirohi on 9.4.1997, and moved an application before him stating that, although she had lodged an FIR under Section 376/342 IPC, the police was not investigating the case in a correct manner and, therefore, she wished to make her statement under Section 164 Cr.P.C.

C. The Chief Judicial Magistrate, Sirohi, entertained the said application and disposed it of on the same day, i.e. 9.4.1997 by directing the Judicial Magistrate, Sheoganj, to record her statement under Section 164 Cr.P.C.

D. In pursuance thereof, the prosecutrix appeared before the Judicial Magistrate, Sheoganj, which is at a far distance from Sirohi, on 9.4.1997 itself and handed over all the requisite papers

to the Magistrate. After examining the order passed by the Chief Judicial Magistrate, Sirohi, the Judicial Magistrate, Sheoganj, directed the public prosecutor to produce the Case Diary of the case at 4.00 P.M. on the same day.

E. As the public prosecutor could not produce the Case Diary at 4.00 P.M, the Judicial Magistrate, Sheoganj, directed the Public prosecutor to produce the Case Diary on 10.4.1997 at 10.00 A.M. The Case Diary was then produced before the said court on 10.4.1997 by the Public prosecutor. The Statement of the prosecutrix under Section 164 Cr.P.C., was recorded after being identified by the lawyer, to the effect that the said FIR lodged by her was false; in addition to which, the statement made by her under Section 161 Cr.P.C., before the Deputy Superintendent of Police was also false; and finally that no offence whatsoever was ever committed by the appellant, so far as the prosecutrix was concerned.

F. After the conclusion of the investigation, charge sheet was filed against the appellant. On 25.3.1998, the Judicial Magistrate, Sheoganj, taking note of the statement given by the prosecutrix under Section 164 Cr.P.C., passed an order of not taking cognizance of the offences under Sections 376 and 342 IPC and not only acquitted the appellant but also passed strictures against the investigating agency.

G. Aggrieved, the public prosecutor filed a revision before the Learned Sessions Judge, Sirohi, wherein, the aforesaid order dated 25.3.1998 was reversed by order dated 25.7.1998 on two grounds, firstly, that a case under Sections 376 and 342 IPC was triable by the Sessions Court and the Magistrate, therefore, had no jurisdiction to discharge/acquit the appellant on any ground whatsoever, as he was bound to commit the case to the Sessions Court, which was the only competent court to deal with the issue. Secondly, the alleged statement of the prosecutrix under Section 164 Cr.P.C. was not worth reliance as she had not been produced before the Magistrate by the police.

H. Being aggrieved by the aforesaid order of the Sessions Court dated 25.7.1998, the appellant moved the High Court and the High Court vide its impugned judgment and order, affirmed the order of the Sessions Court on both counts.

Hence, this appeal.

3. Ms. Aishwarya Bhati, learned counsel appearing on behalf of the appellant, has submitted that in view of the statement of the prosecutrix as recorded under Section 164 Cr.P.C., the Judicial Magistrate, Sheoganj, has rightly refused to take cognizance of the offence and has acquitted the appellant stating that no fault can be found with the said order, and therefore it is stated that both, the Revisional Court, as well as the High Court committed a serious error in reversing the same.

4. On the contrary, Shri Ajay Veer Singh Jain, learned counsel appearing for the State, has opposed the appeal, contending that the Magistrate ought not to have refused to take cognizance of the said offences and has committed a grave error in acquitting the appellant, after taking note of the statement of the prosecutrix which was recorded under Section 164

Cr.P.C. The said statement was recorded in great haste. It is further submitted that, as the prosecutrix had appeared before the Magistrate independently, without any assistance of the police, her statement recorded under Section 164 Cr.P.C. is not worth acceptance. Thus, no interference is called for. The appeal is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

A three Judge bench of this Court in *Jogendra Nahak & Ors. v. State of Orissa & Ors.*, AIR 1999 SC 2565, held that Sub-Section 5 of Section 164, deals with the statement of a person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. Such statements would be very helpful to the accused to get bail and discharge orders.

6. The said judgment was distinguished by this Court in *Mahabir Singh v. State of Haryana*, AIR 2001 SC 2503, on facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 Cr.P.C. by the Magistrate, without knowing him personally or without any attempt of identification of the said person, by any other person.

7. In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three Judge bench in *Jogendra Nahak & Ors.* (Supra), which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 Cr.P.C. The Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else.

8. In *Sanjay Gandhi v. Union of India*, AIR 1978 SC 514, this court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held:

It is not open to the committal Court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in re-moulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold

that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, the Magistrate has simply to commit for trial before the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect.

If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused.

9. Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the Penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

10. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old Cr.P.C., empowered the Magistrate to exercise such a power. However, in the Cr.P.C. 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

11. More so, it was not permissible for the Judicial Magistrate, Sheoganj, to take into consideration the evidence in defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency along with the charge-sheet. Any document which the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. (Vide: *State of Orissa v. Debendra Nath Padhi*, AIR 2003 SC 1512; *State of Orissa v. Debendra Nath Padhi*, AIR 2005 SC 359; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.*, AIR 2005 SC 3512; *Bharat Parikh v. C.B.I.*

&Anr., (2008) 10 SCC 109; and *Rukmini Narvekar v. Vijaya Satardekar & Ors.*, AIR 2009 SC 1013)

12. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings. At the stage of application of Section 227, the court has to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. (*P. Vijayan v. State of Kerala & Anr.*, AIR 2010 SC 663; and *R.S. Mishra v. State of Orissa & Ors.*, AIR 2011 SC 1103).

13. The scheme of the Code, particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court.

14. The Magistrate, in exercise of its power under Section 190 Cr.P.C., can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 Cr.P.C., if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case.

15. We find no force in the submission advanced by the learned counsel for the appellant that the Judicial Magistrate, Sheoganj, has proceeded strictly in accordance with law laid down by this Court in various judgments wherein it has categorically been held that a Magistrate has a power to drop the proceedings even in the cases exclusively triable by the Sessions Court when the charge-sheet is filed by the police. She has placed very heavy reliance upon the judgment of this Court in *Minu Kumari & Anr. v. State of Bihar & Ors.*, AIR 2006 SC 1937 wherein this Court placed reliance upon its earlier judgment in *Bhagwant Singh v. Commissioner of Police & Anr.*, AIR 1985 SC 1285 and held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to informant and grant of being heard in the matter, becomes mandatory.

In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law.

16. The application filed before the Chief Judicial Magistrate, Sirohi, has been signed by the prosecutrix, as well as by her counsel. However, there has been no identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, Sirohi, proceeded to deal with the application without identification of the prosecutrix and has nowhere mentioned that he knew the prosecutrix personally. The Judicial Magistrate, Sheoganj, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, Sirohi or before the Judicial Magistrate, Sheoganj, along with her parents or any other person related to her. In such circumstances, the statement so recorded, loses its significance and legal sanctity.

17. The record of the case reveals that the Chief Judicial Magistrate, Sirohi, passed an order on 9.4.1994. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a place far away from Sirohi, on the same date with papers/order etc. and the said Judicial Magistrate directed the public prosecutor to produce the Case Diary on the same date at 4.00 P.M. The case Diary could not be produced on the said day. Thus, direction was issued to produce the same in the morning of the next day. The statement was recorded on 10.4.1997. The fact-situation reveals that the court proceeded with utmost haste and any action taken so hurriedly, can be labelled as arbitrary.

18. The original record reveals that the prosecutrix had lodged the FIR herself and the same bears her signature. She was medically examined the next day, and the medical report also bears her signature. We have compared the aforementioned signatures with the signatures appearing upon the application filed before the Chief Judicial Magistrate, Sirohi, for recording her statement under Section 164 Cr.P.C., as also with, the signature on the statement alleged to have been made by her under Section 164 Cr.P.C., and after examining the same, prima facie we are of the view that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them.

19. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act i.e. Sections 45, 47 and 73. Section 73 of the said Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. (Vide: **Ram Chandra & Anr. v. State of Uttar Pradesh**, AIR 1957 SC 381; **Ishwari Prasad Misrav. Mohammad Isa**, AIR 1963 SC 1728; **Shashi Kumar Banerjee & Ors. v. Subodh Kumar Banerjee**, AIR 1964 SC 529; **Fakhruddin v. The State of Madhya Pradesh**, AIR 1967 SC 1326; and **State of Maharashtra v. Sukhdeo Singh & Anr.**, AIR 1992 SC 2100).

20. In **Murari Lal v. State of Madhya Pradesh**, AIR 1981 SC 363, this Court, while dealing with the said issue, held that, in case there is no expert opinion to assist the court in

respect of handwriting available, the court should seek guidance from some authoritative text-book and the courts own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.

21. In *A. Neelalohithadasan Nadarv. George Mascrene & Ors.*, 1994 Supp. (2) SCC 619, this Court considered a case involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counter foil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the Court takes upon itself the task of comparing signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in *State (Delhi Administration) v. Pali Ram*, AIR 1979 SC 14; and *Ram Pyarelal Shrivastava v. State of Bihar*, AIR 1980 SC 1523.

22. In *O. Bharathanv. K. Sudhakaran & Anr.*, AIR 1996 SC 1140, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the Court will exercise its power for comparing the signatures and where it will refer the matter to an expert. The observations of the Court are as follows:

The learned Judge in our view was not right.....taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annuling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by the Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to the ultimately rendered. (See also: *Lalit Popli v. Canara Bank & Ors.*, AIR 2003 SC 1795; *Jagjit Singh v. State of Haryana & Ors.*, (2006) 11 SCC 1; *Thiruvengada Pilla iv. Navaneethammal*, AIR 2008 SC 1541; and *G. Someshwar Rao v. Samineni Nageshwar Rao & Anr.*, (2009) 14 SCC 677).

23. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings are recorded solely on the basis of comparison

of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

24. The aforesaid discussion leads to the following inferences:

I. In respect of an incident of rape, an FIR was lodged. The Dy.S.P. recorded the statement of the prosecutrix, wherein she narrated the facts alleging rape against the appellant.

II. The prosecutrix, appeared before the Chief Judicial Magistrate, Sirohi, on 9.4.1997 and lodged a complaint, stating that the police was not investigating the case properly. She filed an application that her statement be recorded under Section 164 Cr.P.C.

III. The prosecutrix had signed the said application. It was also signed by her lawyer. However, she was not identified by any one.

IV. There is nothing on record to show with whom she had appeared before the Court.

V. From the signatures on the FIR and Medical Report, it appears that she is not an educated person and can hardly form her own signatures.

VI. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached the court and how she knew that her statement could be recorded by the Magistrate.

VII. More so, she appeared before the Chief Judicial Magistrate, Sirohi, and not before the area Magistrate at Sheoganj. VIII. The Chief Judicial Magistrate on the same day disposed of the application, directing the Judicial Magistrate, Sheoganj, to record her statement.

IX. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a far distance from Sirohi, where she originally went, on 9.4.1997 itself, and her statement under Section 164 Cr.P.C. was recorded on 10.4.1997 as on 9.4.1997, since the public prosecutor could not produce the Case Diary. X. Signature of the prosecutrix on the papers before the Chief Judicial Magistrate, Sirohi and Judicial Magistrate, Sheoganj, do not tally with the signatures on the FIR and Medical Report. There is apparent dissimilarity between the same, which creates suspicion.

XI. After completing the investigation, charge-sheet was filed before the Judicial Magistrate, Sheoganj, on 20.3.1998. XII. The Judicial Magistrate, Sheoganj, vide order dated 25.3.1998, refused to take cognizance of the offences on the basis of the statement of the prosecutrix, recorded under Section 164 Cr.P.C. The said court erred in not taking cognizance on this count as the said statement could not be relied upon.

XIII. The revisional court as well as the High Court have rightly held that the statement under Section 164 Cr.P.C. had not been recorded correctly. The said courts have rightly set aside the

order of the Judicial Magistrate, Sheoganj, dated 25.3.1998, not taking the cognizance of the offence.

XIV. There is no provision analogous to Section 207-A of the old Cr.P.C. The Judicial Magistrate, Sheoganj, should have committed the case to the Sessions court as the said application could be entertained only by the Sessions Court. More so, it was not permissible for the court to examine the weight of defence evidence at that stage. Thus, the order is insignificant and inconsequential being without jurisdiction.

25. In view of the above, we do not find any force in the appeal. It is, accordingly, dismissed. The judgment and order of the revisional court, as well as of the High Court is upheld. The original record reveals that in pursuance of the High Court's order, the case has been committed by the Judicial Magistrate, Sheoganj, to the Court of Sessions on 23.4.2012. The Sessions Court is requested to proceed strictly in accordance with law, expeditiously and take the case to its logical conclusion without any further delay. We make it clear that none of the observations made herein will adversely affect either of the parties, as the same have been made only to decide the present case.

Abdul Karim v. State of Karnataka
(2000) 8 SCC 710

S.P. BHARUCHA, J. (*for himself and Mohapatra, J.*) - The border between the States of Karnataka and Tamil Nadu runs through mountainous forest. On about 16,000 acres of this forest land, half in Karnataka and half in Tamil Nadu, a man named Veerappan has held sway for more than 10 years. He is alleged to have poached elephants and smuggled out ivory and sandalwood in a very big way. He is alleged to be guilty of the most heinous crimes, including the murder of 119 persons, among them police and forest officers, and kidnapping. Task forces set up by the States of Karnataka and Tamil Nadu for the purpose have been unable to apprehend him and bring him to justice for 10 years.

2. On the night of 30-7-2000, between 2045 and 2110 hours, Veerappan abducted from Gajanoor a film actor named Rajkumar, who is very popular in Karnataka, and three others, namely, Govindraj, who is the son-in-law of Rajkumar, Nagesh, who is a relative of Rajkumar, and Nagappa, who is an Assistant Film Director. As of today, Rajkumar and Nagesh remain in Veerappan's custody. Nagappa is said to have escaped and Govindraj was released by Veerappan. Gajanoor is a town in Tamil Nadu close to the border with Karnataka.

3. On 8-7-1999 the Director General of Police of the State of Karnataka had informed the Inspector General of Police of the State of Tamil Nadu that it had been reliably learnt that Veerappan intended to kidnap Rajkumar during the latter's visit to his farmhouse in Gajanoor and had requested adequate security arrangements for Rajkumar whenever he visited Gajanoor. The record before us reveals that Rajkumar did not want police protection and considered the presence of the police a problem. He had visited Gajanoor on 22-6-2000 but no information in this behalf had been intimated to the police authorities at Gajanoor; however, they had come to know of his presence and had made security arrangements. No information had been received in regard to the visit of Rajkumar to Gajanoor on 28-7-2000, and they had not learnt of it until after the kidnap.

4. At the time of the kidnapping, Veerappan handed over to Rajkumar's wife an audio cassette to be delivered to the Chief Minister of the State of Karnataka. The audio cassette required that he send an emissary to Veerappan. On 31-7-2000 the Chief Ministers of the States of Karnataka and Tamil Nadu met in Chennai and decided to send as an emissary one Gopal, he having served as an emissary when, on 12-7-1997, Veerappan had kidnapped nine forest officers of the State of Karnataka and he had obtained their release thereafter. On 1-8-2000 Gopal left on his first mission to meet Veerappan in the forest along with two members of his staff and a videographer. On 5-8-2000 Gopal sent an audio cassette to Chennai which, in the voices of Veerappan and an associate, set out ten demands for the release of Rajkumar. On the next day, that is, 6-8-2000, the Chief Ministers of the States of Karnataka and Tamil Nadu met in Chennai to discuss the demands and their responses were made public at a press conference held on that very day.

5. The ten demands and the responses thereto, as released to the press, are as follows:

“Demand:

1. Permanent solution for the Cauvery water issue and implementation of the interim orders of the Cauvery Tribunal.

Response:

For implementation of the interim orders, the Cauvery River Water Authority has been set up under the chairmanship of the Prime Minister.

Demand:

2. Adequate compensation for Tamil victims of 1991 riots.

Response:

Karnataka has constituted the Cauvery Riots Relief Authority as directed by the Supreme Court. About 10,000 claims have been received. The time-limit for completion of the work has been extended up to 31-5-2001.

Demand:

3. Karnataka Government should accept Tamil as additional language of administration.

Response:

As per the GOI Instructions, Karnataka has issued orders on 20-5-1999 that where linguistic minorities constitute more than 15 per cent of the population, Government notices, Orders and rules shall be issued in the language of the minorities as well.

Demand:

4. Unveiling of Tiruvalluvar statue at Bangalore.

Response:

Statues of Tiruvalluvar and Sarvajna will be installed and unveiled at Bangalore and Chennai respectively with the participation of both the Chief Ministers.

Demand:

5. Vacation of stay issued by High Court against Justice Sathasivam Commission to inquire into the atrocities by the task forces of the two States. Compensation for victims and punishment for those held guilty by the Commission.

Response:

Karnataka Government will take steps to have the stay vacated.

Demand:

6. Innocent persons languishing in Karnataka Jails should be released.

Response:

TADA charges will be dropped immediately facilitating release of the prisoners.

Demand:

7. Compensation for the families of nine dalits killed in Karnataka.

Response:

Will be considered favourably after collecting particulars.

Demand:

8. Minimum procurement price of Rs 15 per kg for tea leaves grown in the Nilgiris.

Response:

A series of steps taken by the Central and the State Governments has already brought about substantial increase in the price of tea leaves from Rs 4.50 to Rs 9.50.

Demand:

9. Five persons now in Tamil Nadu prisons should be released.

Response:

Will be considered favourably.

Demand:

10. Minimum daily wage of Rs 150 for coffee and tea estate workers in Tamil Nadu and Karnataka.

Response:

Estate workers in Tamil Nadu get a minimum wage of Rs 74.62, inclusive of various allowances the wages add up to Rs 139 per day. Further increase through negotiations would also be considered.”

6. On 11-8-2000 Gopal returned to Chennai with a written message and a video cassette that contained an elaboration of two earlier demands and two new demands. The elaboration related to the release of prisoners in the State of Karnataka, which was reiterated, and the payment of compensation based on the Sathasivam Commission Report. The new demands and the responses thereto were as follows:

Demand:

1. Tamil should be the compulsory medium of instruction till Standard 10 in Tamil Nadu. Tamil should be declared an official language.

Response:

The Government move to make Tamil the medium of instruction till Standard 5 has been stayed by the High Court and an appeal has been preferred in the Supreme Court.

Demand:

2. Compensation of Rs 10 lakhs each for innocent rape victims of Vachathi and Chinnampathi in Tamil Nadu.

Response:

Compensation has already been paid on rates determined by court/commission.”

7. On 10-8-2000 an application was filed by the Special Public Prosecutor under the provisions of Section 321 of the Criminal Procedure Code in fourteen cases (Special Cases Nos. 44, 63, 66 and 67 of 1994, 119 of 1995, 11,12, 13 and 14 of 1997, 3,19, 20 and 21 of 1998 and 79 of 1999) being heard by the Designated Court at Mysore. The cases were filed under the provisions of the Terrorist and Disruptive Activities (Prevention) Act and other penal enactments against Veerappan and a large number of his alleged associates. The application needs to be reproduced in extenso:

It is submitted by the Special Public Prosecutor as follows:

A charge-sheet has been filed against the accused for the offences punishable under Sections 143, 147, 148, 341, 342, 120-B, 326, 307, 302, 396 read with 149 IPC. And under Sections 3, 4 and 5 of the Indian Explosives Act, and under Sections 3 and 25 of the Arms Act, and also for the offences punishable under Sections 3, 4 and 5 of the TADA Act, alleging that on the afternoon of 14-8-1992 Veerappan along with his associates attacked the then Superintendent of Police, Mysore District, Shri Harikrishna, and the then SI of Police of M.M. Hills, Shri Shakeel Ahamed and other police personnel who had been there to nab Veerappan on the information furnished by the informant Kamala Naika, who also died in the incident, and had also resulted in the killing of six police personnel and injuring others and damaging the vehicles and also removing of the weapons and the wireless set belonging to the Police Department.

There are in all 166 accused persons and out of which 30 accused are in custody and 48 accused are on bail.

It is submitted by the Prosecutor that the accused who are on bail have not repeated the offences and they have also not involved themselves in any similar offences and terrorist activity have not been noticed recently in the area.

It is submitted by the Prosecutor that in order to restore the peace and normalcy in the border area and among the people living in the border area and to maintain peace among the public in general and inhabitants of the particular village, the Prosecutor has decided to withdraw from the prosecution the charges under the offences of the provision punishable under Sections 3, 4 and 5 of TADA.

It is submitted further by the Prosecutor that the trial regarding other offences are being continued and the charges under the Arms Act and the Explosive Substances Act, to certain extent cover the provisions of Sections 3 and 4 of TADA. Therefore, no injustice would be caused if the Prosecutor withdraws the charges for the offences punishable under Sections 3, 4 and 5 of the TADA Act.

It is further submitted by the Prosecutor that as a matter of policy, since the Central Government has already withdrawn the Central enactment, no purpose would be served immediately by the prosecution for the offences punishable under Sections 3, 4 and 5 of the TADA Act.

It is submitted by the Prosecutor that in the larger interest of the State and in order to avoid any unpleasant situation in the border area, it is necessary to withdraw from prosecution of the charges under Sections 3, 4 and 5 of the TADA Act.

It is submitted by the Prosecutor that no injustice would be caused to the State by withdrawing from the prosecution, the offences punishable under Sections 3, 4 and 5 of the TADA Act.

Therefore, it is submitted by the Prosecutor that the Hon'ble Court be pleased to accord consent to the Prosecutor to withdraw the charges for the offences punishable under Sections 3, 4 and 5 of the TADA Act, against the accused and the case may be withdrawn from the Designated Court and be transferred to the regular Sessions Court for the continuance of the trial for the other offences in the interest of justice."

8. The appellant in Criminal Appeals Nos. 741-43 of 2000 before us opposed the Special Public Prosecutor's application. He is the father of Shakeel Ahamed who, as the application recites, had, allegedly, been killed by Veerappan and his associates. The appellant's statement of opposition referred to the abduction of Rajkumar and alleged that, consequent thereupon, the Government of the State of Karnataka had yielded to the demands of Veerappan and had issued notifications that it would withdraw all cases against Veerappan and his associates, and this had been widely publicised by the media. The statement of opposition submitted that no cogent reasons had been given for the decision to drop the TADA cases. It submitted that it was the duty of the Special Public Prosecutor to inform the court of the reasons prompting him to withdraw the prosecution and of the court to apprise itself of these reasons. The Special Public Prosecutor rejoined to the statement of opposition by contending that all cases against Veerappan and his associates were not being withdrawn, and they would be prosecuted. He, therefore, denied the submission in the statement of opposition that the Government of the State of Karnataka had yielded to blackmail by Veerappan.

9. The Special Public Prosecutor's application was made when the trial of the cases to which it related was in progress and the evidence of 51 witnesses had been recorded. The trial had been going on until 30-7-2000, on the night of which Rajkumar was abducted.

10. The Principal District and Sessions Judge, Mysore, was the Special Judge designated for the trial of TADA offences. (He is now referred to as "the learned Judge".) On 19-8-2000 the learned Judge passed on the Special Public Prosecutor's application the order that is impugned in these appeals. He set out in paras 2 to 6 the details of the cases before him, thus:

2. The Special Cases Nos. 44 of 1994, 11 of 1997 and 3 of 1998 arise out of a charge-sheet in Crime No. 70 of 1992 of Ramapura Police Station against Veerappan and others for offences under Sections 143, 147, 148, 341, 342, 120-B, 326, 307, 302, 396 read with Section 149 IPC, Sections 3, 4 and 5 of the Indian Explosives Act, Sections 3 and 25 of the Arms Act and also under Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, alleging that on the afternoon of 14-8-1992, Veerappan and his associates had attacked the then Superintendent of Police, Mysore, Shri Harikrishna and the then Sub-Inspector of Police Shri Shakeel Ahamed and other police personnels, who had been there to nab Veerappan and in the encounter, six police personnel were killed and many of them were injured and vehicles were damaged and the weapons and wireless set belonging to the Police Department were taken away. The charge-sheet had been laid against 168 persons, of them 30 accused are in custody and 45 are on bail and rest of them are shown as absconding.

3. The Special Cases Nos. 63 of 1994, 13 of 1997 and 20 of 1998 arise out of a charge-sheet filed in Crime No. 41 of 1992 of Ramapura Police Station against Veerappan and 162 others alleging that on the night of 19/20-5-1992, the accused had attacked Rampura Police Station and caused the death of five police personnel and caused injuries to other police staff, thereby the accused are said to have committed offences punishable under Sections 302, 307, 324, 326, 396 read with Section 149 IPC, Sections 3 and 25 of the Indian Arms Act, Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act. Of the said accused, 46 accused are on bail and 30 accused are in custody and rest of them have been shown to be absconding.

4. The Special Cases Nos. 66 of 1994, 14 of 1997 and 21 of 1998 arise out of a charge-sheet submitted by M.M. Hills Police in CrI. No. 12 of 1993 alleging that the accused had attacked police personnel on 24-5-1993 near Rangaswamy Voddu on M.M Hills-Talabetta Road, near 18/28 S: Curve and in the attack the Superintendent of Police Shri Gopal Hosur and his driver Ravi were injured and six police personnel were killed and four police personnel were injured and thereby the accused are said to have committed offences punishable under Sections 143, 148, 120-B, 341, 353, 395, 302, 109, 114 read with Section 149 IPC, Sections 3, 4 and 5 of the Indian Explosives Act, Sections 3 and 25 of the Indian Arms Act and also under Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act. The charge-sheet has been submitted against 98 accused persons. Of them, 7 accused are on bail, 26 accused are in custody and others are shown to be absconding.

5. The Special Cases Nos. 67 of 1994, 12 of 1997 and 19 of 1998 arise out of a charge-sheet submitted by M.M. Hills Police against 143 accused persons alleging that on 9-4-1993 at Sorekayee Madu the accused had attacked and killed 22 persons belonging to both

the Police and Forest Department and their informants by planting bombs in the forest area of Palar and thereby the accused are said to have committed offences punishable under Sections 143, 147, 148, 341, 342, 120-B, 324, 326, 307, 302 and 396 read with Section 149 IPC, Sections 3 and 25 of the Arms Act, Sections 3, 4 and 5 of the Indian Explosives Substances Act and also Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act. Of the 143 accused persons, 17 accused are on bail, 33 accused are in custody and rest of them are shown to be absconding.

6. The Special Cases Nos. 119 of 1995 and 79 of 1999 arise out of a charge-sheet submitted by Ramapura Police in CrI No. 5 of 1994 against 17 accused persons alleging that on 17-1-1994 at Changadi Forest, the accused had attacked staff of special task force and informants of the Police and Forest Department and killing one police personnel and one gunman and thereby the accused are said to have committed offences under Sections 143, 147, 148, 326, 307, 302 read with Section 149 IPC, Sections 3 and 25 of the Indian Arms Act and also Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act.

The learned Judge then noted that the trial had begun and many material witnesses had been examined. He referred to the pleadings in the application before him and the arguments of the Special Public Prosecutor; among them, “there is no terrorist activity in the area. The instant application has been filed with an intention to maintain peace and tranquillity. He has not been directed by the State. It is the act of the Public Prosecutor only”. The learned Judge opined that the present appellant could not be said to be an aggrieved party who could be permitted to raise objections to the application. He then dealt with precedents relevant to the application and concluded that his power was limited. It was only a supervisory power over the action of the Special Public Prosecutor. The function of the court was to prevent abuse. Its duty was to see, in furtherance of justice, that the permission was not sought on grounds extraneous to the interest of justice. Permission to withdraw could only be granted if the court was satisfied on the materials placed before it that its grant subserved the administration of justice and it was not being sought covertly, with an ulterior purpose unconnected with vindication of the law, which the executive organs were duty-bound to further and maintain. The learned Judge stated that it was seen from the material on record that terrorist activity had not been noticed recently in the area. The learned Judge did not accept the contention of the Special Public Prosecutor that, since the TADA Act had been withdrawn, the permission should be granted. The learned Judge noted that it had been mentioned in the statement of objections that Rajkumar had been abducted by the prime accused before him; as such, he said that he would have to take notice of this aspect. He mentioned that the trial of one of the special cases involved in the application had been posted for hearing on 30-7-2000 but, on account of the changed situation, he had felt “that there was a likelihood of danger to the person of accused, who are in custody, if they are insisted to be produced before the court on the said hearing dates”. The learned Judge stated that he was satisfied that the Special Public Prosecutor had applied his mind in filing the application. In view of the grounds and circumstances mentioned by the Special Public Prosecutor, he was satisfied, on the materials placed before him,

that the grant of permission to withdraw subserves the administration of justice and the permission had not been sought covertly with an ulterior purpose unconnected with the vindication of law, which the executive organs are duty-bound to further and maintain.

The learned Judge observed that things could have been viewed from a different angle altogether if the Special Public Prosecutor had sought for blanket withdrawal of the cases against the accused; but this was not the situation in the case on hand for the case against the accused for other offences would be proceeded with. Accordingly, the learned Judge allowed the application, according consent to withdrawal of the charges relating to offences punishable under the TADA Act against the accused. He ordered, "the accused in custody and on bail, facing trial for offences under the TADA Act stand acquitted/discharged as the case may be". He transferred the cases to the Court of the Principal District and Sessions Judge, Mysore for disposal in accordance with law of all charges other than under the TADA Act.

11. The accused who were in custody and were discharged by the Special Court in respect of TADA charges against them immediately filed an application for bail before the Court of District and Sessions Judge, Mysore. On 28-8-2000, the learned Judge, now as Principal District and Sessions Judge, noted in his order that learned counsel for the present appellant had informed him that the appellant had filed a petition for special leave to appeal against the order on the Special Public Prosecutor's application which was to be taken up for hearing on the next day and that learned counsel had prayed that orders on the bail petition should not be pronounced until thereafter. The Special Public Prosecutor had submitted in reply that the special leave petition related only to the withdrawal of charges under the TADA Act and the passing of orders on the bail petitions would not be affected thereby. The learned Judge found that no order of stay had been passed by this Court, and, therefore, it overruled the prayer and passed orders on the bail petitions. In the course thereof, the learned Judge referred to "the urgency of the matter". The learned Judge found force in the contention on behalf of the accused that there had been a change in the circumstances in view of the fact that the Designated Court had permitted the State to withdraw TADA charges against them. Having carefully gone through the material on record and the nature of the accusations made against the accused and the evidence projected, it was the learned Judge's opinion that

there is no prima facie case made out against the accused for the said offence. Having regard to the facts and circumstances, the social status of the accused and other relevant factors, the court is of the opinion that the bail petition will have to be allowed on the following terms in the ends of justice.

The accused were directed to be released on bail on each of them executing a bond for Rs 10,000 with one surety for the like sum or, in the alternative, on each furnishing cash security of Rs 20,000, on the conditions that they would appear before the court regularly, as and when required, they would not tamper with the prosecution witnesses and they would not commit any other offence.

12. The order dated 19-8-2000 on the Special Public Prosecutor's application is impugned in the appeals before us.

13. On 14-8-2000 the Government of the State of Tamil Nadu issued a Government Order directing that charges against one Radio Venkatesan in respect of two cases registered against him under the provisions of the TADA (Prevention) Act be withdrawn "in the public interest". The Inspector General of Police Intelligence, Chennai was directed to take necessary action accordingly. On 16-8-2000 the Special Public Prosecutor before the Designated Court (TADA

Act) at Chennai made two applications to that court under the provisions of Section 321 of the Criminal Procedure Code. They stated that Radio Venkatesan was charged before the Designated Court in cases arising under the TADA Act, the Explosive Substances Act, the Indian Penal Code and the Arms Act and the cases were pending for framing charges. The applications added,

it is further submitted that after perusal of records I am satisfied that under the new change of circumstances and also in the public interest I hereby request this Hon'ble Court to permit me to withdraw the charges under Sections 3(1), 3(3), 4(1) and 5 of the Tamil Nadu Terrorist and Disruptive Activities Preventive Act, 1987 against the accused Venkatesan @ Radio Venkatesan and thus render justice.

A copy of the Government Order of 14-8-2000 was submitted with the applications. On 16-8-2000, the Designated Court, Chennai passed an order on the applications. It noted:

The Government has passed an order stating that TADA offences against the accused Venkatesan @ Radio Venkatesan is withdrawn in the public interest. There is no mention in the Government Order for withdrawal of cases against the said accused under IPC offences and other laws.

The court referred to the applications before it and the provisions of Section 321 which permitted withdrawal from prosecution of one or more offences when the accused was charged with more than one offence. It then stated:

So far as this case is concerned the Government has passed the order to withdraw the TADA case alone as against the accused Venkatesan @ Radio Venkatesan, who is involved in Crl. No. 50 of 1993 and Crl. No. 346 of 1993. As this application has been filed by the learned Special Public Prosecutor on the basis of the Government Order referred above, permission is granted to withdraw the TADA case against the accused Venkatesan @ Radio Venkatesan and he has been discharged from the various offences of the TADA Act.

The applications were allowed accordingly.

14. Insofar as four detenus under the National Security Act were concerned, the Government of the State of Tamil Nadu passed orders on 14-8-2000. As an example, that relating to Sathyamoorthy is reproduced below:

1. Kannada film actor Dr Rajkumar and few others were kidnapped by sandalwood brigand Veerappan and his men in the night of 30-7-2000. He has made 10 demands to release them from hostage. One of the demands is to release 5 prisoners from the various prisons in Tamil Nadu. Thiru Sathyamoorthy @ Sathya @ Kandasamy @ Neelan, is one among the NSA detenus mentioned above. A tense situation is prevailing due to the kidnapping of Kannada film actor Dr Rajkumar. There is an apprehension that in case any harm is caused to him, there may be a backlash on Tamils in Karnataka. In order to avoid such a situation and in the public interest, the Government has decided to revoke the order of detention passed by the Collector and District Magistrate, Erode District, in his proceedings first read above, under NSA against Thiru Sathyamoorthy @ Sathya @Kandasamy @ Neelan and to release him from detention under NSA.

2. NOW THEREFORE in exercise of the powers conferred by clause (a) of sub-section (1) of Section 14 of the National Security Act, 1980, the Governor of Tamil Nadu hereby

revokes the order of detention made by the District Collector and District Magistrate, Erode District, against Thiru Sathyamoorthy @ Sathya @ Kandasamy @ Neelan, s/o Thiru Nataraja Muthiraiyar, in the proceedings first read above and direct that the said Thiru Sathyamoorthy @ Sathya @ Kandasamy @ Neelan, be released from detention under the said Act forthwith. This order applies only in respect of detention under the National Security Act.

15. The aforesaid orders of the Government of the State of Tamil Nadu and the order of the Designated Court, Chennai are challenged in the two public interest petitions before us.

16. In the appeals aforementioned, this Court passed an order on 29-8-2000 directing that none of the respondents accused therein should be released, on bail or otherwise, pending further orders. Observing the spirit of this order, those who are the beneficiaries of the aforesaid orders of the Government and Designated Court of the State of Tamil Nadu have also not been released.

18. The law as it stands today in relation to applications under Section 321 is laid down by the majority judgment delivered by Khalid, J. in the Constitution Bench decision of this Court in *Sheonandan Paswan v. State of Bihar* [(1987) 1 SCC 288]. It is held therein that when an application under Section 321 is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. What the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration all the material before him, the court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The section should not be construed to mean that the court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher court is satisfied that such consent was given on an overall consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the court in a supervisory and not an adjudicatory manner. What the court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable under Section 321 is fettered only by a consent from the court on a consideration of the material before it. What is necessary to satisfy the section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

20. It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent.

21. The applications under Section 321 made by the Special Public Prosecutor before the Designated Court at Mysore submitted that the Special Public Prosecutor had decided to withdraw from prosecution the charges under the TADA Act “in order to restore the peace and normalcy in the border area and among the people living in the border area and to maintain peace among the public in general and inhabitants of the particular village” and that such withdrawal from prosecution was necessary “in the larger interest of the State and in order to avoid any unpleasant situation in the border area”. The applications did not state why the Special Public Prosecutor apprehended a disturbance of the peace and normalcy of “the border area” or the “particular village”, nor was any material in this behalf, or a summary thereof, set out. There was, therefore, no basis laid in the applications upon which the learned Judge presiding over the Designated Court could conclude that the Special Public Prosecutor had applied his mind to the relevant material and exercised discretion in good faith and that the withdrawal would not stifle or thwart the course of the law and cause manifest injustice. The order of the learned Judge noted that the statement of opposition filed by the present appellant averred that Rajkumar had been abducted by Veerappan and it said that he would have to take notice of this aspect. The order did not note that the statement of opposition also said that, consequent upon such abduction, the State of Karnataka had yielded to the demands made by Veerappan and had issued notifications that it would withdraw all cases against Veerappan and his associates. No query in this regard was made by the learned Judge with the Special Public Prosecutor. The learned Judge said that he was satisfied on the material placed before him that the grant of permission to withdraw subserved the administration of justice and it had not been sought covertly, but he did not state what those materials were. It is not the case of anybody that any materials were placed before the learned Judge upon the basis of which he could have been satisfied that the Special Public Prosecutor had applied his mind thereto and had reached, in good faith, the conclusion that the withdrawal he sought was necessary for the reasons he pleaded. The learned Judge placed on record, as he called it, the decision of this Court in the case of *Sheonandan Paswan*, referred to above, but he did not appreciate what it required of a Public Prosecutor and of a court in regard of Section 321, and he did not follow it. The order

granting consent on the Special Public Prosecutor's application, therefore, does not meet the requirements of Section 321 and is bad in law.

22. The applications under Section 321 filed before the Designated Court at Chennai sought consent to the withdrawal from TADA prosecution against Venkatesan @ Radio Venkatesan after "perusal of records" by the Special Public Prosecutor, and they submitted that "under the new change of circumstances and also in the public interest the permission was sought". What the record was that the Special Public Prosecutor had perused was not set out nor was it annexed nor a summary thereof recited. What the changed circumstances were was not set out. The order on the applications was founded only upon the relevant Government Order, thus:

So far as this case is concerned the Government has passed order to withdraw the TADA case alone as against the accused Venkatesan @ Radio Venkatesan, who is involved in CrI. Nos. 50 and 346 of 1993. As this application has been filed by the learned Special Public Prosecutor on the basis of the Government Order referred above, permission is granted to withdraw the TADA case against the accused Venkatesan @ Radio Venkatesan....

The order, therefore, was not passed after meeting the requirements of Section 321, and it is bad in law.

23. It was submitted by the learned Solicitor General, appearing for the State of Karnataka, that we, sitting in appeal, should consider the grant of consent under Section 321 based upon the state of knowledge of the Special Public Prosecutor on the date on which he made the application before the Designated Court at Mysore. In this behalf, two affidavits, both dated 19-10-2000, were filed. One affidavit is made by the Minister of Law and Parliamentary Affairs of the State of Karnataka and the other by the Special Public Prosecutor.

24. The affidavit of the Minister for Law states:

2. That I have been party to most of the decisions which have been taken in this matter, which has culminated in the issuance of the Government Order dated 8-8-2000 requesting the Special Public Prosecutor, in charge of the TADA cases pending before the Designated Court at Mysore against Veerappan and his associates, to withdraw the charges under TADA.

3. I also held a meeting with the Special Public Prosecutor in charge of the cases, on 5-8-2000 in my office in Vidhan Soudha, Bangalore. The discussions held during the meeting and the persons present have already been stated in the affidavit of Shri Ashwini Kumar Joshi which I confirm.

4. Prior to this meeting, the problems arising out of the abduction of Dr Rajkumar, the options available to the State Government to deal with this crisis and the responses of the Government publicly announced to Veerappan's demands, have all been discussed at various levels including in informal meetings held between me, the Home Minister and the Chief Minister as well as the Cabinet meetings which have been held frequently during the period 1-8-2000 to 8-8-2000.

5. I submit that one option, which the Government had always considered relates to the use of force for the release of Dr Rajkumar. While considering this option and evaluation of the risk factors, as advised by the senior officials at the level of Home Secretary, and the Chief Secretary as well as our own experience in the past were also considered. After detailed discussions on more than one occasion, the option of use of force in the present

circumstances and as at present advised, was ruled out in favour of acceding to some of his demands.

6. The demands made by Veerappan were discussed informally at various levels of the Secretaries, at the level of the Ministers and also informally in the Cabinet.

7. I submit that the Government made public its response to Veerappan's demands in which it indicated, inter alia, that only TADA charges (and not all cases) against the 51 accused would be withdrawn.

8. I submit that the matter of withdrawal of TADA charges had been informally discussed in the Cabinet on 3rd August and the final decision taken between 4-8-2000/5-8-2000 between myself, the Home Minister and the Chief Minister of Karnataka.

9. I respectfully state that it was after considering the options and the likely repercussions in future of succumbing to his demands (i.e. the signals sent by agreeing to such demands, and the fact that it may encourage further such acts) and after weighing it against the problem apprehended if any harm were to be caused to Dr Rajkumar, that this decision to withdraw TADA charges was taken.

10. In the informal Cabinet meeting held on 3-8-2000, the Cabinet had authorised the Chief Minister, the Home Minister and myself as well as the Chief Secretary to take a final decision in this matter and pursuant to this, we took a final decision between 4-8-2000/5-8-2000."

25. The decision of the Government of the State of Karnataka, therefore, was that, in view of its apprehension of the unrest that would follow if any harm were to come to Rajkumar, it was better to yield to Veerappan's demand and to withdraw TADA charges against Veerappan and his associates, including the respondents-accused. In this context, the Special Public Prosecutor should have considered and answered the following questions for himself before he decided to exercise his discretion in favour of such withdrawal from prosecution of TADA charges.

1. Was there material to show that the police and intelligence authorities and the State Government had a reasonable apprehension of such civil disturbances as would justify the dropping of charges against Veerappan and others accused of TADA offences and the release on bail of those in custody in respect of the other offences they were charged with?

2. What was the assessment of the police and intelligence authorities and of the State Government of the risk of leaving Veerappan free to commit crimes in future, and how did it weigh against the risk to Rajkumar's life and the likely consequent civil disturbances?

3. What was the likely effect on the morale of the law-enforcement agencies?

4. What was the likelihood of reprisals against the many witnesses who had already deposed against the respondents-accused?

5. Was there any material to suggest that Veerappan would release Rajkumar when some of Veerappan's demands were not to be met at all?

6. When the demand was to release innocent persons languishing in the Karnataka Jails, was there any material to suggest that Veerappan would be satisfied with the release of only the respondents-accused?

7. In any event, was there any material to suggest that after the respondents-accused had secured their discharge from TADA charges and bail on the other charges Veerappan would release Rajkumar?

8. Given that the Government of the States of Karnataka and Tamil Nadu had not for 10 years apprehended Veerappan and brought him to justice, was this a ploy adopted by them to keep Veerappan out of the clutches of the law?
26. The affidavit of the Special Public Prosecutor states:
6. On 5-8-2000, I was called by the Office of the Hon'ble Law Minister for a meeting in his chamber in Vidhan Soudha, Bangalore.
7. When I went to the meeting, the Special Secretary (Law) and the Director of Prosecutions as well as the Additional Director General of Police (Intelligence) were present. We discussed the matter relating to withdrawal of TADA charges against these 51 accused at considerable length for over 2 hours. In the course of the discussion, I recall that I was informed, inter alia, that the negotiations had reached a point where it was felt that withdrawal of TADA charges against these 51 accused would secure the release of Dr Rajkumar. I was informed that the Government had intelligence reports and that if any harm were to be caused to Dr Rajkumar, it would lead to problems between the two linguistic communities in the State. I was informed that apprehending trouble, schools and colleges had been declared closed immediately in the whole State and they were closed up to 5-8-2000. I was informed of the incidents, which had occurred in Bangalore City on 31-7-2000 as an aftermath of this incident of kidnapping also showed that the abduction was being construed by the people as an issue between two communities. The character of the incident showed that these people were ready to indulge in acts of violence. I was also informed that acting on intelligence reports, the Government had taken steps to arrange for deployment of central forces, such as the Rapid Action Force, Armed Reserve Police, and Paramilitary Force from the neighbouring States and some steps had already been taken and others were likely to be taken.
8. I was informed by the Hon'ble Law Minister that the Cabinet had also informally discussed this matter in its urgent meeting held on 3-8-2000 and that a decision had been taken to take appropriate steps and on that basis the Government would formally request me to take appropriate steps to withdraw TADA charges.
9. On 8-8-2000 the GO issued by the Government along with its covering letter was duly forwarded to me through the Law Department. A copy of the said GO and the connected documents are collectively annexed hereto and marked as Annexure A.
10. Based on my understanding of the situation, which in turn, was based on the aforesaid material, and the information which had been given to me which I believed to be true, I decided that it would be in the interest of public peace and maintenance of law and order in the State to withdraw the charges against the 51 TADA detenus.
11. I respectfully submit that the information which had been provided to me by the Additional Director General of Police (Intelligence), the Hon'ble Law Minister and others present in the meeting as well as my own knowledge of local events (being a resident of Mysore for 27 years and having witnessed the problems which had resulted after the Cauvery riots), I felt there was substance in the Government's request that any such step which could secure the release of Dr Rajkumar would be a step to protect public peace. I felt that if withdrawal of TADA charges which would enable the accused to file necessary bail applications and their consequent release on bail could preserve amity between the two communities, it would outweigh the likely problems which would arise on the release of these 51. In arriving at this decision that I was influenced by the fact that the 73 co-accused who had already been enlarged on bail (by the court) had complied with the bail conditions

which suggested that they had not gone back to their old ways. There were 12 women, 3 old persons of 70 years age and 3 persons aged between 55-60 amongst TADA accused. I also considered the facts that they had been in the jail for six to seven years.

12. I was also informed in the course of the aforesaid meetings that in other districts also some incidents have been reported. I believed the statement as I had no reason to doubt its credibility. I have subsequently ascertained the particulars of the cases which are hereto annexed and marked as Annexure C.

27. The affidavit of the Special Public Prosecutor reveals that he was “informed” that the Government of the State of Karnataka had intelligence reports that if any harm were to be caused to Rajkumar, it would lead to problems between two linguistic communities. Clearly, he was not shown the intelligence reports. Throughout the affidavit the phrase “I was informed” recurs. There is no statement therein which shows that the Special Public Prosecutor had the opportunity of assessing the situation for himself by reading the primary material and deciding, upon the basis thereof, whether he should exercise his discretion in favour of the withdrawal of TADA charges. Acting upon the information, which he could not verify, the Special Public Prosecutor could not be satisfied that such withdrawal was in the public interest and that it would not thwart or stifle the process of the law or cause manifest injustice. The Special Public Prosecutor, in fact, acted only upon the instructions of the Government of the State of Karnataka. He, therefore, did not follow the requirement of the law that he be satisfied and the consent he sought under Section 321 cannot be granted by this Court.

28. The affidavit of the Special Public Prosecutor speaks of “withdrawal of TADA charges which would enable the accused to file necessary bail applications and their consequent release on bail” It is, thus, clear that what was envisaged by the Government of the State of Karnataka and the Special Public Prosecutor was a package which comprised of the withdrawal of TADA charges against the respondents-accused and their release on bail on applications filed by them. This indicates complicity with the respondents-accused. It will have been noticed that stress was laid by the Special Public Prosecutor in his application under Section 321 on the fact that the prosecutions against the respondents-accused on charges other than under the TADA Act would continue, and this was noted in the order of the Designated Court. The Designated Court was not told either in the application or thereafter that the Government of the State of Karnataka and the Special Public Prosecutor had in mind that the respondents-accused would file bail applications subsequent to the order under Section 321 which would not be opposed. There can, in the circumstances, be little doubt that after their release on bail the respondents-accused were not expected to attend the court to answer the remaining charges against them and that the stress laid as aforesaid was intended to mislead the Designated Court. We deprecate the conduct of the Government of the State of Karnataka and the Special Public Prosecutor in this behalf. We deem it appropriate, in the facts and circumstances, to set aside the orders granting bail to the respondents-accused.

29. Having set aside the order under Section 321 passed by the Designated Court at Chennai in the matter of Radio Venkatesan, the Government of the State of Tamil Nadu cannot comply with Veerappan’s demand to release the five prisoners from its jails. It is appropriate in the circumstances to set aside the orders of the Government of the State of Tamil Nadu under the National Security Act releasing the other four persons from detention.

30. The questions that we have posed above were put to the learned counsel for the State of Karnataka in the context of the State Government's decision to concede to the demand of Veerappan that prisoners in Karnataka Jails should be released. The answers do not satisfy us. We do not find on the record, including that placed before us in sealed covers, material that could give rise to a reasonable apprehension of such civil disturbances as justifies the decision to drop TADA charges against Veerappan and his associates, including the respondents-accused, and to release the latter on bail. There is nothing on the record which suggests that the possibility of reprisals against the witnesses who have already deposed against the respondents-accused or the effect on the morale of the law-enforcement agencies were considered before it was decided to release the respondents-accused. There is also nothing to suggest that there was reason to proceed upon the basis that Veerappan would release Rajkumar when his demands were not being met in full. The Government of the State of Karnataka would appear to be unaware that once the respondents-accused were discharged from TADA charges, the deal was done; and that when they were released on bail they could not be detained further, whether or not Rajkumar was released in exchange. While we cannot assert that conceding to Veerappan's demands was a ploy of the Government of the State of Karnataka to keep him out of the clutches of the law, we do find that it acted in panic and haste and without thinking things through in doing so. That this is so, is clear from the fact that the demands were conceded overnight and also from the fact that the Government of the State of Karnataka did not ascertain the legal position that it was not for it but for the court to decide upon the release of persons facing criminal prosecutions.

31. What causes us the gravest disquiet is that when, not so very long back, as the record shows, his gang had been considerably reduced, Veerappan was not pursued and apprehended and now, as the statements in the affidavit filed on behalf of the State of Tamil Nadu show, Veerappan is operating in the forest that has been his hideout for 10 years or more along with secessionist Tamil elements. It seems to us certain that Veerappan will continue with his life of crime and very likely that those crimes will have anti-national objectives.

32. The Government of the State of Tamil Nadu had been apprised that Rajkumar faced the risk of being kidnapped by Veerappan when he visited his farmhouse at Gajanoor. It knew that Rajkumar was unlikely to give advance intimation of his visits: he had visited Gajanoor for the house-warming ceremony of his new farmhouse in June 2000 without prior notice. To put it mildly, it would have been prudent, in the circumstances, to post round the clock at Rajkumar's farmhouse in Gajanoor one or two policemen who could inform their local station house of his arrival there and thus ensure his safety.

33. The locus standi of the present appellant has not been contested before this Court. Had it not been for his appeal, a miscarriage of justice would have become a fait accompli.

34. The respondents-accused may have individual grounds for challenging the continued prosecution of TADA charges against them or for bail. They shall be free to adopt proceedings in that regard, if so advised. Such proceedings shall be decided on their merits and nothing that we have said in this judgment shall stand in the way.

35. The appeals are allowed and the order under appeal, dated 19-8-2000, is set aside. The order dated 28-8-2000 passed by the Principal District and Sessions Judge, Mysore granting bail to the respondents-accused is also set aside.

36. Further, the order of the Designated Court at Chennai dated 16-8-2000 is set aside. The orders of the Government of the State of Tamil Nadu passed on 14-8-2000 under the National Security Act in respect of Sathyamoorthy and three others revoking the orders of their detention under the National Security Act are also set aside. The writ petitions were made absolute accordingly.

Y.K. SABHARWAL, J. (*concurring*) - I have gone through the elaborate and learned judgment prepared by my brother Justice S.P. Bharucha. I respectfully agree that the orders granting consent on the Special Public Prosecutor's applications do not meet the requirements of Section 321 of the Code of Criminal Procedure (for short, "CrPC") and the orders are bad in law. The questions raised in these matters have wide-ranging repercussions regarding the scope of Section 321 Cr.P.C and what is required to be considered by the Special Public Prosecutor before consent of court is sought under Section 321 to withdraw from the prosecution of any person. I record these additional reasons for concurring with the decision arrived at by Justice Bharucha and Justice Mohapatra.

38. The facts in detail have been set out in the judgment of Justice Bharucha and it is unnecessary to repeat them except to briefly notice the broad, admitted and/or well-established facts for appreciating the points involved. They are as under:

(A) Veerappan is a dreaded criminal and despite various attempts over a number of years he could not be apprehended.

(B) Veerappan and his associates are alleged to be responsible for killing of a large number of people (over 100) including police personnel, forest personnel and others besides being responsible for causing injuries to a large number of people and loss of property to the tune of crores of rupees.

(C) Veerappan and his gang members hatched a conspiracy to kill Superintendent of Police, Mysore District, Shri Harikrishna and Sub-Inspector of Police of M.M. Hills Shri Shakeel Ahamed and other police personnel who had been there to nab Veerappan with a view to terrorise the police force and to put fear of death into the minds of policemen who were performing duty in attempting to arrest the wanted persons. Various charges relating to murder, ambush, attempt to overawe the Government of Karnataka, killing of elephants, smuggling of sandalwood etc. from the forest, possession of arms and ammunition, opening of fire on task force personnel, have been framed against accused who are said to be the associates of Veerappan. Cases filed against them are under the provisions of Terrorist and Disruptive Activities (Prevention) Act (TADA) and other penal provisions, i.e., Indian Penal Code, Arms Act and Explosive Substances Act.

(D) From their source information police authorities had learnt that Veerappan intended to kidnap Rajkumar during his visit to his farmhouse in Gajanoor. More than a year back, Director General of Police of the State of Karnataka had informed the Inspector General of Police of the State of Tamil Nadu requesting for adequate security arrangements being made for Rajkumar whenever he visited the said farmhouse.

(E) Rajkumar is a very popular film actor of Karnataka. In case any harm is caused to Rajkumar, there may be backlash on Tamils in Karnataka and it may lead to problems between the two linguistic communities in the States. The people may indulge in acts of violence.

(F) On 30-7-2000, Veerappan abducted Rajkumar from his farmhouse along with three others. As of today, Rajkumar and one Nagesh are still in Veerappan's custody.

(G) No police protection or security was provided when Rajkumar visited the farmhouse.

(H) Soon after the abduction of Rajkumar and others, the two State Governments decided to accept the demands of Veerappan to release those in respect of whom TADA charges and detention orders under the National Security Act have been withdrawn. The decision was taken in the meeting held on 4-8-2000/5-8-2000 between the Chief Ministers of the two States.

(I) Applications under Section 321 Cr.P.C seeking consent of court to withdraw TADA charges were filed to facilitate ultimately the release of accused persons from judicial custody so as to meet Veerappan's demand. The arrangement was that once TADA charges are withdrawn, the accused in judicial custody will move bail applications in cases of offences under IPC and other penal enactments. The Public Prosecutor will concede and will not oppose the grant of bail. The court will grant the bail and, thus, accused will come out from judicial custody and, thus, this demand of Veerappan would be met.

39. Keeping in view the aforesaid facts, let me now revert to application filed under Section 321 Cr.P.C.

40. The application filed under Section 321 has been reproduced in extenso in the judgment of Justice Bharucha. The application makes no reference whatsoever to any such arrangement as mentioned at (I) above. The main ground stated in the application is that in order to restore the peace and normalcy in the border area and among the people living in the border area and to maintain peace among the public in general and inhabitants of the particular village, the Prosecutor has decided to withdraw from the prosecution against the accused charged of the offences punishable under Sections 3, 4 and 5 of TADA. Abdul Karim, father of Shakeel Ahamed, opposed the application on various grounds, inter alia, stating in the objection petition that if the cases against the hard core criminals are withdrawn or if they are released on bail that may expose the families of the victims to terror unleashed by the TADA detenus, who may unleash terror and jeopardise public order and cause detriment to the general public interest. In reply to the said objections, instead of admitting that TADA charges are being withdrawn to facilitate grant of bail, the stand taken by the Public Prosecutor, inter alia, is that Veerappan and his associates will not be let out freely as they will be facing prosecution for other offences and, therefore, the submission that the State Government has yielded to blackmail tactics of outlaw Veerappan is not correct.

41. The Public Prosecutor has to be straight, forthright and honest and has to admit the arrangement and inform the court that the real arrangement is to ultimately facilitate the release of these accused from judicial custody by not opposing the bail applications after the withdrawal of TADA charges. The arrangement as set out above has neither been disputed nor is it capable of being disputed. It is well established that the real purpose for withdrawal of TADA charges was to facilitate the grant of bail to the accused. In such circumstances, why the camouflage? Why is it not so stated in the application filed under Section 321? In fact, it is a

deceit. These are the questions for which there is no plausible answer. No court of law can be a party to such a camouflage and deceit in judicial proceedings. The answer to these basic questions cannot be that the Judge knew about it from the very nature of the case. Under these circumstances, it cannot be said that the application was made in good faith.

42. The satisfaction for moving an application under Section 321 Cr.P.C has to be of the Public Prosecutor which in the nature of the case in hand has to be based on the material provided by the State. The nature of the power to be exercised by the Court while deciding application under Section 321 is delineated by the decision of this Court in ***Sheonandan Paswan v. State of Bihar***. This decision holds that grant of consent by the court is not a matter of course and when such an application is filed by the Public Prosecutor after taking into consideration the material before him, the court exercises its judicial discretion by considering such material and on such consideration either gives consent or declines consent. It also lays down that the court has to see that the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.

43. True, the power of the court under Section 321 is supervisory but that does not mean that while exercising that power, the consent has to be granted on mere asking. The court has to examine that all relevant aspects have been taken into consideration by the Public Prosecutor and/or by the Government in exercise of its executive function.

44. Besides the eight questions noticed in the main judgment, the question and aspect of association of Veerappan with those having secessionist aspirations were also not considered. Further, though it may have been considered as to what happened on 1st August, immediately after the abduction of Rajkumar, but what does not seem to have been considered is that those were spontaneous outbursts and the authorities may have been taken unaware but what would be the ground realities when the law-enforcing agencies have sufficient time to prepare for any apprehended contingency.

45. The application and order under Section 321 is a result of panic reaction by overzealous persons without proper understanding of the problem and consideration of the relevant material, though they may not have any personal motive. It does not appear that anybody considered that if democratically-elected governments give an impression to the citizens of this country of being lawbreakers, would it not breed contempt for law; would it not invite citizens to become a law unto themselves. It may lead to anarchy. The Governments have to consider and balance the choice between maintenance of law and order and anarchy. It does not appear that anyone considered this aspect. It yielded to the pressure tactics of those who according to the Government are out to terrorise the police force and to overawe the elected Governments. It does not appear that anyone considered that with their action people may lose faith in the democratic process, when they see public authority flouted and the helplessness of the Government. The aspect of paralysing and discrediting the democratic authority had to be taken into consideration. It is the executive function to decide in the public interest to withdraw from prosecution as claimed, but it is also for the Government to maintain its existence. The self-preservation is the most pervasive aspect of sovereignty. To preserve its independence and territories is the highest duty of every nation and to attain these ends nearly all other considerations are to be subordinated. Of course, it is for the State to consider these aspects and

take a conscious decision. In the present case, without consideration of these aspects the decision was taken to withdraw TADA charges. It is evident from material now placed on record before this Court that Veerappan was acting in consultation with secessionist organisations/groups which had the object of liberation of Tamil from India. There is no serious challenge to this aspect. None of the aforesaid aspects were considered by the Government or the Public Prosecutors before having recourse to Section 321 Cr.P.C.

46. With these additional reasons, I am in complete respectful agreement with the conclusion and opinion of my senior colleague Hon'ble Mr Justice S.P. Bharucha.

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Zahira Habibulla H. Sheikh v. State of Gujarat
(2004) 4 SCC 158

ARIJIT PASAYAT, J - 2. The present appeals have several unusual features and some of them pose very serious questions of far reaching consequences. The case is commonly known as "Best Bakery Case". One of the appeals is by Zahira who claims to be an eye-witness to macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgment by the trial Court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before Court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the public prosecutor. Last, but not the least that the role of the investigating agency itself was perfunctory and not impartial. Though its role is perceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

2. The appeals are against judgment of the Gujarat High Court in Criminal Appeal No. 956 of 2003 upholding acquittal of respondents-accused by the trial Court. Along with said appeal, two other petitions namely Criminal Miscellaneous Application No. 10315 of 2003 and Criminal Revision No. 583 of 2003 were disposed of. The prayers made by the State for adducing additional evidence under Section 391 of the Code of Criminal Procedure, 1973 (in short the 'Code'), and/or for directing retrial were rejected. Consequentially, prayer for examination of witnesses under Section 311 of the Code was also rejected.

3. In a nutshell the prosecution version which led to trial of the accused persons is as follows:

Between 8.30 p.m. of 1.3.2002 and 11.00 a.m. of 2.3.2002, a business concern known as "Best Bakery" at Vadodara was burnt down by an unruly mob of large number of people. In the ghastly incident 14 persons died. The attacks were stated to be a part of retaliatory action to avenge killing of 56 persons burnt to death in the Sabarmati Express. Zahira was the main eye-witness who lost family members including helpless women and innocent children in the gruesome incident. Many persons other than Zahira were also eye-witnesses. Accused persons were the perpetrators of the crime. After investigation charge sheet was filed in June 2002.

4. During trial the purported eye-witnesses resiled from the statements made during investigation. Faulty and biased investigation as well as perfunctory trial were said to have marred the sanctity of the entire exercise undertaken to bring the culprits to books. By judgment dated 27.6.2003, the trial Court directed acquittal of the accused persons.

5. Zahira appeared before National Human Rights Commission (in short the 'NHRC') stating that she was threatened by powerful politicians not to depose against the accused persons. On 7.8.2003 an appeal not up to the mark and neither in conformity with the required care, appears to have been filed by the State against

the judgment of acquittal before the Gujarat High Court. NHRC moved this Court and its Special leave petition has been treated as a petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution'). Zahira and another organisation - Citizens for Justice and Peace filed SLP (Crl.) No. 3770 of 2003 challenging judgment of acquittal passed by the trial Court. One Sahera Banu (sister of appellant-Zahira) filed the afore-noted Criminal Revision No. 583 of 2003 before the High Court questioning the legality of the judgment returning a verdict of acquittal. Appellant-State filed an application (Criminal Misc. Application NO.7677 of 2003) in terms of Sections 391 and 311 of the Code for permission to adduce additional evidence and for examination of certain persons as witness. Criminal Miscellaneous Application No. 9825 of 2003 was filed by the State to bring on record a document and to treat it as corroborative piece of evidence. By the impugned judgment the appeal, revision and the applications were dismissed and rejected.

6. The State and Zahira had requested for a fresh trial primarily on the following grounds:

When a large number of witnesses have turned hostile it should have raised a reasonable suspicion that the witnesses were being threatened or coerced. The public prosecutor did not take any step to protect the star witness who was to be examined on 17.5.2003 especially when four out of seven injured witnesses had on 9.5.2003 resiled from the statements made during investigation. Zahira Sheikh - the Star witness had specifically stated on affidavit about the threat given to her and the reason for her not coming out with the truth during her examination before Court on 17.5.2003.

7. The public prosecutor was not acting in a manner befitting the position held by him. He even did not request the Trial court for holding the trial in camera when a large number of witnesses were resiling from the statements made during investigation.

8. The trial court should have exercised power under section 311 of the Code and recalled and re-examined witnesses as their evidence was essential to arrive at the truth and a just decision in the case. The power under Section 165 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') was not resorted to at all and that also had led to miscarriage of justice.

9. The public prosecutor did not examine the injured witnesses. Exhibit 36/68 was produced by the public prosecutor which is a statement of one Rahish Khan on the commencement of the prosecution case, though the prosecution was neither relying on it nor it was called upon by the accused, to be produced before the Court. The said statement was wrongly allowed to be exhibited and treated as FIR by the public prosecutor.

10. x x x x x x x x x

21. Section 391 of the Code is intended to sub-serve the ends of justice by arriving at the truth and there is no question of filling of any lacuna in the case on hand. The

provision though a discretionary one is hedged with the condition about the requirement to record reasons. All these aspects have been lost sight of and the judgment, therefore, is indefensible. It was submitted that this is a fit case where the prayer for retrial as a sequel to acceptance of additional evidence should be directed. Though, the re-trial is not the only result flowing from acceptance of additional evidence, in view of the peculiar circumstances of the case, the proper course would be to direct acceptance of additional evidence and in the fitness of things also order for a re-trial on the basis of the additional evidence.

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

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

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

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

It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determination on the same subject-matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A

well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step.

32. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

33. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane J. put it:

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

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

35. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair

trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

36. While dealing with the claims for the transfer of a case under Section 406 of the Code from one State to another this Court in *Mrs. Maneka Sanjay Gandhi and Anr. v. Ms. Rani Jethmalani* [1979 (4) SCC 167] emphasised the necessity to ensure fair trial, observing as hereunder:

2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.

5. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may

become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed :

.... But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting, and even if justice were done it would not be "seen to be done". (*G. X. Francis v. Banke Behari Singh*, AIR 1958 SC 309).

6. Accepting this perspective we must approach the facts of the present case without excitement, exaggeration or eclipse of a sense of proportion. It may be true that the petitioner attracts a crowd in Bombay. Indeed, it is true of many controversial figures in public life that their presence in a public place gathers partisans for and against, leading to cries and catcalls or 'jais' or 'zindabads'. Nor is it unnatural that some persons may have acquired, for a time a certain quality of reputation, sometimes notoriety, sometimes glory, which may make them the cynosure of popular attention when they appear in cities even in a court. And when unkempt crowds press into a court hall it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim. This is a far cry from saying that the peace inside the court has broken down, that calm inside the court is beyond restoration, that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties, advocates and witnesses has ceased to exist. None of the allegations made by the petitioner, read in the pragmatic light of the counter-averments of the respondent and understood realistically, makes the contention of the counsel credible that a fair trial is impossible. Perhaps, there was some rough weather but it subsided, and it was a storm in the tea cup or transient tension to exaggerate which is unwarranted. The petitioner's case of great insecurity or molestation to the point of threat to life is, so far as the record bears out, difficult to accept. The mere word of an interested party is insufficient to convince us that she is in jeopardy or the court may not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. We are disinclined to stampede ourselves into conceding a transfer of the case on this score, as things stand now.

7. Nevertheless, we cannot view with unconcern the potentiality of a flare up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable

solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.
38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.
39. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.
40. "Witnesses" as Bentham said: "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse

of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

41. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.
42. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands

of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

43. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India* [1991 Supp (1) SCC 271] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.
44. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

45. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.
46. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.
47. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.
48. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community

acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

49. In **Rambhau v. State of Maharashtra** [2001 (4) SCC 759] it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The Court has to keep these salutary principle in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of reasons.
50. Need for circumspection was dealt with by this Court in **Mohanlal Shamji Soni's** case (*supra*) and **Ram Chander v. State of Haryana** [1981 (3) SCC 191] which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short the 'Old Code') and also in **Jamatraj's** case. While dealing with Section 311 this Court in **Rajendra Prasad v. Narcotic Cell through Its officer in Charge, Delhi** [1999 (6) SCC 110] held as follows:
 7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.
 8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.
51. Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straight-jacket formula of universal and invariable application can be formulated.
52. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 of the Code the underlying object which the Court must keep in view is the very reasons for which the Courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of Courts are not employed or utilized in a manner which give room to unfairness or lend themselves to be used as instruments of oppression and injustice.

53. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

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67. If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the Trial Court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing or fixed trials. Judicial Criminal Administration System must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.
68. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern day 'Neros' were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order, as well as public interest, become martyrs and monuments.

69. In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act it has to be seen as to whether the High Court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecuting agencies and the Trial Court, as well. There are several infirmities which are tell-tale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a re-trial of the case. There was no reason for the High Court to come to the further conclusion of its own about false implication without concrete basis and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and outturn of events can equally be not ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted at this stage that the High Court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion.
70. The High Court has come to a conclusion that Zahira seems to have unfortunately for some reasons after the pronouncement of the judgment fallen into the hands of some who prefer to remain behind the curtain to come out with the affidavit alleging threat during trial. It has rejected the application for adducing additional evidence on the basis of the affidavit, but has found fault with the affidavit and hastened to conclude unjustifiably that they are far from truth by condemning those who were obviously victims. The question whether they were worthy of credence, and whether the subsequent stand of the witnesses was correct needed to be assessed, and adjudged judiciously on objective standards which are the hallmark of a judicial pronouncement. Such observations if at all could have been only made after accepting the prayer for additional evidence. The disclosed purpose in the State Government's prayer with reference to the affidavits was to bring to High Court's notice the situation which prevailed during trial and the reasons as to why the witnesses gave the version as noted by the Trial Court. Whether the witness had told the truth before the Trial Court or as stated in the affidavit, were matters for assessment of evidence when admitted and tendered and when the affidavit itself was not tendered as evidence, the question of analysing it to find fault was not the proper course to be adopted. The affidavits were filed to emphasise the need for permitting additional evidence to be taken and for being considered as the evidence itself. The High Court has also found that some persons were not present and, therefore, question of their statement being recorded by the police did not arise. For coming to this conclusion, the High Court noted that the statements under Section 161 of the Code were recorded in Gujarati language though the witnesses did not know Gujarati. The reasoning is erroneous for more reasons than one. There was no material before the High Court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not a literate to read and write. Additionally, it is not a requirement

in law that the statement under Section 161 of the Code has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 of the Code. Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the concerned police officer. Sub-section (3) is relevant, and it requires the police officer to reduce into writing any statement made to him in the course of an examination under this Section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the Section is a truthful disclosure by the person who is examined. In the above circumstance the conclusion of the High Court holding that the persons were not present is untenable. The reasons indicated by the High Court to justify non-examination of the eye-witnesses is also not sustainable. In respect of one it has been said that whereabouts of the witness may not be known. There is nothing on record to show that the efforts were made by the prosecution to produce the witness for tendering evidence and yet the net result was 'untraceable'. In other words, the evidence which should have been brought before the Court was not done with any meticulous care or seriousness. It is true that the prosecution is not bound to examine each and every person who has been named as witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in the Court. There was no such material brought to the notice of the Courts below to justify non-examination. The materials on record are totally silent on this aspect. Another aspect which has been lightly brushed aside by the High Court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the Trial Court and also by the High Court. It is to be noted that the High Court has found fault with DCP Shri Piyush Patel and has gone to the extent of saying that he has miserably failed to discharge his duties; while finding at the same time that police inspector Baria had acted fairly. The criticism according to us is uncalled for. Role of Public Prosecutor was also not in line with what is expected of him. Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. Time and again, this Court stressed upon the need of the investigating officer being present during trial unless compelling reasons exist for a departure. In the instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even Public Prosecutor does not appear to have taken note of this desirability. In ***Shailendra Kumar v. State of Bihar*** [(2002)1 SCC 655] it was observed as under:

9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the sessions judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution can not be frustrated by such methods and victims of the crime cannot be left in lurch.

72. A somewhat an unusual mode in contrast to the lapse committed by non-examining victims and injured witnesses adopted by the investigating agency and the prosecutor was examination of six relatives of accused persons. They have expectedly given a clean chit to the accused and labeled them as saviors. This unusual procedure was highlighted before the High Court. But the same was not considered relevant as there is no legal bar. When we asked Mr. Rohtagi, learned counsel for the State of Gujarat as to whether this does not reflect badly on the conduct of investigating agency and the prosecutor, he submitted that this was done to show the manner in which the incident had happened. This is a strange answer. Witnesses are examined by prosecution to show primarily who is the accused. In this case it was nobody's stand that the incident did not take place. That the conduct of investigating agency and the prosecutor was not *bona fide*, is apparent and patent.

73. So far as non-examination of some injured relatives are concerned, the High Court has held that in the absence of any medical report, it appears that they were not present and, therefore, held that the prosecutor might have decided not to examine Yasminbanu because there was no injury. This is nothing but a wishful conclusion based on presumption. It is true that merely because the affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances as in this case clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to background of events as happened the appropriate course for the Courts would be to admit additional evidence for final adjudication so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly and legally tested in the context of probative value of the two versions. There cannot be straight-jacket formula or rule of universal application when alone it can be done and when, not. As the provisions under Section 391 of the Code are by way of an exception, the Court has to carefully consider the need for and desirability to accept additional evidence. We do not think it necessary to highlight all the infirmities in the judgment of the High Court or the approach of the Trial Court lest nothing credible or worth mentioning would remain in the process. This appears to be a case where the truth has become a casualty in the trial. We are satisfied that it is fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation a re-trial is a must and essentially called for in order to save and preserve the justice delivery system unscathed and unscathed by vested interests. We should not be understood to have held that

whenever additional evidence is accepted, re-trial is a necessary corollary. The case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence. It is normally for the Appellate Court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on the facts of this case, the direction for re-trial becomes inevitable.

74. Prayer was made by learned counsel for the appellant that the trial should be conducted outside the State so that the unhealthy atmosphere which led to failure of miscarriage of justice is not repeated. This prayer has to be considered in the background and keeping in view the spirit of Section 406 of the Code. It is one of the salutary principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case or that general allegations of a surcharged atmosphere against a particular community alone does not suffice. The Court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains apprehension, no doubt is a relevant factor but not the only determinative or concluding factor. But the Court must be fully satisfied about the existence of such conditions which would render inevitably impossible the holding of a fair and impartial trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of reasonable and right thinking citizen, in the justice delivery system. The apprehension must appear to the Court to be a reasonable one. This position has been highlighted in *Gurcharan Das Chadha v. State of Rajasthan* [1966 (2) SCR 678] and *K. Ambazhagan v. The Superintendent of Police* [(2004)3 SCC 767].

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

76. We direct the State Government to appoint another Public Prosecutor and it shall be open to the affected persons to suggest any name which may also be taken into account in the decision to so appoint. Though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainants party, would be appropriate.

77. The fees and all other expenses of the public prosecutor who shall be entitled to assistance of one lawyer of his choice shall initially be paid by the State of Maharashtra, who will thereafter be entitled to get the same reimbursed from the State of Gujarat. The State of Gujarat shall ensure that all the documents and records are forthwith transferred to the Court nominated by the Chief Justice of the Bombay High Court. The State of Gujarat shall also ensure that the witnesses are produced before the concerned Court whenever they are required to attend that Court. Necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person. In case, any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. All expenses

necessary for the trial shall be initially borne by the State of Maharashtra, to be reimbursed by the State of Gujarat.

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

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

80. Before we part with the case it would be appropriate to note some disturbing factors. The High Court after hearing the appeal directed its dismissal on 26.12.2003 indicating in the order that the reasons were to be subsequently given, because the Court was closing for winter holidays. This course was adopted "due to paucity of time". We see no perceivable reason for the hurry. The accused were not in custody. Even if they were in custody, the course adopted was not permissible. This Court has in several cases deprecated the practice adopted by the High Court in the present case.

81. About two decades back this Court in ***State of Punjab v. Jagdev Singh Talwandi*** [(1984) 1 SCC 596] had *inter alia* observed as follows :

30. We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this Court against the order passed by the High Court. That places this Court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this Court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment.

82. It may be thought that such orders are passed by this Court and, therefore, there is no reason why the High Courts should not do the same. We would like to point out that the orders passed by this Court are final and no further appeal lies against them. The Supreme Court is the final Court in the hierarchy of our Courts. Orders passed by the High Court are subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and other provisions of the concerned statutes. We thought it necessary to make these observations so that a practice which is not a very desirable one and which achieves no useful purpose may not grow out of and beyond its present infancy. What is still more baffling is that written arguments of the State

were filed on 29.12.2003 and by the accused persons on 1.1.2004. A grievance is made that when the petitioner in Criminal Revision No.583 of 2003 wanted to file notes of arguments that were not accepted making a departure from the cases of the State and the accused. If the written arguments were to be on record, it is not known as to why the High Court dismissed the appeal. If it had already arrived at a particular view there was no question of filing written arguments.

83. The High Court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before competent courts - the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters. Irresponsible allegations, suggestions and challenges may be made by parties, though not permissible or pursued defiantly during course of arguments at times with the blessings or veiled support of the Presiding Officers of Court. But, such besmirching tacts, meant as innuendos or serve as surrogacy ought not to be made or allowed to be made, to become part of solemn judgments, of at any rate by High Courts, which are created as Court of record as well. Decency, decorum and judicial discipline should never be made casualties by adopting such intemperate attitudes of judicial obstinacy. The High Court also made some observations and remarks about persons/constitutional bodies like NHRC who were not before it. We had an occasion to deal with this aspect to certain extent in the appeal relating to SLP (Crl.) Nos. 530-532/2004. The move adopted and manner of references made, in para no. 3 of the judgment except the last limb (sub-para) is not in good taste or decorous. It may be noted that certain reference is made therein or grievances purportedly made before the High Court about role of NHRC. When we asked Mr. Sushil Kumar who purportedly made the submissions before the High Court, during the course of hearing, he stated that he had not made any such submission as reflected in the judgment. This is certainly intriguing. Proceedings of the court normally reflect the true state of affairs. Even if it is accepted that any such submission was made, it was not proper or necessary for the High Court to refer to them in the judgment, to finally state that no serious note was taken of the submissions. Avoidance of such manoeuvres would have augured well with the judicial discipline. We order the expunging and deletion of the contents of para 3 of the judgment except the last limb of the sub-para therein and it shall be always read to have not formed part of the judgment.

84. A plea which was emphasised by Mr. Tulsi relates to the desirability of restraint in publication/exhibition of details relating to sensitive cases, more particularly description of alleged accused persons in the print/electronic/broadcast medias. According to him, "media trial" causes indelible prejudice to the accused persons. This is sensitive and complex issue, which we do not think it proper to deal in detail in these appeals. The same may be left open for an appropriate case where the media is also duly and effectively represented.

85. If the accused persons were not on bail at the time of conclusion of the trial, they shall go back to custody, if on the other hand they were on bail that order shall continue unless modified by the concerned Court. Since we are directing a re-trial, it would be appropriate if same is taken up on day-to-day basis keeping in view the mandate of Section 309 of the Code and completed by the end of December 2004.

86. The appeals are allowed on the terms and to the extent indicated above.

Mohd. Hussain v. State (Govt. of NCT of Delhi)

(2012) 9 SCC 408

R.M. Lodha, J.—1. We are called upon to decide in this appeal the issue on reference by a two-Judge Bench [*Mohd. Hussain v. State (Govt. of NCT of Delhi)*, (2012) 2 SCC 584], whether the matter requires to be remanded for a *de novo* trial in accordance with law or not?

16. The two-Judge Bench [*Mohd. Hussain v. State (Govt. of NCT of Delhi)*, (2012) 2 SCC 584] that heard the criminal appeal, was unanimous that the appellant was denied the assistance of a counsel in substantial and meaningful manner in the course of trial although necessity of counsel was vital and imperative and that resulted in denial of due process of law. In their separate judgments, the learned Judges agreed that the appellant has been put to prejudice rendering the impugned judgments unsustainable in law. They, however, differed on the course to be adopted after it was held that the conviction and sentence awarded to the appellant by the trial court and confirmed by the High Court were vitiated. As noted above, H.L. Dattu, J. ordered the matter to be remanded to the trial court for fresh disposal in accordance with law after providing to the appellant the assistance of the counsel before the commencement of the trial till its conclusion if the accused was unable to engage a counsel of his own choice. On the other hand, C.K. Prasad, J. for the reasons indicated by him held that the incident occurred in 1997; the appellant was awarded the sentence of death more than seven years ago and at such distance of time it shall be travesty of justice to direct for the appellant's *de novo* trial.

40. “Speedy trial” and “fair trial” to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the

prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

43. We have to consider now, whether the matter requires to be remanded for a *de novo* trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus-stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Sections 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of the ES Act. It is true that the appellant has been in jail since 9-3-1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for the appellant's acquittal and dismissal of indictment. We think not.

44. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice.

47. In what we have discussed above we answer the reference by holding that the matter requires to be remanded for a *de novo* trial. The Additional Sessions Judge shall proceed with the trial of the appellant in Sessions Case No. 122 of 1998 from the stage of prosecution evidence and shall further ensure that the trial is concluded as expeditiously as may be possible and in no case later than three months from the date of communication of this order.

Mohd. Ajmal Amir Kasab v. State of Maharashtra
(2012) 9 SCC 1

Aftab Alam, J.: 401. Proceeding from the premise that fair trial is an inalienable right of every person, Mr Ramachandran submitted that in case of the appellant the constitutional guarantee remained unsatisfied because of denial to him of two valuable constitutional rights/protections: first, the right to counsel at the earliest, as provided under Article 22(1) of the Constitution; and secondly, the right to protection against self-incrimination as stipulated by Article 20(3) of the Constitution.

459. But on the issue of the right of the suspect or the accused to be represented by a lawyer, we find Mr Subramaniam's submissions equally unacceptable. Mr Subramaniam contends that Article 22(1) merely allows an arrested person to consult a legal practitioner of his choice and the right to be defended by a legal practitioner crystallises only at the stage of commencement of the trial in terms of Section 304 CrPC. We feel that such a view is quite incorrect and insupportable for two reasons. First, such a view is based on an unreasonably restricted construction of the constitutional and statutory provisions; and second, it overlooks the socio-economic realities of the country.

460. Article 22(1) was part of the Constitution as it came into force on 26-1-1950. The Criminal Procedure Code, 1973 (2 of 1974), that substituted the earlier Code of 1898, came into force on 1-4-1974. The Criminal Procedure Code, as correctly explained by Mr Subramaniam in his submissions, incorporated the constitutional provisions regarding the protection of the accused against self-accusation. The Criminal Procedure Code also had a provision in Section 304 regarding access to a lawyer, to which Mr Subramaniam alluded in support of his submission that the right to be defended by a legal practitioner would crystallise only on the commencement of the trial.

461. But the Constitution and the body of laws are not frozen in time. They comprise an organic structure developing and growing like a living organism. We cannot put it better than in the vibrant words of Justice Vivian Bose, who, dealing with the incipient Constitution in *State of W.B. v. Anwar Ali Sarkar* [AIR 1952 SC 75] made the following observations: (AIR p. 103, para 85)

“85. I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire, *potent to mould the future* as well as guide the present. *The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs.* I feel therefore that in each case Judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these ‘laws’ which have been called in question offend a still greater law before which even they must bow?”(emphasis supplied)

462. In the more than four decades that have passed since, true to the exhortation of Justice Bose, the law, in order to serve the evolving needs of the Indian people, has made massive progress through constitutional amendments, legislative action and, not least, through the pronouncements by this Court. Article 39-A came to be inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976 with effect from 3-1-1977 as part of the “Directive Principles of the State Policy”. The Article reads as under:

“39-A. *Equal justice and free legal aid.*—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

463. In furtherance to the ideal of Article 39-A, Parliament enacted the Legal Services Authorities Act, 1987, that came into force from 9-11-1995. The Statement of Objects and Reasons of the Act, insofar as relevant for the present, reads as under:

“Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, *to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*”(emphasis added)

464. Sections 12 and 13 in Chapter IV of the Act deal with entitlement to legal services, and provide for legal services under the Act to a very large class of people, including members of the Scheduled Castes and the Scheduled Tribes, women and children and persons in receipt of annual income less than rupees nine thousand (Rs 9000) if the case is before a court other than the Supreme Court, and less than rupees twelve thousand (Rs 12,000) if the case is before the Supreme Court. As regards income, an affidavit made by the person concerned would be regarded as sufficient to make him eligible for entitlement to legal services under the Act. In the past seventeen (17) years since the Act came into force, the programme of legal aid had assumed the proportions of a national movement.

465. All this development clearly indicates the direction in which the law relating to access to lawyers/legal aid has developed and continues to develop. It is now rather late in the day to contend that Article 22(1) is merely an enabling provision and that the right to be defended by a legal practitioner comes into force only on the commencement of trial as provided under Section 304 CrPC.

466. And this leads us to the second ground for not accepting Mr Subramaniam's submission on this issue. Mr Subramaniam is quite right and we are one with him in holding that the provisions of CrPC and the Evidence Act fully incorporate the constitutional guarantees, and that the statutory framework for the criminal process in India affords the fullest protection to personal liberty and dignity of an individual. We find no flaws in the provisions in the statute books, but the devil lurks in the faithful application and enforcement of those provisions. It is common knowledge, of which we take judicial notice, that there is a great hiatus between what the law stipulates and the realities on the ground in the enforcement of the law. The abuses of the provisions of CrPC are perhaps the most subversive of the right to life and

personal liberty, the most precious right under the Constitution, and the human rights of an individual. Access to a lawyer is, therefore, imperative to ensure compliance with statutory provisions, which are of high standards in themselves and which, if duly complied with, will leave no room for any violation of constitutional provisions or human rights abuses.

467. In any case, we find that the issue stands settled long ago and is no longer open to a debate. More than three decades ago, in *Hussainara Khatoon (4) v. State of Bihar* [(1980) 1 SCC 98], this Court referring to Article 39-A, then newly added to the Constitution, said that the article emphasised that free legal aid was an unalienable element of a “reasonable, fair and just” procedure, for without it a person suffering from economic or other disabilities would be deprived from securing justice. In para 7 of the judgment the Court observed and directed as under: (SCC p. 105)

“7. ... The right to free legal services is, therefore, 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. *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.* We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such undertrial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated 12-2-1979 [*Hussainara Khatoon (1) v. State of Bihar*, (1980) 1 SCC]. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.”

468. Two years later, in *Khatri (2)* [(1981) 1 SCC 627] relating to the infamous case of blinding of prisoners in Bihar, this Court reiterated that the right to free legal aid is an essential ingredient of due process, which is implicit in the guarantee of Article 21 of the Constitution. In para 5 of the judgment, the Court said: (SCC p. 631)

“5. ... This Court has pointed out in *Hussainara Khatoon (4) case* [(1980) 1 SCC 98] which was decided as far back as 9-3-1979 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.”(emphasis supplied)

469. Then, brushing aside the plea of financial constraint in providing legal aid to an indigent, the Court went on to say: [*Khatri (2) case* [(1981) 1 SCC 627, pp. 631-32, para 5]

“5. ... 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.”(emphasis supplied)

470. In para 6 of the judgment, this Court further said: [*Khatari (2)* case [(1981) 1 SCC 627, p. 632, para 6]

“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. ... 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. ... We would, therefore, direct the Magistrates and Sessions 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 of the free legal services provided by the State, he must be provided legal representation at the cost of the State.”(emphasis added)

471. The resounding words of the Court in *Khatari (2)* [(1981) 1 SCC 627] are equally, if not more, relevant today than when they were first pronounced. In *Khatari (2)* [(1981) 1 SCC 627] the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.

472. As noted in *Khatari (2)* [(1981) 1 SCC 627] as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

473. To deal with one terrorist, we cannot take away the right given to the indigent and underprivileged people of this country by this Court thirty-one (31) years ago.

474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and

be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.

475. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.

476. At this stage the question arises, what would be the legal consequence of failure to provide legal aid to an indigent who is not in a position, on account of indigence or any other similar reasons, to engage a lawyer of his own choice?

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das v. UT of Arunachal Pradesh* [(1986) 2 SCC 401]).

478. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent Magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.

485. The appellant's refusal to accept the services of an Indian lawyer and his demand for a lawyer from his country cannot be anything but his own independent decision. The demand for a Pakistani lawyer in those circumstances, and especially when Pakistan was denying that

the appellant was even a Pakistani citizen, might have been impractical, even foolish, but the man certainly did not need any advice from an Indian court or authority as to his rights under the Indian Constitution. He was acting quite independently and, in his mind, he was a “patriotic” Pakistani at war with this country.

486. On 23-3-2009, the appellant finally asked for a lawyer, apparently convinced by then that no help would come from Pakistan or anywhere else. He was then immediately provided with a set of two lawyers.

487. In the aforesaid facts we are firmly of the view that there is no question of any violation of any of the rights of the appellant under the Indian Constitution. He was offered the services of a lawyer at the time of his arrest and at all relevant stages in the proceedings. We are also clear in our view that the absence of a lawyer at the pre-trial stage was not only as per the wishes of the appellant himself, but that this absence also did not cause him any prejudice in the trial.

Hardeep Singh v. State of Punjab
(2014)3 SCC 92

Dr. B.S. CHAUHAN, J. 1. This reference before us arises out of a variety of views having been expressed by this Court and several High Courts of the country on the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C'). The doubts as categorised in paragraphs 75 and 78 of the reference order led to the framing of two questions by the said Bench which are reproduced hereunder:

(1) When the power under sub-section (1) of Section 319 of the Code of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-examination of the witness is complete?

(2) What is the test and what are the guidelines of exercising power under sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted?

3. The reference was desired to be resolved by a three-Judge Bench whereafter the same came up for consideration and vide order dated 8.12.2011, the Court opined that in view of the reference made in the case of **Dharam Pal v. State of Haryana** [(2004) 13 SCC 9,] the issues involved being identical in nature, the same should be resolved by a Constitution Bench consisting of at least five Judges. The Bench felt that since a three-Judge Bench has already referred the matter of **Dharam Pal** (Supra) to a Constitution Bench, then in that event it would be appropriate that such overlapping issues should also be resolved by a Bench of similar strength.

4. Reference made in the case of **Dharam Pal** (Supra) came to be answered in relation to the power of a Court of Sessions to invoke Section 319 Cr.P.C. at the stage of committal of the case to a Court of Sessions. The said reference was answered by the Constitution Bench in the case of **Dharam Pal v State of Haryana** [AIR 2013 SC 3018 (hereinafter called **Dharam Pal** (CB))], wherein it was held that a Court of Sessions can with the aid of Section 193 Cr.P.C. proceed to array any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

6. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Constitutional Bench:

(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

7. In this reference what we are primarily concerned with, is the stage at which such powers can be invoked and, secondly, the material on the basis whereof the invoking of such powers can be justified. To add as a corollary to the same, thirdly, the manner in which such power has to be exercised, also has to be considered.

8. The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 (hereinafter referred to as the Constitution) provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty.

11. Section 319 Cr.P.C.-Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

12. Section 319 Cr.P.C. springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

16. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word court has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

17. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the charge sheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

21. At the very outset, we may explain that the issue that was being considered by this Court in **Dharam Pal** (CB), was the exercise of such power at the stage of committal of a case and the court held that even if Section 319 Cr.P.C. could not be invoked at that stage, Section 193 Cr.P.C. could be invoked for the said purpose. We are not delving into the said issue which had been answered by the five-Judge Bench of this Court. However, we may clarify that the opening words of Section 193 Cr.P.C. categorically recite that the power of the Court of Sessions to take cognizance would commence only after committal of the case by a magistrate. The said provision opens with a non-obstante clause except as otherwise expressly provided by this code or by any other law for the time being in force. The Section therefore is clarified by the said opening words which clearly means that if there is any other provision under Cr.P.C., expressly making a provision for exercise of powers by the court to take cognizance, then the same would apply and the provisions of Section 193 Cr.P.C. would not be applicable.

22. In our opinion, Section 319 Cr.P.C. is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial. It is this part which is under reference before this Court and therefore in our opinion, while answering the question referred to herein, we do not find any conflict so as to delve upon the situation that was dealt by this Court in **Dharam Pal** (CB).

Q .(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

25. The stage of inquiry and trial upon cognizance being taken of an offence, has been considered by a large number of decisions of this Court and that it may be useful to extract the same hereunder for proper appreciation of the stage of invoking of the powers under Section 319 Cr.P.C. to understand the meaning that can be attributed to the word 'inquiry' and 'trial' as used under the Section.

27. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section 2(g) Cr.P.C., which defines an inquiry as follows: 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

29. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf. In **Moly v. State of Kerala**, [AIR 2004 SC 1890], this Court observed that though the word 'trial' is not defined in the Code, it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. A three-Judge Bench of this Court in **State of Bihar v. Ram Naresh Pandey** [AIR 1957 SC 389] held: The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry.

33. In **Union of India v. Major General Madan Lal Yadav (Retd.)**, [AIR 1996 SC 1340], a three-Judge Bench while dealing with the proceedings in General Court Martial under the provisions of the Army Act 1950, applied legal maxim *nullus commodum capere potest de injuria sua propria* (no one can take advantage of his own wrong), and referred to various dictionary meanings of the word 'trial' and came to the conclusion:

'It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial.'

In **Common cause v. Union of India**, [AIR 1997 SC 1539], this Court while dealing with the issue held:

(i) In case of trials before Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the concerned cases.

ii) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973, while in trials of warrant cases by Magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the concerned accused under Section 246 of the Code of Criminal Procedure, 1973.

iii) In cases of trials of summons cases by Magistrates the trials would be considered to have commenced when the accused who appear or are brought before the Magistrate are asked under Section 251 whether they plead guilty or have any defence to make.

38. In view of the above, the law can be summarised to the effect that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the 'trial' commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken.

40. Even the word 'course' occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word 'course' therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry upto the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word 'course' ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time.

42. To say that powers under Section 319 Cr.P.C. can be exercised only during trial would be reducing the impact of the word 'inquiry' by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim "*A Verbis Legis Non Est Recedendum*" which means, "from the words of law, there must be no departure" has to be kept in mind.

54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.

56. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the

complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

57. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice.

Q.(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

59. Before we answer this issue, let us examine the meaning of the word evidence. According to Section 3 of the Evidence Act, evidence means and includes:

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- (2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;

66. In **Kalyan Kumar Gogoi v. Ashutosh Agnihotri**, [AIR 2011 SC 760], while dealing with the issue this Court held : "18. The word 'evidence' is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts."

78. It is, therefore, clear that the word 'evidence' in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the Cr.P.C.

80. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be

held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of Section 319 Cr.P.C.

74. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.

84. The word 'evidence' therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.

Q.(ii) Does the word 'evidence' in Section 319 Cr.P.C. means as arising in Examination-in-Chief or also together with Cross- Examination?

86. The second question referred to herein is in relation to the word 'evidence' as used under Section 319 Cr.P.C., which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In *Rakesh (Supra)*, it was held that "It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not.

89. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.

90. As held in **Mohd. Shafi** [(2007)14,SCC544] and **Harbhajan Singh** [(2009)16,SCC 785] all that is required for the exercise of the power under Section 319 Cr.P.C. is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The pre-requisite for the exercise of this power is similar to the prima facie view which the magistrate must come to in order to take cognizance of the offence. Therefore, no straight-jacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/Court is convinced even on the basis of evidence appearing in Examination-in-Chief, it can exercise the power under Section 319 Cr.P.C. and can proceed against such other person(s). It is essential to note that the Section also uses the words such person could be tried instead of should be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section 4 of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of Examination- in-Chief, the Court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by Cross Examination, undoubtedly in itself, is an evidence.

91. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way

participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

92. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

Q. (iv) What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?

93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word appear means clear to the comprehension or a phrase near to, if not synonymous with proved. It imparts a lesser degree of probability than proof.

95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in **Vikas v. State of Rajasthan**, [2013 (11) SCALE 23], held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

96. In **Rajendra Singh** [(2007)7,SCC 378] the Court observed: Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is may and not shall. The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression appears indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not.

98. In **Sarabjit Singh v. State of Punjab**, [AIR 2009 SC 2792], while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed: “21-For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong

suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative.”

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence is clear from the words for which such person could be tried together with the accused. The words used are not for which such person could be convicted. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?

107. In **Joginder Singh v. State of Punjab**, [AIR 1979 SC 339], a three-Judge Bench of this Court held that as regards the contention that the phrase any person not being the accused occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

108. In **Anju Chaudhary v. State of U.P.**, [(2013) 6 SCC 384], a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

109. In **Suman v. State of Rajasthan**, [AIR 2010 SC 518], a two- Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge- sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood

the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

117. We accordingly sum up our conclusions as follows:

Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND Q.III Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In Dharam Pal's case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said

provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Q.V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh. The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.

Mehmood Nayyar Azam v. State of Chhattisgarh
(2012) 8 SCC 1

DIPAK MISRA, J.— Leave granted. Albert Schweitzer highlighting on the Glory of Life, pronounced with conviction and humility, “the reverence of life offers me my fundamental principle on morality”. The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is inseparably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, “a brief candle”, or “a hollow bubble”. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of “creative intelligence”. When a dent is created in the reputation, humanism is paralysed. There are some megalomaniac officers who conceive the perverse notion that they are the “Law” forgetting that law is the science of what is good and just and, in the very nature of things, protective of a civilised society. Reverence for the nobility of a human being has to be the cornerstone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our constitutional philosophy and it has its ubiquitous presence, and the majesty and sacrosanctity of dignity cannot be allowed to be crucified in the name of some kind of police action.

2. The aforesaid prologue gains signification since in the case at hand, a doctor, humiliated in custody, sought a public law remedy for grant of compensation and the High Court, despite no factual dispute, has required him to submit a representation to the State Government for adequate relief pertaining to grant of compensation after expiry of 19 years with a further stipulation that if he is aggrieved by it, he can take recourse to requisite proceedings available to him under law. We are pained to say that this is not only asking a man to prefer an appeal from Caesar to Caesar's wife but it also compels him like a cursed Sisyphus [Ed.: In Greek mythology Sisyphus was the King of Corinth who was punished by the Gods by being compelled to roll a huge stone up a hill, only to watch it roll back down and repeat the exercise forever, thus consigning him to an eternity of useless efforts and unending frustration.] to carry the stone to the top of the mountain wherefrom the stone rolls down and he is obliged to repeatedly perform that futile exercise.

11. After issuing notice, this Court on 17-2-2012 [*Mehmood Nayyar Azam v. State of Chhattisgarh*, SLP (C) No. 34702 of 2010, decided on 17-2-2012 (SC)] thought it apposite that the appellant should submit a representation within a week which shall be considered by the respondents within four weeks therefrom. In pursuance of the aforesaid order, the appellant submitted a representation which has been rejected on 19-3-2012 by the OSD/Secretary, Government of Chhattisgarh, Home (Police) Department. In the rejection order, it has been stated as follows:

“In the aforesaid cases, the arrest and the action regarding submission of charge-sheet in the Hon'ble Court was in accordance with law.

(2) On 24-9-1992 the police officers taking your photograph and writing objectionable words thereon was against the legal procedure. Considering this, action was taken against the guilty police officers concerned in accordance with law and two police officers were punished.

(3) In your representation, compensation has been demanded on the following grounds:

A. Defamation was caused due to the police officers taking photograph.

B. Your wife became unwell mentally. She is still unwell.

C. Difficulty in marriage of daughter.

Regarding the aforesaid grounds, the actual position is as follows:

A. Defamation is such a subject, the decision on which is within the jurisdiction of the competent court. No decision pertaining to defamation has been received from the court of competent jurisdiction. Therefore, it would not be proper for the State Government to take a decision in this regard.

B. Regarding mental ailment of your wife, no such basis has been submitted by you, on the basis of which any conclusion may be drawn.

C. On the point of there being no marriage of children also, no such document or evidence has been produced by you before the Government along with the representation, on the basis of which any decision may be taken.

Therefore, in the light of the above, the State Government hereby rejects your representation and accordingly decides your representation.”

16. At the very outset, we are obliged to state that five aspects are clear as day and do not remotely admit of any doubt. First, the appellant was arrested in respect of the alleged offence under the Penal Code, 1860 and the Electricity Act, 2003; second, there was a direction by the Magistrate for judicial remand and thereafter instead of taking him to jail the next day, he was brought to the police station; third, self-humiliating words were written on the placard and he was asked to hold it and photographs were taken; and fourth, the photographs were circulated in general public and were also filed by one of the respondents in a revenue proceeding; and fifth, the High Court, in categorical terms, has found that the appellant was harassed.

19. We have referred to the aforesaid paragraphs of *D.K. Basu case* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] to highlight that this Court has emphasised on the concept of mental agony when a person is confined within the four walls of police station or lock-up. Mental agony stands in contradistinction to infliction of physical pain. In the said case, the two-Judge Bench referred to Article 5 of the Universal Declaration of Human Rights, 1948 which provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Thereafter, the Bench adverted to Article 21 and proceeded to state that the expression “life or personal liberty” has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee against torture and assault by the State or its functionaries. Reference was made to Article 20(3) of the Constitution which postulates that a person accused of an offence shall not be compelled to be a witness against himself.

20. It is worthy to note that in *D.K. Basu* [(1997) 1 SCC 416] , the concern shown by this Court in *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260] was taken note of. In *Joginder Kumar case* this Court voiced its concern regarding complaints of violation of human rights during and after arrest. It is apt to quote a passage from the same: (*Joginder Kumar case* SCC pp. 263-64, paras 8-9)

“8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first — the criminal or society, the law violator or the law abider....”

21. After referring to *Joginder Kumar* , A.S. Anand, J. (as His Lordship then was), dealing with the various facets of Article 21 in *D.K. Basu case* [(1997) 1 SCC 416] , stated that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot be put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

36 From the aforesaid discussion, there is no shadow of doubt that any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the welfare State is governed by the rule of law which has paramountcy. It has been said by Edward Biggon “the laws of a nation form the most instructive portion of its history”. The Constitution as the organic law of the land has unfolded itself in a manifold manner like a living organism in the various decisions of the court about the rights of a person under Article 21 of the Constitution of India. When citizenry rights are sometimes dashed against and pushed back by the members of City Halls, there has to be a rebound and when the rebound takes place, Article 21 of the Constitution springs up to action as a protector. That is why, an investigator of a crime is required to possess the qualities of patience and perseverance as has been stated in *Nandini Satpathy v. P.L. Dani* [(1978) 2 SCC 424] .

37. In *Delhi Judicial Service Assn. v. State of Gujarat* [(1991) 4 SCC 406] , while dealing with the role of police, this Court condemned the excessive use of force by the police and observed as follows: (SCC pp. 454-55, para 39)

“39. The main objective of police is to apprehend offenders, to investigate crimes and to prosecute them before the courts and also to prevent commission of crime and above all to ensure law and order to protect the citizens' life and property. The law enjoins the police to be scrupulously fair to the offender and the Magistracy is to ensure fair investigation and fair trial to an offender. The purpose and object of Magistracy and police are complementary to each other. It is unfortunate that these objectives have remained unfulfilled even after 40 years of our Constitution. Aberrations of police officers and police excesses in dealing with the law and order situation have been subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it. The police has power to arrest a person even without obtaining a warrant of arrest from a court. The amplitude of this power casts an obligation on the police ... [and it] must bear in mind, as held by this Court that if a person is arrested for a crime, his constitutional and fundamental rights must not be violated.”

38. It is imperative to state that it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities. We may hasten to add that a balance has to be struck and, in this context, we may fruitfully quote a passage from *D.K. Basu* [(1997) 1 SCC 416, pp. 434-35, para 33)

“33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. ... The action of the State, however, must be ‘right, just and fair’. Using any form of *torture* for extracting any kind of information would neither be ‘right nor just nor fair’ and, therefore, would be impermissible, being offensive to Article 21. Such a crime suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be *tortured or subjected to third-degree methods* or *eliminated* with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons, etc. His constitutional right cannot be abridged [except] in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal.”(emphasis in original)

39 In the case at hand, the appellant, while in custody, was compelled to hold a placard in which condemning language was written. He was photographed with the said placard and the photograph was made public. It was also filed in a revenue proceeding by the fifth respondent. The High Court has recorded that the competent authority of the State has conducted an enquiry and found the erring officers to be guilty. The High Court has recorded the findings in the favour of the appellant but left him to submit a representation to the authorities concerned. This Court, as has been indicated earlier, granted an opportunity to the State to deal with the matter in an appropriate manner but it rejected the representation and stated that it is not a case of defamation. We may at once clarify that we are not at all concerned with defamation as

postulated under Section 499 IPC. We are really concerned how in a country governed by the rule of law and where Article 21 of the Constitution is treated to be sacred, the dignity and social reputation of a citizen has been affected.

40 As we perceive, from the admitted facts borne out on record, the appellant has been humiliated. Such treatment is basically inhuman and causes mental trauma. In *Kaplan and Sadock's Synopsis of Psychiatry*, while dealing with torture, the learned authors have stated that intentional physical and psychological torture of one human by another can have emotionally damaging effects comparable to, and possibly worse than, those seen with combat and other types of trauma. Any psychological torture inflicts immense mental pain. A mental suffering at any age in life can carry the brunt and may have nightmarish effect on the victim. The hurt develops a sense of insecurity, helplessness and his self-respect gets gradually atrophied. We have referred to such aspects only to highlight that in the case at hand, the police authorities possibly had some kind of sadistic pleasure or to “please someone” meted out the appellant with this kind of treatment.

41. It is not to be forgotten that when dignity is lost, the breath of life gets into oblivion. In a society governed by the rule of law where humanity has to be a laser beam, as our compassionate Constitution has so emphasised, the police authorities cannot show the power or prowess to vivisection and dismember the same. When they pave such path, law cannot become a silent spectator. As pithily stated in *Jennison v. Baker* [(1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997 (CA)] : (QB p. 66 H)

“... ‘The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.’” (All ER p. 1006d)

42. Presently, we shall advert to the aspect of grant of compensation. The learned counsel for the State, as has been indicated earlier, has submitted with immense vehemence that the appellant should sue for defamation. Our analysis would clearly show that the appellant was tortured while he was in custody. When there is contravention of human rights, the inherent concern envisaged in Article 21 springs to life and enables the citizen to seek relief by taking recourse to public law remedy.

43. In this regard, we may fruitfully refer to *Nilabati Behera v. State of Orissa* [(1993) 2 SCC 746] wherein it has been held thus: (SCC pp. 762-63, para 17)

“17. ... ‘a claim in public law for compensation’ for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is ‘distinct from, and in addition to, the remedy in private law for damages for the tort’ resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of

their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.”

44. Dr A.S. Anand, J. (as His Lordship then was), in his concurring opinion, expressed that: (*Nilabati case* (1993) 2 SCC 746, pp. 768-69, para 34)

“34. ... The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting ‘compensation’ in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of ‘exemplary damages’ awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.”

45. In *Sube Singh v. State of Haryana* [(2006) 3 SCC 178] a three-Judge Bench of the Apex Court, after referring to its earlier decisions, has opined as follows: (SCC pp. 198-99, para 38)

“38. It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure.”

46. At this stage, we may fruitfully refer to the decision in *Hardeep Singh v. State of M.P.* [(2012) 1 SCC 748]. The appellant therein was engaged in running a coaching centre where students were given tuition to prepare for entrance test for different professional courses. On certain allegation, he was arrested and taken to police station where he was handcuffed by the police without there being any valid reason. A number of daily newspapers published the appellant's photographs and on seeing his photograph in handcuffs, the appellant's elder sister was so shocked that she expired. After a long and delayed trial, the appellant, Hardeep Singh, filed a writ petition before the High Court of Madhya Pradesh at Jabalpur that the prosecution purposefully caused delay in conclusion of the trial causing harm to his dignity and reputation. The learned Single Judge, who dealt with the matter, did not find any ground to grant

compensation. On an appeal being preferred, the Division Bench observed that an expeditious trial ending in acquittal could have restored the appellant's personal dignity but the State instead of taking prompt steps to examine the prosecution witnesses delayed the trial for five long years. The Division Bench further held that there was no warrant for putting the handcuffs on the appellant which adversely affected his dignity. Be it noted, the Division Bench granted compensation of Rs 70,000.

47. This Court, while dealing with the facet of compensation, held thus: (*Hardeep Singh case* [(2012) 1 SCC 748, pp. 752-53, para 17])

“17. Coming, however, to the issue of compensation, we find that in the light of the findings arrived at by the Division Bench, the compensation of Rs 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs 2,00,000 (Rupees two lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs 2,00,000 (Rupees two lakhs) as compensation. In case the sum of Rs 70,000 as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs 1,30,000 (Rupees one lakh thirty thousand).”

Thus, suffering and humiliation were highlighted and the amount of compensation was enhanced.

48. On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate the cause of the poor and the downtrodden, but, the social humiliation that has been meted out to him is quite capable of destroying the heart of his philosophy. It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong-minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of law appears to cause torment and insult and tyrannise the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualised when the appellant came out from custody and witnessed his photograph being circulated with the self-condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution. Regard being had to the various aspects which we have analysed and taking note of the totality of facts and circumstances, we are disposed to think that a sum of Rs 5 lakhs (Rupees five lakhs only) should be granted towards compensation to the appellant and, accordingly, we so direct. The said amount shall be paid by the respondent State within a period of six weeks and be realised from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State.

Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra
(2012) 8 SCC 43

K.S. Radhakrishnan, J.-Death sentence has been awarded by the High Court of Bombay to Ajay Pandit @ JagdishDayabhai Patel for double murder, in separate incidents, one for the murder of NileshBhailal Patel and another for the murder of Jayashree. The Bombay High Court heard both the appeals Criminal Appeal No. 46 of 2000 and Criminal Appeal No. 789 of 2001 together and rendered a common judgment on 22nd December, 2005 confirming the order of conviction and enhancing the sentence of life imprisonment to death and ordered to be hanged till death against which this appeal has been preferred.

2. The accused Ajay Pandit @ JagdishDayabhai Patel was a dentist by profession, known as Doctor Jagdish Patel at his DhabasiMohalla, District Kheda, Gujarat. He possesses a degree in Dental Hygienist and Dental Mechanic (D.H.D.M.) from the Gujarat University. Professional income was not sufficient for him to lead a lavish and luxurious life, he had other evil and demonic ideas in mind, to make quick and easy money. Self publicity was given of his make-belief contacts with the officials of the American Embassy by which he lured the vulnerable into his net, for sending them to America for better prospects in life. Several persons fell in his net like Nilesh and Jayashree and few others narrowly escaped from the clutches of death.

3. We may first deal with the facts arising out of the judgment of the Bombay High Court in Criminal Appeal No. 46 of 2000 in which the High Court, convicted the accused under Section 419 of the Indian Penal Code (for short the IPC) and sentenced to suffer R.I. for one year, under Section 420 of the IPC, R.I. for two years and fine, under Section 302 of the IPC life imprisonment with fine which was converted to death.

4. Doctor Jagdish Patel the accused had developed contacts with a family of one Dilip Manilal Patel and he used to visit their house at Bhayandar and Kandivali since 1993. During those visits, the accused used to boost that he had contacts with the officials of the American Embassy which kindled hopes in the minds of Dilip Patel and his family members and they decided to send NileshBhailal Patel, cousin brother of Smt. Sarala Patel, wife of Dilip Patel, to America using the accused's alleged influence in the American Embassy. A deal was struck and the accused demanded an amount of Rs.2,50,000/- for realization of their dream. Negotiations took place and the amount was reduced to Rs.1,10,000/- as an initial payment, and the balance was to be paid after getting Nilesh employment in America. Dilip Patel in October 1993 paid Rs.60,000/- to the accused and the balance amount of Rs.50,000/- was paid by Mahendra Bhailal Patel, brother of the deceased - Nilesh to the accused. Noticing that even after payment of money, the accused was not fulfilling his promises, various meetings and phone calls took place between the accused and the family of Nilesh. The accused reiterated his promise and later asked Dilip Patel to send Nilesh to Bombay Central Railway Station on 8.2.1994 with return ticket of the accused. The accused had also requested Dilip Patel a further amount of Rs.3500/- towards medical expenses and also for arranging visa. Dilip Patel had assured the accused that he himself would be coming to Bombay with the required amount. As promised, Dilip Patel reached Bombay in the afternoon of 8.2.1994 and found the accused waiting at Bhulabhai Desai Road near the American Consulate. The accused told Dilip Patel that the necessary papers had been submitted to the Consulate and asked to leave the place.

Dilip Patel accordingly left the place and that was the last time, Dilip Patel saw Nilesh in the company of the accused that was around 3 o' clock. In the evening of 8.2.1994 at about 5 o' clock, Dilip Patel received a phone call from the accused stating that the formalities had been completed and Nilesh would be coming home late in the night. Dilip Patel reached home but not Nilesh. Dilip Patel contacted the accused in the morning of 9.2.1994 and he was informed by the accused that Nilesh was waiting upto 5.30PM on the previous day at Bombay Central Railway Station and that he would be back. Dilip Patel contacted the accused on several occasions to know whereabouts of Nilesh. Meanwhile an attempt was made by the accused through one Tikabhai to inform Dilip Patel that Nilesh had already left for America.

5. Dilip Patel in November 1994 read in a local newspaper *Sandhya Jansatta* of a news item of an incident of attempt to murder and murder by administering some tablets to three persons by one Doctor by name Jagdish. Dilip Patel also read in Mid Day Evening Daily dated 5.11.1994 about arrest of Dr. Jagdish Patel the accused. On the basis of this information, Dilip Patel approached Gamdevi Police Station on 13.11.1994 and narrated the entire story to the police. The statement was accordingly recorded and a photograph of the dead body of unidentified person found in Room No. 103 of the Hotel Aradhana at Nana Chowk in the evening of 9.2.1994 was also shown. In the evening of 8.2.1994, the accused had booked Room No. 103 on the first floor of that Hotel. The accused left the Hotel about 7.45PM in the evening of 8.2.1994 keeping the room locked and he did not return. On 9.2.1994, for the purpose of cleaning the room, it was opened with a duplicate key and the dead body of Nilesh was found. The dead body was sent for post-mortem but prior to that police completed other formalities, finger print experts also did their job, articles received were sent to the Forensic Laboratory, C.A. report was obtained. Till August 1994, there was no trace of the suspect and the investigation was continuing. In fact on 30.8.1994, case was classified as true but not detected. The accused was, however, arrested by Malabar Hill Police in C.R. No. 278/94 for murdering one woman - Jayashree and for the attempted murder of two other persons at Hotel Kemps Corner. The accused was identified by Dilip Patel, his wife Sarala Patel and Mahendra Patel brother of the deceased - Nilesh. This was the brief background of the first case.

6. We will now refer briefly to the facts of the second case which came up before the Bombay High Court vide Criminal Appeal No. 789 of 2001. In the second case, Dr. Jagdish Patel had three persons in his net aspiring for better prospects in America. One Kaushikbhai Sanabhai Patel was leading a normal family life with his wife Jayashree at Labhvel, District Anand, in the State of Gujarat. One Jagdish @ Harishbhai Patel was the cousin brother of Jayashree. All the three were also dreaming better prospects in America. In fact, they had contacted Joy Travel Agency for the said purpose in October 1994. Kaushikbhai was told by the owner of Joy Travels that the expenses of sending one person to America would be around Rs.7,23,000/-. Kaushikbhai paid Rs.20,000/- to the travel agent for himself and Jagdish. While he was nurturing the idea of going to America, the accused seized that opportunity and got acquainted with Kaushikbhai and Jagdish. The accused promised that he would realize their dreams for which he demanded a huge sum. Kaushikbhai expressed his inability to the accused to pay such huge amount for a person to go to America and consequently withdrew his request. The accused, however, could prevail upon him by suggesting that he would arrange a loan for him for the time being through one Ramchandra and he only need to purchase the tickets. On

the accused initiative, Ramchandra visited the house of Kaushikbhai on 1.11.1994 and gave Rs.4,00,000/- to him, as instructed by the accused, by way of loan.

7. Kaushikbhai, his wife - Jayashree and Jagdish then boarded the train to Bombay Central from Baroda Railway Station. Few of their relatives were present at the Railway Station, Baroda to see them off to Bombay. Accused reached Bombay Central Railway Station in the early hours of 2.11.1994 and all the three along with the accused went to the Hotel Kemps Corner and two Rooms Nos. 202 and 206 were booked in the name of the accused. The accused informed them that all the requisite formalities had been completed and a Doctor, who was supposed to issue the medical certificate, would be coming at 4.30 pm on the same day to the hotel for medical check-up. The accused demanded money for completing other formalities, Rs.60,000/- was received from Kaushikbhai and Rs.40,000/- was received from Jagdish. A cheque drawn on Punjab National Bank, Anand for Rs.14,50,000/-, one promissory note of Rs.8,50,000/- and Rs.4,37,000/- were given to the accused by Kaushikbhai. Later, the accused gave one capsule and two tablets each to Kaushikbhai, Jayashree and Jagdish which they were asked to take before the medical check-up, which they did. Later, Jayashree went to Room No. 202 and Kaushikbhai and Jagdish remained in Room No. 206. Kaushikbhai and Jagdish started feeling drowsiness and a sleeping sensation and they lied down on the bed. The accused then administered an injection on the abdomen of Kaushikbhai who went fast asleep. Jagdish by that time was already fast asleep and that was the last time, they saw the accused. In the mid-night, Kaushikbhai regained consciousness, he felt some foul play and alerted the Hotel Manager and they went to the room of Jayashree and got the room opened, but Jayashree was found dead. Intimation was given to Malabar Hill Police Station and complaint of Kaushikbhai was recorded. Police arrested the accused in November 1994.

8. The trial court as well as the High Court had elaborately discussed the various steps taken by the investigating agency to unravel the truth and hence, we are not dealing with those facts in detail. The prosecution in the case of death of Nilesh examined 17 witnesses. PW1 to PW4 are the employees of the hotel and PW5 and PW6 are the relatives of the deceased Nilesh. We have also gone through the evidence of other witnesses critically and it is unnecessary to repeat what they have said, since the trial court as well as the High Court had elaborately discussed the evidence given by those witnesses.

9. So far as the death of Nilesh is concerned, there was no eye witness to the incident and the guilt of the accused could be brought out by the prosecution only by circumstantial evidence. The direct evidence of PW5 and PW6 preceded the death of Nilesh. Therefore, it is necessary to deal with their evidence. PW5 is the sister of the deceased Nilesh by name Sarala Dilip Patel. She had deposed that she knew the accused since 1991. Further, she had deposed that in January 1993, the accused made a proposal about sending the deceased "Nilesh to America for which he demanded Rs.3,50,000/-. The evidence clearly indicates what had happened from 1993 till the death of Nilesh. She stated that after Nilesh had gone to Bombay, his whereabouts were not known. She had also deposed that on 27.3.1994, her husband lodged a complaint at Kandivali Police Station since Nilesh was found missing. Further, they had also noticed the news item appeared in various newspapers about the arrest of the accused in respect of some other case. On 13.11.1994, her husband had again lodged a complaint as to missing of Nilesh. She had also narrated the steps they had taken on coming to know that her brother

Nilesh was missing. Evidence given by this witness is consistent with the case of the prosecution and there is no reason to disbelieve the version of this witness.

10. PW6 Dilip Patel, the husband of PW5 - had deposed that he knew the accused since 1991 and the accused had come with the proposal for sending Nilesh to America stating that he had good connections with the officials of the American Embassy. Details of the amounts paid for the said purpose was also given, in detail, in his deposition. The details of the various telephone calls he had with the accused before the incident as well as after the incident were minutely stated in his oral evidence. PW6 had also deposed that he had also gone to Bombay with cash as directed by the accused. Further, he had also deposed that on 8.2.1994, Nilesh had left his house for Bombay and that PW6 had also gone to Bombay since the accused asked him to meet at Opera house at 11.30AM on 8.2.1994. PW6, it was stated, saw the accused and Nilesh near the bus stop of Blobe Radio. The accused told him that at about 3.00 pm on 8.2.1994 he had submitted the papers before the Embassy and asked PW6 to leave the place stating that Consulate would not like the presence of too many persons. PW 6, therefore, left the place leaving behind the accused and Nilesh. Nilesh did not return home, search was made and a complaint was lodged on 28.3.1994 at Kandivali Police Station. On 6.9.1994, notice was sent through advocate to Kandivali Police Station. PW 6 also stated that he had met accused at village Borsad Chaukadi and the accused gave evasive answers. Later, PW 6 came across a news item in Sandhya Jansatta wherein reference was made to one Dr. Jagdish who had committed murder and attempted to commit murder of few other persons. News item also appeared in other newspapers as well.

11. PW 6 was cross-examined at length but the defence could not demolish his evidence or the evidence of other witnesses including that of PW5. Evidence, in this case, proved beyond reasonable doubt that it was the accused who lured Nilesh for sending him to America. Facts would clearly indicate that it was the accused who had extracted money giving false hopes. The deceased was also seen by PW 6 last, in the company of the accused. PW 6 had also made payment to the accused for medical expenses. PW 5 and PW 6, therefore, proved the chain and links from the stage of acquaintance with the accused till the stage of Nilesh being seen in the custody or company of the accused, for the purpose of sending Nilesh to America.

12. The prosecution had examined PW 1 to PW 4 to prove the subsequent events and the steps taken. PW 1 to PW 4 were all attached to Hotel Aradhana or guest house of Aradhana. PW 1 is an independent witness Manager of the Hotel Aradhana. He narrated what had happened at his Hotel. PW 1 also saw the deceased in the company of the accused. He saw the accused taking Nilesh in Room No. 103 and later coming back alone leaving the hotel without handing over the key at the reception counter. Nothing had been brought out in the cross examination of these witnesses to contradict what he had stated.

13. Sister of the accused was also examined in this case as PW 14, she had narrated, in detail, the professional and other details of the accused. The evidence of the rest of the witnesses had also been elaborately dealt with by the High Court. Learned counsel appearing for the accused had also not seriously attacked the findings and reasoning given by the trial court as well as the High Court in ordering conviction and his thrust was on the quantum of sentence awarded, and later death penalty.

14. We have already indicated the modus operandi adopted by the accused in the second case was also almost the same. Few facts of this case have already been dealt in the earlier

paragraphs of this judgment and hence, we may directly come to the evidence of the key witnesses in this case. Jayashreethe victim was poisoned by the accused at Hotel Kemps Corner. PW 1 and PW 5 were direct victims of the accused who fortunately survived. PW 1 was the husband and PW 5 was the brother of Jayashreethe deceased. PW 1 and PW 5 had narrated, in detail, what transpired prior to the incident. The details of the money paid to the accused for sending them to America had been elaborately stated in their oral evidence and the same had been extensively dealt with by the trial court as well as the High Court, hence, we are not repeating the same. They were cross-examined, at length, by the defence. Nothing was brought out to discredit their version. There was no reason for these witnesses to depose falsely against the accused and they have no motive in doing so. Evidence of PW 1 and PW 5 are consistent and have not been shaken at all by the defence. No doubt has been created about the veracity of their testimony. PW 1 and PW 5 were the direct victims and were also the eye witnesses to the entire transaction and we have critically gone through the evidence adduced by PW 1 and PW 5 and nothing was brought out to discredit their evidence.

15. The prosecution examined sixteen witnesses PW 2, PW 4, PW 14 were the staff members of the hotel Kemps Corner - they had narrated, in detail, the manner in which the accused booked the room, paid the amount, took the three witnesses to both the rooms. The hotel witnesses identified the accused in the court as well as in the identification parade. The prosecution examined PW 8 panch witnesses before whom the accused voluntarily gave statement u/s 27 of the Evidence Act which led to the discovery of huge cash amount, cheques, promissory notes and various articles like passports, rubber stamps etc.

16. PW 6 was a Doctor who examined PW 1 and PW 5 and found they were under the influence of sedatives and in a drowsy condition. We have also gone through, critically, the oral evidence and the documents produced in this case and found no reason to take a different view from that of the trial court and the High Court on conviction. We have also gone through the statement under section 313 Cr.P.C. made by the accused in both the cases which was of total denial of the crime. The accused, a professional, wanted to make quick and easy money and in that process lured people giving false hopes of sending them to America utilizing his alleged contacts with the American Embassy. The accused, though educated, brought discredit to his profession and to the dentist community in general. Education and professional standing had no influence on the accused and his only motto was to make quick money and for achieving the same, he would go any extent and the Dentist turned killer gave no value to the human life. The Dentist took away the life of two human beings as if he was uprooting two teeth.

17. Nilesh the deceased, victim in the first case was an unmarried boy of 25 years and yet to become mature enough to know the world around him. All the hopes dashed on the eventful day when he was murdered in a brutal manner not only by inflicting injuries by deadly weapon on vital parts of the body but also injuries on the testis causing him immense suffering and pain.

18. Jayashree, the deceased - victim was administered excessive tablets by the Dentist turned killer and Jayashree died of that in the night of that fateful day. The medical evidence clearly indicates that Kaushikbhai, Jayashree and Jagdish had taken one capsule and two tablets. The accused had advised them to take the tablets prior to medical check-up so that they must get favorable medical certificates. Kaushikbhai and Jagdish started feeling drowsiness. Kaushikbhai was about to regain consciousness but the accused gave an injection on his

abdomen. Kaushikbhai tried to avoid the injection but could not resist due to drowsiness and injection was administered due to which he went fast asleep. Unfortunately, Jayashree succumbed to the poison administered and died. The Bombay High Court noticing the ghastly manner in which the accused had murdered Nilesh as well as Jayashree and poisoned PW 1 and PW 5, considered it as a rarest of rare case warranting death sentence.

19. The High Court heard the arguments of the advocate for the accused as well as the prosecutor on the point as to whether the High Court could enhance the sentence of the accused from life to death. Having noticed that the High Court has the power to enhance the sentence from life imprisonment to death, the High Court issued a notice on 1.12.2005 to the accused to show cause why the sentence of life imprisonment be not enhanced to death sentence. The operative portion of the order reads as follows:

We have heard the arguments of learned advocate for the petitioner as well as learned APP for the State for quite some time on two occasions. In exercise of *suo-moto* powers and on the basis of judgment of the Supreme Court, it will be necessary to hear the accused as to why his sentence should not be enhanced from life imprisonment to death. Therefore, the accused be produced by the Kalyan District Prison Authorities before this Court on 12th December 2005.

20. The accused was produced before the Court on 12th December 2005 but the advocate representing the accused was absent. Consequently, the matter was adjourned to 13.12.2005. On 13.12.2005, the accused as well as his advocate were present and the Court on 13.12.2005 recorded the following statement of the accused which reads as follows:

(Accused understands English. He gives the statement in English. We are recording the same in his own language.) I am not involved in the case. The travel agent should also have been implicated in this case. I am not involved. I am not guilty. (Repeatedly the accused was informed by us about the nature of the show cause notice given. He made the aforesaid statement and he does not want to say any more. Matter adjourned to 22nd December, 2005 at 3.00 for Judgment. Accused to be produced on that day.

21. Mr. Sushil Karanjakar, learned advocate appearing for the accused submitted that the High Court has not followed the procedure laid down under Section 235(2) of the Code of Criminal Procedure (for short the Cr.P.C.) before enhancing the sentence of life imprisonment to death. Learned counsel pointed out that 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 parts of the criminal procedure and non-compliance thereof will *ex facie* vitiate the order. In support of his contention, learned counsel placed reliance on the judgment of this Court in *Santa Singh v. State of Punjab*; (1976) 4 SCC 190 and a recent judgment in *Rajesh Kumar v. State through Government of NCT of Delhi*; (2011) 13 SCC 706.

22. Mr. Shankar Chillarge, learned counsel appearing for the State, submitted that in the facts and circumstances of this case, the High Court was justified in according maximum sentence of death penalty, since on facts, it was found to be a rarest of rare case and the test laid down by this Court in *Bachan Singh v. State of Punjab*; (1980) 2 SCC 684 has been fully satisfied. Learned prosecutor submitted this is a case of double murder and attempt to commit murder of two others and the manner in which the same was executed was gruesome. Further,

it was pointed out that the procedure laid down under Section 235(2) Cr.P.C. was fully complied with and there is no reason to upset the conviction/ sentence awarded by the High Court.

23. We heard the learned counsel on either side on this point at length. The original file made available to this Court did not contain the copy of show cause notice dated 1.12.2005 issued by the High Court as well as the full text of the order passed by the High Court on 13.12.2005 recording the statement of the accused. We passed an order on 11.04.2012 to produce the original files to examine whether the High Court had followed the procedure laid down under Section 235(2) Cr.P.C. Records were made available and we went through those records with great care. We have also perused the full text of the show cause notice dated 1.12.2005 issued by the High Court and the statement recorded by the High Court under Section 235(2) Cr.P.C. after summoning the accused.

24. We have to examine whether the High Court has properly appreciated the purpose and object of Section 235(2) Cr.P.C. and applied the same bearing in mind the fact that they are taking away the life of a human being.

25. Section 235 Cr.P.C. in its entirety is extracted for reference:

235. Judgment of acquittal or conviction (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

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

The necessity of inserting sub-section (2) was highlighted by the Law Commission in its 41st Report which reads as follows:

It is now being increasingly recognized 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 the characteristics and background of the offender. The aims of sentencing become all the more so in the absence of information on which the correctional process is to operate.

The public as well as the courts themselves are in the dark about the judicial approach in this regard. 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. The Law Commission in its Report had opined that the taking of evidence as to the circumstances relevant to sentencing should be encouraged in the process. The Parliament, it is seen, has accepted the recommendation of the Law Commission fully and has enacted sub-section (2).

26. The scope of the abovementioned provision has come up for consideration before the Apex Court on various occasions. Reference to few of the judgments is apposite. The courts are unanimous in their view that sub-section (2) of Section 235 clearly states that the hearing has to be given to the accused on the question of sentence, but the question is what is the object and purpose of hearing and what are the matters to be elicited from the accused. Of course, full opportunity has to be given to produce adequate materials before the Court and, if found, necessary court may also give an opportunity to lead evidence. Evidence on what, the evidence which has some relevance on the question of sentence and not on conviction. But the further

question to be examined is whether, in the absence of adding any materials by the accused, has the Court any duty to elicit any information from whatever sources before awarding sentence, especially capital punishment. Psychological trauma which a convict undergoes on hearing that he would be awarded capital sentence, that is, death, has to be borne in mind, by the court. Convict could be a completely shattered person, may not be in his normal senses, may be dumbfound, unable to speak anything. Can, in such a situation, the court presume that he has nothing to speak or mechanically record what he states, without making any conscious effort to elicit relevant information, which has some bearing in awarding a proper and adequate sentence. Awarding death sentence is always an exception, only in rarest of rare cases.

27. In *Santa Singh* (supra), this Court has extensively dealt with the nature and scope of Section 235(2) Cr.P.C. stating that such a provision was introduced in consonance with the modern trends in penology and sentencing procedures. The Court noticed today more than ever before, sentencing has become a delicate task, requiring an inter-disciplinary approach and calling for skills and talents very much different from those ordinarily expected of lawyers. In *Santa Singh*, (supra) the Court found that the requirements of Section 235(2) were 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. The Court noticed in that case the Sessions Court chose to inflict death sentence on the accused and the possibility could not be ruled out that if the accused had been given an opportunity to produce material and make submissions on the question of sentence, as contemplated by Section 235(2), he might have been in a position to persuade the Sessions Court to impose a lesser penalty of life imprisonment. The Court, therefore, held the breach of the mandatory requirement of Section 235(2) could not, in the circumstances, be ignored as inconsequential and it can vitiate the sentence of death imposed by the Sessions Court. The Court, therefore, allowed the appeal and set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the accused to be heard. Further, in *Santa Singh*, the Court also held as follows:

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.

28. The above issue again came up before this Court in *Dagdu & ors. v. State of Maharashtra*; (1977) 3 SCC 68; wherein the three Judges Bench, referring to the judgment in *Santa Singh*, held as follows:

The Court on convicting an accused must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that court to remedy the breach by giving a hearing to the accused on the question of sentence.

It further held as follows:

For a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has

recorded the conviction. Remand is an exception, not a rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases.

29. Again in *Muniappan v. State of Tamil Nadu*; AIR 1981 SC 1220; this Court held as follows:

The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence.

The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence.

30. Later, in *Allauddin Mian & ors. v. State of Bihar*; (1989) 3 SCC 5, this Court also considered the effect of non-compliance of Section 235(2) Cr.P.C. and held that the provision is mandatory. The operative portion of the judgment reads as follows:

The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced Sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality.

31. Later, three Judges Bench in *Malkiat Singh v. State of Punjab*; (1991) 4 SCC 341 indicated the necessity of adjourning the case to a future date after convicting the accused and held as follows:

On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the Court facts and material relating to various factors on the question of sentence and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence.

or the minimum sentence of life imprisonment may be awarded, as the case may be.

32. This Court in a recent judgment in **Rajesh Kumar** (supra) examined at length the evaluation of sentencing policy and the concept of mitigating circumstances in India relating to the death penalty. The meaning and content of the expression hearing the accused under Section 235(2) and the scope of Sections 354(3) and 465 Cr.P.C. were elaborately considered. The Court held that the object of hearing under Section 235(2) Cr.P.C. being intrinsically and inherently connected with the sentencing procedure, the provisions of Section 354(3) Cr.P.C. which calls for recording of special reason for awarding death sentence, must be read conjointly. The Court held that such special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence.

33. In our view, the principles laid down in the above cited judgments squarely applies on the question of awarding of sentence and we find from the records that the High Court has only mechanically recorded what the accused has said and no attempt has been made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the Court of the nature of the show-cause-notice. What was the nature of show cause notice? The nature of the show-cause-notice was whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort has been made by the Court to elicit any information either from the accused or the prosecution as to whether any circumstance exists which might influence the Court to avoid and not to award death sentence. Awarding death sentence is an exception, not the rule, and only in rarest of rare cases, the Court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Cr.P.C.

34. In such circumstances, we are inclined to set aside the death sentence awarded by the High Court and remit the matter to the High Court to follow Section 235(2) Cr.P.C. in accordance with the principles laid down. The conviction awarded by the High Court, however, stands confirmed. The High Court is requested to pass fresh orders preferably within a period of six months from the date of the receipt of the copy of this order. The appeal is allowed to that extent.

154th Report of the Law Commission on The Criminal Procedure Code

CHAPTER XIII

PLEA BARGAINING

1. The arrears of criminal cases awaiting trial are assuming menacing proportions. Grievances have been vented in public that the disposal of criminal trials in the courts takes considerable time and that in many cases trials do not commence for as long a period as three to four years after the accused was remitted to judicial custody. Large number of persons accused of criminal offences have not been able to secure bail for one reason or the other and have to languish in jails as undertrial prisoners for years. It is also a matter of common knowledge that majority of the cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend considerable amount by way of legal expenses and the public exchequer has to bear the resultant economic burden. During the course of detention as undertrial prisoners the accused persons are exposed to the influence of hardcore criminals. Quite apart from this the accused have to remain in a state of uncertainty and are unable to settle down in life for a number of years awaiting the completion of trial. Huge arrears of criminal cases are a common feature in almost all the criminal courts. It is in this background the Law Commission felt that some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of undertrial prisoners. The Law Commission in its *142nd Report on Concessional Treatment of Offenders* who on their own initiative choose to plead guilty without any bargaining (1991) considered the question of introduction of the concept of concessional treatment for those *who* choose to plead guilty by way of plea-bargaining.

2. The justification for introducing, plea-bargaining cannot be expressed any better than what the Twelfth Law Commission in its *142nd Report* had already done as below:

- (1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community.
- (2) It is desirable to infuse life in the reformatory provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now.
- (3) It will help the accused who have to remain as undertrial prisoners awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as-
 - (a) end of uncertainty.
 - (b) saving in litigation-cost.
 - (c) saving in anxiety-cost.
 - (d) being able to know his or her fate and to start of fresh life without fear of having to

undergo a possible prison sentence at a future date disrupting his life or career.

- (e) saving avoidable visits to lawyer's office and to court on every date or adjournment.
- (4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.
- (5) It will reduce congestion in jails.
- (6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.
- (7) Under the present system 75% to 90% of the criminal cases if not more, result in acquittals.

3. The concept of plea bargaining has not been recognized so far by the criminal jurisprudence of India. However, plea bargaining is considered to be one of the alternatives to deal with the huge arrears of criminal cases. Plea-bargaining in its most traditional and general sense refers to pre-trial negotiations between the accused usually conducted by the counsel and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. It has two facets. One is "charge bargaining" which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the accused in exchange for guilty plea. The second one is "sentence bargaining" which refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea.

4. The practice of plea bargaining in USA dates back to a century or more. The Prosecuting Agency has a leading role in this process in that it has the discretion to reduce or dismiss some of the charges against the accused and also to make recommendations to the Court about the sentences in exchange for a guilty plea. The Supreme Court of USA in *Brady v. United States* [297 US 742-25 L.Ed. 2d 747] and *Santobello v. New York* [404 US 257 (1971)]; *Hutto v. Ross* [50 L.Ed. 2d 876]; *Chaffin v. Stynchcombe* [412 US 17 (1973)]; *Blackledge v. Allison* [52 L.Ed. 2d 136]; *Weatherford v. Bursey* [429 US 545 (1977)] upheld the constitutional validity and the significant role the concept of the plea bargaining plays in the disposal of criminal cases. It has approved this practice mainly on the premise that the accused who are convicted on the basis of negotiated pleas of guilt would ordinarily have been convicted had they been subjected to trial processes. One of the main arguments advanced in favour of plea bargaining is that it helps the disposal of accumulated cases and will expedite delivery of criminal justice.

5. The Supreme Court of India has examined the concept of plea bargaining in *Murlidhar Meghraj Loya v. State of Maharashtra* [AIR 1976 SC 1929] and *Kasambhai v. State of Gujarat* [AIR 1980 SC 854]. The Court did not approve of the procedure of plea bargaining on the basis of informal inducement. In Kasambhai's case the Court squarely observed that conviction based on the plea of guilty entered by the accused as a result of plea bargaining could not be sustained and that it was opposed to public policy to convict the accused by inducing him to confess to a plea of guilty "on allurement being held out to him that if he enters a plea of guilty he will be let off very lightly".

6. The Law Commission in its *142nd Report*, having considered the concept as is being practiced in other countries, recommended that the scheme for concessional treatment to offenders who plead guilty on their own volition in lieu of a promise to reduce the charge, to

drop some of the charges or getting lesser punishment be statutorily introduced by adding a Chapter in the Code of Criminal Procedure. In making such a recommendation, however, the Law Commission considered the views in favour of the concept as well as against it.

7. We have examined the cases decided in USA as well as by the Supreme Court of India in respect of this concept and the **142nd Report** of the Law Commission. [Law Commission, **One Hundred Forty Second Report**, Chapter IX, paras 9.1-9.40 pp 24-34 (1991)] We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure have to be incorporated in the Code of Criminal Procedure.

8. Having given our earnest consideration, we recommend that this concept may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code. Plea bargaining can also be in respect of the nature and gravity of offences and the quantum of punishment.

9. However, plea bargaining should not be available to habitual offenders, those who are accused of socio-economic offences of a grave nature and offences against women and children.

9.1, The process of plea bargaining shall be set in motion after issue of process and when the accused appears, either on a written application by the accused to the Court or *suo motu* by the Court to ascertain the willingness of the accused. On ascertainment of the willingness of the accused, the Court shall require him to make an application accordingly.

9.2. On the date so fixed for the hearing the court shall ascertain from the accused whether the application was made by him voluntarily without any inducement or pressure from any quarters, particularly from Public Prosecutors or Police. The Court shall ensure that neither the public prosecutor nor police is present at the time of making the preliminary examination of the accused.

9.3 Once the Court is satisfied about the voluntary nature of the application, the Court shall fix a date for hearing the public prosecutor and the aggrieved party and the accused applicant for final hearing and passing of final order. If the Court finds that the application has been made under duress or pressure, or that the applicant after realizing the consequences is not prepared to proceed with the application, the Court may reject the application.

9.4 Such an application may be rejected either at the initial stage or after hearing the public prosecutor and the aggrieved party. If the Court finds that, having regard to the gravity of the offence or any other circumstances which may be brought to its notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of its powers of plea-bargaining, the Court may reject the application supported by reasons therefor.

9.5 The order passed by the Court on the application of the accused applicant shall be confidential and will be given only to the accused if he so desires. The making of such application by the accused shall not create any prejudice against the accused at the ensuing trial.

9.6 We are of the view that such a plea bargaining can be availed of by the accused in the categories of offences mentioned above before the Court at any stage after the charge sheet is filed by the investigating agency in police cases and in respect of private complaints at any stage after the cognizance is taken. An order passed by the court on such a plea shall be final and no appeal shall lie against such an order passed by the Court accepting the plea.

9.7 In cases where the provisions of Probation of Offenders Act, 1958 and/or section 360 of Cr. P.C. are applicable to an accused applicant, he would be entitled to make an application that he is desirous of pleading guilty along with a prayer for availing of the benefit under the legislative provisions referred to above. In such cases, the Court after hearing the public prosecutor and the aggrieved party, may pass appropriate order conferring the benefit of those legislative provisions. The Court may be empowered to dispense with the necessity of calling a report from the probation officer in appropriate cases. The provision regarding confidentiality of the making of application and the consequence of rejection outlined in paragraph 9.5 will be applicable if the application is rejected by the Court.

9.8 If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for the Court may instead of rejecting the application *in limine*, after hearing the public prosecutor and the aggrieved party accept the plea of guilty and pass an order of conviction and sentence to the tune of one/half of the minimum sentence provided.

9.9 The Court shall on such a plea of guilty being taken explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the Public Prosecutor or the aggrieved person as the case may be:

- (i) impose a suspended sentence and release him on probation;
- (ii) order him to pay compensation to the aggrieved party; or
- (iii) impose a sentence which commensurate with the plea bargaining, or
- (iv) convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.

10. We recommend that a separate Chapter XXIA on Plea Bargaining be incorporated in the Code of Criminal Procedure on the lines indicated above.

Gian Singh v. State of Punjab
(2012) 10 SCC 303

R.M. LODHA, J.— When the special leave petition in *Gian Singh v. State of Punjab* [(2010) 15 SCC 118] came up for hearing, a two-Judge Bench (Markandey Katju and Gyan Sudha Misra, JJ.) doubted the correctness of the decisions of this Court in *B.S. Joshi v. State of Haryana* [(2003) 4 SCC 675], *Nikhil Merchant v. CBI* [(2008) 9 SCC 677 : (2008) 3 SCC (Cri) 858] and *Manoj Sharma v. State* [(2008) 16 SCC 1 : (2010) 4 SCC (Cri) 145] and referred the matter to a larger Bench.

2. The reference order [(2010) 15 SCC 118] reads as follows: (SCC pp. 119-20, paras 1-9)

“1. Heard the learned counsel for the petitioner.

2. The petitioner has been convicted under Section 420 and Section 120-B IPC by the learned Magistrate. He filed an appeal challenging his conviction before the learned Sessions Judge. While his appeal was pending, he filed an application before the learned Sessions Judge for compounding the offence, which, according to the learned counsel, was directed to be taken up along with the main appeal. Thereafter, the petitioner filed a petition under Section 482 CrPC for quashing of the FIR on the ground of compounding the offence. That petition under Section 482 CrPC has been dismissed by the High Court by its impugned order. Hence, this petition has been filed in this Court.

3. The learned counsel for the petitioner has relied on the three decisions of this Court, all by two-Judge Benches. They are *B.S. Joshi v. State of Haryana* [(2003) 4 SCC 675] ; *Nikhil Merchant v. CBI* [(2008) 9 SCC 677] and *Manoj Sharma v. State* [(2008) 16 SCC 1 : (2010) 4 SCC (Cri) 145] . In these decisions, this Court has indirectly permitted compounding of non-compoundable offences. One of us, Hon'ble Mr Justice Markandey Katju, was a member to the last two decisions.

4. Section 320 CrPC mentions certain offences as compoundable, certain other offences as compoundable with the permission of the court, and the other offences as non-compoundable vide Section 320(7).

5. Section 420 IPC, one of the counts on which the petitioner has been convicted, no doubt is a compoundable offence with the permission of the court in view of Section 320 CrPC but Section 120-B IPC, the other count on which the petitioner has been convicted, is a non-compoundable offence. Section 120-B (criminal conspiracy) is a separate offence and since it is a non-compoundable offence, we cannot permit it to be compounded.

6. The court cannot amend the statute and must maintain judicial restraint in this connection. The courts should not try to take over the function of Parliament or the executive. It is the legislature alone which can amend Section 320 CrPC.

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

8. It is true that in the last two decisions, one of us, Hon'ble Mr Justice Markandey Katju, was a member but a Judge should always be open to correct his mistakes. We feel that

these decisions require reconsideration and hence we direct that this matter be placed before a larger Bench to reconsider the correctness of the aforesaid three decisions.

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

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

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

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

Table

<i>Offence</i>	<i>Section of the Indian Penal Code applicable</i>	<i>Person by whom offence may be compounded</i>
(1)	(2)	(3)

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

Table

<i>Offence</i>	<i>Section of the Indian Penal Code applicable</i>	<i>Person by whom offence may be compounded</i>
(1)	(2)	(3)

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

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

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908), of such person may, with the consent of the court, compound such offence.

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

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

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

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

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

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

“**482. Saving of inherent powers of High Court.**—Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.”

5. In **B.S. Joshi**, the undisputed facts were these: the husband was one of the appellants while the wife was Respondent 2 in the appeal before this Court. They were married on 21-7-1999 and were living separately since 15-7-2000. An FIR was registered under Sections 498-A/323 and 406 IPC at the instance of the wife on 2-1-2002. When the criminal case registered at the instance of the wife was pending, the dispute between the husband and wife and their family members was settled. It appears that the wife filed an affidavit that her disputes with the husband and the other members of his family had been finally settled and she and her husband had agreed for mutual divorce. Based on the said affidavit, the matter was taken to the High Court by both the parties and they jointly prayed for quashing the criminal proceedings launched against the husband and his family members on the basis of the FIR registered at the wife's instance under Sections 498-A and 406 IPC. The High Court dismissed the petition for quashing the FIR as in its view the offences under Sections 498-A and 406 IPC were non-compoundable and the inherent powers under Section 482 of the Code could not be invoked to by-pass Section 320 of the Code. It is from this order that the matter reached this Court. This Court held that the High Court in exercise of its inherent powers could quash the criminal proceedings or the FIR or the complaint and Section 320 of the Code did not limit or affect the powers under Section 482 of the Code. The Court in paras 14 and 15 of the Report held as under: (**B.S. Joshi case** [(2003) 4 SCC 675, p. 682])

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

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

6. In **Nikhil Merchant**, a company, M/s Neemuch Emballage Ltd., Mumbai was granted financial assistance by Andhra Bank under various facilities. On account of default in repayment of loans, the Bank filed a suit for recovery of the amount payable by the borrower Company. The Bank also filed a complaint against the Company, its Managing Director and

the officials of Andhra Bank for diverse offences, namely, Section 120-B read with Sections 420, 467, 468, 471 IPC read with Sections 5(2) and 5(1)(d) of the Prevention of Corruption Act, 1947 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The suit for recovery filed by the Bank against the Company and the Managing Director of the Company was compromised. The suit was compromised upon the defendants agreeing to pay the amounts due as per the schedule mentioned in the consent terms. Clause 11 of the consent terms read, “agreed that save as aforesaid neither party has any claim against the other and parties do hereby withdraw all the allegations and counter-allegations made against each other”. Based on Clause 11 of the consent terms, the Managing Director of the Company, the appellant who was Accused 3 in the charge-sheet filed by CBI, made application for discharge from the criminal complaint. The said application was rejected by the Special Judge (CBI), Greater Bombay, which came to be challenged before the Bombay High Court. The contention before the High Court was that since the subject-matter of the dispute had been settled between the appellant and the Bank, it would be unreasonable to continue with the criminal proceedings. The High Court rejected the application for discharge from the criminal cases. It is from this order that the matter reached this Court by way of special leave.

7. The Court having regard to the facts of the case and the earlier decision of this Court in **B.S. Joshi**, set aside the order of the High Court and quashed the criminal proceedings by consideration of the matter thus: (*Nikhil Merchant case* [(2008) 9 SCC 677] , SCC p. 684, paras 28-31)

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

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

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

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

the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.”

8. In *Manoj Sharma* the Court was concerned with the question whether an FIR under Sections 420/468/471/34/120-B IPC can be quashed either under Section 482 of the Code or under Article 226 of the Constitution when the accused and the complainant have compromised and settled the matter between themselves. Altamas Kabir, J., who delivered the lead judgment referred to *B.S. Joshi* and the submission made on behalf of the State that *B.S. Joshi* required a second look and held that the Court was not inclined to accept the contention made on behalf of the State that the decision in *B.S. Joshi* required reconsideration, at least not in the facts of the case. It was held that what was decided in *B.S. Joshi* was the power and authority of the High Court to exercise jurisdiction under Section 482 of the Code or under Article 226 of the Constitution to quash the offences which were not compoundable. The law stated in *B.S. Joshi* simply indicated the powers of the High Court to quash any criminal proceeding or first information report or complaint whether the offences were compoundable or not. Altamas Kabir, J. further observed: (*Manoj Sharma case* [(2008) 16 SCC 1, p. 5, para 6)

“6. ... The ultimate exercise of discretion under Section 482 CrPC or under Article 226 of the Constitution is with the court which has to exercise such jurisdiction in the facts of each case. It has been explained that the said power is in no way limited by the provisions of Section 320 CrPC. We are unable to disagree with such statement of law. In any event, in this case, we are only required to consider whether the High Court had exercised its jurisdiction under Section 482 CrPC legally and correctly.”

Then in paras 8 and 9 of the Report, Altamas Kabir, J., inter alia, held as under: (*Manoj Sharma case* [(2008) 16 SCC 1, p. 5])

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

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

9. Markandey Katju, J. although concurred with the view of Altamas Kabir, J. that criminal proceedings in that case deserved to be quashed but observed that the question may have to be decided in some subsequent decision or decisions (preferably by a larger Bench) as to which non-compoundable cases can be quashed under Section 482 of the Code or Article 226 of the Constitution on the basis that the parties have entered into compromise. In paras 27 and 28 of the Report he held as under: (*Manoj Sharma case* [(2008) 16 SCC 1, p. 10])

“27. There can be no doubt that a case under Section 302 IPC or other serious offences like those under Sections 395, 307 or 304-B cannot be compounded and hence proceedings in those provisions cannot be quashed by the High Court in exercise of its power under Section 482 CrPC or in writ jurisdiction on the basis of compromise. However, in some other cases (like those akin to a civil nature), the proceedings can be quashed by the High Court if the parties have come to an amicable settlement even though the provisions are not compoundable. Where a line is to be drawn will have to be decided in some later decisions of this Court, preferably by a larger Bench (so as to make it more authoritative). Some guidelines will have to be evolved

in this connection and the matter cannot be left at the sole unguided discretion of Judges, otherwise there may be conflicting decisions and judicial anarchy. A judicial discretion has to be exercised on some objective guiding principles and criteria, and not on the whims and fancies of individual Judges. Discretion, after all, cannot be the Chancellor's foot.

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

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

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

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

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

14. The learned counsel for the petitioner in Special Leave Petition (Crl.) No. 8989 of 2010 submitted that the court should have positive view to quash the proceedings once the aggrieved party has compromised the matter with the wrongdoer. It was submitted that if the court did not allow the quashing of the FIR or the complaint or the criminal case where the parties settled their dispute amicably, it would encourage the parties to speak lie in the court and witnesses would become hostile and the criminal proceeding would not end in conviction. The learned counsel submitted that the court could also consider the two questions:

(1) Can there be partial quashing of the FIR qua the accused with whom the complainant/aggrieved party enters into compromise,

(2) Can the court quash the proceedings in the cases which have not arisen from matrimonial or civil disputes but the offences are personal in nature like grievous hurt (Section 326), attempt to murder (Section 307), rape (Section 376), trespassing (Section 452) and kidnapping (Sections 364, 365), etc.

15. Mr P.P. Malhotra, learned Additional Solicitor General referred to the scheme of the Code. He submitted that in any criminal case investigated by the police on filing the report under Section 173 of the Code, the Magistrate, after applying his mind to the charge-sheet and the documents accompanying the same, if takes cognizance of the offences and summons the accused and/or frames charges and in certain grave and serious offences, commits the accused to be tried by a Court of Session and the Sessions Court after satisfying itself and after hearing the accused frames charges for the offences alleged to have been committed by him, the Code provides a remedy to the accused to challenge the order taking cognizance or of framing charges. Similar situation may follow in a complaint case. The learned Additional Solicitor General submitted that the power under Section 482 of the Code cannot be invoked in the non-compoundable offences since Section 320(9) expressly prohibits the compounding of such offences. Quashing of criminal proceedings of the offences which are non-compoundable would negative the effect of the order of framing charges or taking cognizance and therefore quashing would amount to taking away the order of cognizance passed by the Magistrate.

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

17. If power under Section 482 is exercised, in relation to non-compoundable offences, it will amount to what is prohibited by law and such cases cannot be brought within the parameters “to secure the ends of justice”. Any order in violation and breach of the statutory provisions, the learned Additional Solicitor General would submit, would be a case against the ends of justice. He heavily relied upon a Constitution Bench decision of this Court in **CBI v. Keshub Mahindra** [(2011) 6 SCC 216] wherein this Court held: (SCC p. 219, para 11)

“11. No decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code....” (emphasis in original)

18. With reference to **B.S. Joshi**, the learned Additional Solicitor General submitted that that was a case where the dispute was between the husband and wife and the court felt that if the proceedings were not quashed, it would prevent the woman from settling in life and the wife had already filed an affidavit that there were temperamental differences and she was not supporting continuation of criminal proceedings. As regards, **Nikhil Merchant**, the learned Additional Solicitor General submitted that this Court in **State of M.P. v. Rameshwar** [(2009) 11 SCC 424] held that the said decision was a decision under Article 142 of the Constitution. With regard to **Manoj Sharma** [(2008) 16 SCC 1], the learned Additional Solicitor General referred to the observations made by Markandey Katju, J. in paras 24 and 28 of the Report.

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

20. More than 65 years back, in **King Emperor v. Khwaja Nazir Ahmad** [(1943-44) 71 IA 203 : (1945) 47 Bom LR 245], it was observed by the Privy Council that Section 561-A (corresponding to Section 482 of the Code) had not given increased powers to the Court which it did not possess before that section was enacted. It was observed:

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

21. In **Khushi Ram v. Hashim** [AIR 1959 SC 542] this Court held as under: (AIR p. 544, para 3)

“3. ... It is unnecessary to emphasise that the inherent power of the High Court under Section 561-A cannot be invoked in regard to matters which are directly covered by the specific provisions of the Code....”

22. The above view of the Privy Council in **Khwaja Nazir Ahmad** and another decision in **Lala Jairam Das v. King Emperor** [(1944-45) 72 IA 120 : AIR 1945 PC 94] was expressly accepted by this Court in **State of U.P. v. Mohd. Naim** [AIR 1964 SC 703]. The Court said: (**Mohd. Naim case** [AIR 1964 SC 703, p. 705, para 7])

“7. ... It is now well settled that the section confers no new powers on the High Court. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. The section provides that those powers which the court inherently possesses shall be preserved lest it be considered that the only powers possessed by the court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code....”

23. In *Pampapathy v. State of Mysore* [AIR 1967 SC 286] a three-Judge Bench of this Court stated as follows: (AIR p. 289, para 8)

“8. The inherent power of the High Court mentioned in Section 561-A of the Criminal Procedure Code can be exercised only for either of the three purposes specifically mentioned in the section. The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that Section 561-A can come into operation.”

24. In *State of Karnataka v. L. Muniswamy* [(1977) 2 SCC 699] , a three-Judge Bench of this Court referred to Section 482 of the Code and in para 7 of the Report held as under: (SCC p. 703)

“7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.”

The Court then observed in (*L. Muniswamy case* [(1977) 2 SCC 699] , p. 704, para 9) that the, “considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by Section 482 ought not to be encased within the straitjacket of a rigid formula”.

25. A three-Judge Bench of this Court in *Madhu Limaye v. State of Maharashtra* [(1977) 4 SCC 551] dealt with the invocation of inherent power under Section 482 for quashing the interlocutory order even though revision under Section 397(2) of the Code was prohibited. The Court noticed the principles in relation to the exercise of the inherent power of the High Court as under: (SCC p. 555, para 8)

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

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

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

26. In *Raj Kapoor v. State* [(1980) 1 SCC 43] the Court explained the width and amplitude of the inherent power of the High Court under Section 482 vis-à-vis the revisional power under Section 397 as follows: (SCC pp. 47-48, para 10)

“10. ... The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In *Madhu Limaye case* this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution: (*Madhu Limaye case* [(1977) 4 SCC 551, pp. 555-56, para 10)

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

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

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

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation

need not take up this Court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified.”

27. In *Simrikhia v. Dolley Mukherjee* [(1990) 2 SCC 437] the Court considered the scope of Section 482 of the Code in a case where on dismissal of the petition under Section 482, a second petition under Section 482 of the Code was made. The contention before this Court was that the second petition under Section 482 of the Code was not entertainable; the exercise of power under Section 482 on a second petition by the same party on the same ground virtually amounts to review of the earlier order and is contrary to the spirit of Section 362 of the Code and the High Court was in error in having quashed the proceedings by adopting that course. While accepting this argument, this Court held as follows: (SCC pp. 439-40, paras 3, 5 & 7)

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

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

7. The inherent jurisdiction of the High Court cannot be invoked to override bar of review under Section 362. It is clearly stated in *Sooraj Devi v. Pyare Lal* [(1981) 1 SCC 500], that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. The law is therefore clear that the inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. The court is not empowered to review its own decision under the purported exercise of inherent power. We find that the impugned order in this case is in effect one reviewing the earlier order on a reconsideration of the same materials. The High Court has grievously erred in doing so. Even on merits, we do not find any compelling reasons to quash the proceedings at that stage.”

28. In *Dharampal v. Ramshri* [(1993) 1 SCC 435] this Court observed as follows: (SCC p. 438, para 6)

“6. ... It is now well settled that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code.”

29. In *Arun Shankar Shukla v. State of U.P.* [(1999) 6 SCC 146] a two-Judge Bench of this Court held as under: (SCC pp. 147-48, para 2)

“2. ... It is true that under Section 482 of the Code, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions ‘abuse of the process of law’ or ‘to secure the ends of justice’ do not confer unlimited jurisdiction on the High Court and the alleged abuse of the process of law or the ends of justice could only be secured in accordance with law including procedural law and not otherwise. Further, inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in Section 482 of the Code in cases where there is no express provision empowering the High Court to achieve the said object. It is well-nigh settled that inherent power is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provision of the Code. In the present case, the High Court overlooked the procedural law which empowered the convicted accused to prefer statutory appeal against conviction of the offence. The High Court has intervened at an uncalled for stage and soft-pedalled the course of justice at a very crucial stage of the trial.”

30. In *G. Sagar Suri v. State of U.P.* [(2000) 2 SCC 636] the Court was concerned with the order of the High Court whereby the application under Section 482 of the Code for quashing the criminal proceedings under Sections 406 and 420 IPC pending in the Court of the Chief Judicial Magistrate, Ghaziabad was dismissed. In para 8 of the Report, the Court held as under: (SCC p. 643)

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

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

“6. ... It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent

powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.”

32. The Court in para 9 further stated: (*M. Devendrappa case* [(2002) 3 SCC 89] ,p. 96)

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

33. In *CBI v. A. Ravishankar Prasad* [(2009) 6 SCC] the Court observed in paras 17, 19, 20 and 39 of the Report as follows: (SCC pp. 356-57 & 363)

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

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

20. Reference to the following cases would reveal that the courts have consistently taken the view that they must use the court's extraordinary power only to prevent injustice and secure the ends of justice. We have largely inherited the provisions of inherent powers from the English jurisprudence, therefore the principles decided by the English courts would be of relevance for

us. It is generally agreed that the Crown Court has inherent power to protect its process from abuse. The English courts have also used inherent power to achieve the same objective.

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

34. In *Devendra v. State of U.P.* [(2009) 7 SCC] , while dealing with the question whether a pure civil dispute can be the subject-matter of a criminal proceeding under Sections 420, 467, 468 and 469 IPC, a two-Judge Bench of this Court observed that: (SCC p. 504, para 24)

“24. ... the High Court ordinarily would exercise its jurisdiction under Section 482 of the [Code] if the allegations made in the first information report, even if given face value and taken to be correct in their entirety, do not make out any offence.”

35. In *Sushil Suri v. CBI* [(2011) 5 SCC 708] the Court considered the scope and ambit of the inherent jurisdiction of the High Court and made the following observations in para 16 of the Report: (SCC p. 715)

“16. Section 482 CrPC itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely, (i) to give effect to an order under CrPC; (ii) to prevent an abuse of the process of court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdiction under Section 482 CrPC. Though it is emphasised that exercise of inherent powers would depend on the facts and circumstances of each case, but the common thread which runs through all the decisions on the subject is that the court would be justified in invoking its inherent jurisdiction where the allegations made in the complaint or charge-sheet, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged.”

36. Besides *B.S. Joshi* , *Nikhil Merchant* and *Manoj Sharma* , there are other decisions of this Court where the scope of Section 320 vis-à-vis the inherent power of the High Court under Section 482 of the Code has come up for consideration.

37. In *Madan Mohan Abbot v. State of Punjab* [(2008) 4 SCC 582] in the appeal before this Court which arose from an order of the High Court refusing to quash the FIR against the appellant lodged under Sections 379, 406, 409, 418, 506/34 IPC on account of compromise entered into between the complainant and the accused, in paras 5 and 6 of the Report, the Court held as under: (SCC p. 584)

“5. It is on the basis of this compromise that the application was filed in the High Court for quashing of proceedings which has been dismissed by the impugned order. We notice from a reading of the FIR and the other documents on record that the dispute was purely a personal one between two contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against the accused. We are, therefore, of the opinion that no useful purpose would be

served in continuing with the proceedings in the light of the compromise and also in the light of the fact that the complainant has on 11-1-2004 passed away and the possibility of a conviction being recorded has thus to be ruled out.

6. We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law.”

38. In *Ishwar Singh v. State of M.P.* [(2008) 15 SCC 667] the Court was concerned with a case where the appellant-accused was convicted and sentenced by the Additional Sessions Judge for an offence punishable under Section 307 IPC. The High Court dismissed the appeal from the judgment and conviction. In the appeal, by special leave, the injured complainant was ordered to be joined as party as it was stated by the counsel for the appellant that mutual compromise has been arrived at between the parties i.e. the accused on the one hand and the complainant victim on the other hand during the pendency of the proceedings before this Court. It was prayed on behalf of the appellant that the appeal be disposed of on the basis of compromise between the parties. In para 12 of the Report, the Court observed as follows: (SCC p. 670)

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

39. The Court also referred to the earlier decisions of this Court in *Jetha Ram v. State of Rajasthan* [(2006) 9 SCC 255], *Murugesan v. Ganapathy Velar* [(2001) 10 SCC 504 : 2003 SCC (Cri) 1032], *Ishwarlal v. State of M.P.* [(2008) 15 SCC 671 : (2009) 3 SCC (Cri) 1156] and *Mahesh Chand v. State of Rajasthan* [1990 Supp SCC 681 : 1991 SCC (Cri) 159] and noted in para 13 of the Report as follows: (*Ishwar Singh case* [(2008) 15 SCC 667, p. 670])

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

Then, in paras 14 and 15 the Court held as under: (*Ishwar Singh case* [(2008) 15 SCC 667, p. 670])

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

15. In the instant case, the incident took place before more than fifteen years; the parties are residing in one and the same village and they are also relatives. The appellant was about 20 years of age at the time of commission of crime. It was his first offence. After conviction, the

petitioner was taken into custody. During the pendency of appeal before the High Court, he was enlarged on bail but, after the decision of the High Court, he again surrendered and is in jail at present. Though he had applied for bail, the prayer was not granted and he was not released on bail. Considering the totality of facts and circumstances, in our opinion, the ends of justice would be met if the sentence of imprisonment awarded to the appellant (Accused 1) is reduced to the period already undergone.”

40. In *Rumi Dhar v. State of W.B.* [(2009) 6 SCC 364] , the Court was concerned with the applicability of Section 320 of the Code where the accused was being prosecuted for the commission of the offences under Sections 120-B/420/467/468/471 IPC along with the bank officers who were being prosecuted under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal. The accused prayed for her discharge on the grounds: (i) having regard to the settlement arrived at between her and the bank, no case for proceeding against her has been made out; (ii) the amount having already been paid and the title deeds having been returned, the criminal proceedings should be dropped on the basis of the settlement; and (iii) the dispute between the parties were purely civil in nature and that she had not fabricated any document or cheated the bank in any way whatsoever and charges could not have been framed against her. The CBI contested the application for discharge on the ground that mere repayment to the bank could not exonerate the accused from the criminal proceeding. The two-Judge Bench of this Court referred to Section 320 of the Code and the earlier decisions of this Court in *CBI v. Duncans Agro Industries Ltd.* [(1996) 5 SCC 591] , *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335] , *State of Bihar v. P.P. Sharma* [1992 Supp (1) SCC 222] , *Janata Dal v. H.S. Chowdhary* [(1992) 4 SCC 305] and *Nikhil Merchant* which followed the decision in *B.S. Joshi* and then with reference to Article 142 of the Constitution and Section 482 of the Code refused to quash the charge against the accused by holding as under: (*Rumi Dhar case*[(2009) 6 SCC 364, p. 372, para 24)

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

41. In *Shiji v. Radhika* [(2011) 10 SCC 705] this Court considered the exercise of inherent power by the High Court under Section 482 in a matter where the offence was not compoundable as the accused was already involved in commission of the offences punishable under Sections 354 and 394 IPC. The High Court rejected the prayer by holding that the offences with which the appellants were charged are not “personal in nature” to justify quashing the criminal proceedings on the basis of a compromise arrived at between the complainant and the appellants. This Court considered the earlier decisions of this Court, the provisions contained in Sections 320 and 394 of the Code and in paras 17, 18 and 19 of the Report held as under: (SCC pp. 712-13)

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

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

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

42. In *Ashok Sadarangani v. Union of India* [(2012) 11 SCC 321] the issue under consideration was whether an offence which was not compoundable under the provisions of the Code could be quashed. That was a case where a criminal case was registered against the accused persons under Sections 120-B, 465, 467, 468 and 471 IPC. The allegation was that the accused secured the credit facilities by submitting forged property documents as collaterals and utilised such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the Bank

to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash credit facility. The Court considered the earlier decisions of this Court including *B.S. Joshi*, *Nikhil Merchant*, *Manoj Sharma*, *Shiji, Duncans Agro Industries Ltd.*, *Rumi Dhar* and *Sushil Suri* [(2011) 5 SCC 708] and also referred to the order of reference in one of the cases before us.

43. In *Sadarangani case* it was held as under: (SCC pp. 327-29, paras 24-31)

“24. Having carefully considered the facts and circumstances of the case, as also the law relating to the continuance of criminal cases where the complainant and the accused had settled their differences and had arrived at an amicable arrangement, we see no reason to differ with the views that had been taken in *Nikhil Merchant case* or *Manoj Sharma case* or the several decisions that have come thereafter. It is, however, no coincidence that the golden thread which runs through all the decisions cited, indicates that continuance of a criminal proceeding after a compromise has been arrived at between the complainant and the accused, would amount to abuse of the process of court and an exercise in futility, since the trial could be prolonged and ultimately, may conclude in a decision which may be of any consequence to any of the other parties.

25. Even in *Sushil Suri case* on which the learned Additional Solicitor General had relied, the learned Judges who decided the said case, took note of the decisions in various other cases, where it had been reiterated that the exercise of inherent powers would depend entirely on the facts and circumstances of each case. In other words, not that there is any restriction on the power or authority vested in the Supreme Court in exercising powers under Article 142 of the Constitution, but that in exercising such powers the Court has to be circumspect, and has to exercise such power sparingly in the facts of each case.

26. Furthermore, the issue, which has been referred to a larger Bench in *Gian Singh case* [(2010) 15 SCC 118] in relation to the decisions of this Court in *B.S. Joshi case*, *Nikhil Merchant case*, as also *Manoj Sharma case*, deals with a situation which is different from that of the present case. While in the cases referred to hereinabove, the main question was whether the offences which were not compoundable, under Section 320 CrPC could be quashed under Section 482 CrPC, in *Gian Singh case* the Court was of the view that a non-compoundable offence could not be compounded and that the courts should not try to take over the function of Parliament or the executive. In fact, in none of the cases referred to in *Gian Singh case*, did this Court permit compounding of non-compoundable offences. On the other hand, upon taking various factors into consideration, including the futility of continuing with the criminal proceedings, this Court ultimately quashed the same.

27. In addition to the above, even with regard to *CBI v. A. Ravishankar Prasad* [(2009) 6 SCC] this Court observed that the High Court can exercise power under Section 482 CrPC to do real and substantial justice and to prevent abuse of the process of court when exceptional circumstances warranted the exercise of such power. Once the circumstances in a given case were held to be such as to attract the provisions of Article 142 or Articles 32 and 226 of the Constitution, it would be open to the Supreme Court to exercise its extraordinary powers under Article 142 of the Constitution to quash the proceedings, the continuance whereof would only amount to abuse of the process of court.

28. In the instant case the dispute between the petitioners and the Banks having been compromised, we have to examine whether the continuance of the criminal proceeding could turn out to be an exercise in futility without anything positive being ultimately achieved.

29. As was indicated in *Harbhajan Singh v. State of Punjab* [(2009) 13 SCC 608] , the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in *Gian Singh case* need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.

30. In the present case, the fact situation is different from that in *Nikhil Merchant case*. While in *Nikhil Merchant case* the accused had misrepresented the financial status of the company in question in order to avail of credit facilities to an extent to which the Company was not entitled, in the instant case, the allegation is that as part of a larger conspiracy, property acquired on lease from a person who had no title to the leased properties, was offered as collateral security for loans obtained. Apart from the above, the actual owner of the property has filed a criminal complaint against Shri Kersi V. Mehta who had held himself out as the attorney of the owner and his family members.

31. The ratio of the decisions in *B.S. Joshi case* and in *Nikhil Merchant case* or for that matter, even in *Manoj Sharma case*, does not help the case of the writ petitioners. In *Nikhil Merchant case*, this Court had in the facts of the case observed that the dispute involved had overtures of a civil dispute with criminal facets. This is not so in the instant case where the emphasis is more on the criminal intent of the petitioners than on the civil aspect involving the dues of the Bank in respect of which a compromise was worked out.”

The Court distinguished *B.S. Joshi* and *Nikhil Merchant* by observing that those cases dealt with different fact situation.

44. In *Rajiv Saxena v. State (NCT of Delhi)* [(2012) 5 SCC 627] this Court allowed the quashment of criminal case under Sections 498-A and 496 read with Section 34 IPC by a brief order. It was observed that since the parties had settled their disputes and the complainant agreed that the criminal proceedings need not be continued, the criminal proceedings could be quashed.

45. In a very recent judgment decided by this Court in the month of July 2012 in *Jayrajsinh Digvijaysinh Rana v. State of Gujarat* [(2012) 12 SCC 401] this Court was again concerned with the question of quashment of an FIR alleging the offences punishable under Sections 467, 468, 471, 420 and 120-B IPC. The High Court refused to quash the criminal case under Section 482 of the Code. The question for consideration was that inasmuch as all those offences, except Section 420 IPC, were non-compoundable offences under Section 320 of the Code, whether it would be possible to quash the FIR by the High Court under Section 482 of the Code or by this Court under Article 136 of the Constitution of India. The Bench elaborately considered the decision of this Court in *Shiji* and by invoking Article 142 of the Constitution quashed the criminal proceedings. It was held as under: (*Jayrajsinh case* [(2012) 12 SCC 401], SCC paras 13-15)

“13. In the light of the principles mentioned above, inasmuch as Respondent 2 complainant has filed an affidavit highlighting the stand taken by the appellant (Accused 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the

Constitution, we accept the terms of settlement insofar as the appellant herein (Accused 3) is concerned.

14. In view of the same, we quash and set aside the impugned FIR No. 45 of 2011 registered with Sanand Police Station, Ahmedabad for offences punishable under Sections 467, 468, 471, 420 and 120-B IPC insofar as the appellant (Accused 3) is concerned.

15. The appeal is allowed to the extent mentioned above.”

46. In *Y. Suresh Babu v. State of A.P.* [(2005) 1 SCC 347] decided on 29-4-1987, this Court allowed the compounding of an offence under Section 326 IPC even though such compounding was not permitted by Section 320 of the Code. However, in *Ram Lal v. State of J&K* [(1999) 2 SCC 213] this Court observed that *Y. Suresh Babu* was per incuriam. It was held that an offence which law declares to be non-compoundable cannot be compounded at all even with the permission of the Court.

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

48. A five-Judge Bench of the Punjab and Haryana High Court in *Kulwinder Singh v. State of Punjab* [(2007) 4 CTC 769] was called upon to determine, inter alia, the question whether the High Court has the power under Section 482 of the Code to quash the criminal proceedings or allow the compounding of the offences in the cases which have been specified as non-compoundable offences under the provisions of Section 320 of the Code. The five-Judge Bench referred to quite a few decisions of this Court including the decisions in *Madhu Limaye*, *Bhajan Lal*, *L. Muniswamy*, *Simrikhia*, *B.S. Joshi*, and *Ram Lal* and framed the following guidelines: (*Kulwinder Singh case*, CTC pp. 783-84, para 21)

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

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

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

(d) Minor offences as under Section 279 IPC may be permitted to be compounded on the basis of legitimate settlement between the parties. Yet another offence which remains non-compoundable is Section 506(II) IPC, which is punishable with 7 years imprisonment. It is the judicial experience that an offence under Section 506 IPC in most cases is based on the oral declaration with different shades of intention. Another set of offences, which ought to be liberally compounded, are Sections 147 and 148 IPC, more particularly where other offences are compoundable. It may be added here that the State of Madhya Pradesh vide M.P. Act 17 of 1999 (Section 3) has made Sections 506(II) IPC, 147 IPC and 148 IPC compoundable offences by amending the schedule under Section 320 CrPC.

(e) The offences against human body other than murder and culpable homicide where the victim dies in the course of transaction would fall in the category where compounding may not be permitted. Heinous offences like highway robbery, dacoity or a case involving clear-cut

allegations of rape should also fall in the prohibited category. Offences committed by public servants purporting to act in that capacity as also offences against public servant while the victims are acting in the discharge of their duty must remain non-compoundable. Offences against the State enshrined in Chapter VII (relating to army, navy and air force) must remain non-compoundable.

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

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

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

49. It was further held as under: (*Kulwinder Singh case*, CTC pp. 784-85, paras 23 & 25)

"23. No embargo, be in the shape of Section 320(9) CrPC, or any other such curtailment, can whittle down the power under Section 482 CrPC.

25. The only inevitable conclusion from the above discussion is that there is no statutory bar under CrPC which can affect the inherent power of this Court under Section 482. Further, the same cannot be limited to matrimonial cases alone and the court has the wide power to quash the proceedings even in non-compoundable offences notwithstanding the bar under Section 320 CrPC, in order to prevent the abuse of law and to secure the ends of justice. The power under Section 482 CrPC is to be exercised *ex debito justitiae* to prevent an abuse of process of court. There can neither be an exhaustive list nor the defined parameters to enable a High Court to invoke or exercise its inherent powers. It will always depend upon the facts and circumstances of each case. The power under Section 482 CrPC has no limits. However, the High Court will exercise it sparingly and with utmost care and caution. The exercise of power has to be with circumspection and restraint. The court is a vital and an extraordinary effective instrument to maintain and control social order. The courts play role of paramount importance in achieving peace, harmony and everlasting congeniality in society. Resolution of a dispute by way of a compromise between two warring groups, therefore, should attract the immediate and prompt attention of a court which should endeavour to give full effect to the same unless such compromise is abhorrent to lawful composition of the society or would promote savagery."

50. A three-Judge Bench of the Bombay High Court in *Abasaheb Yadav Honmane v. State of Maharashtra* [(2008) 2 Mah LJ 856] dealt with the inherent power of the High Court under Section 482 of the Code vis-à-vis the express bar for compounding of the non-compoundable offences in Section 320(9) of the Code. The High Court referred to various decisions of this Court and also the decisions of the various High Courts and then stated as follows: (Mah LJ pp. 904-05, para 14)

"14. The power of compounding on one hand and quashing of criminal proceedings in exercise of inherent powers on the other, are incapable of being treated as synonymous or even

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

51. Section 320 of the Code articulates public policy with regard to the compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the court and the composition of certain offences with the permission of the court. The offences punishable under the special statutes are not covered by Section 320. When an offence is compoundable under Section 320, abatement of such offence or an attempt to commit such offence or where the accused is liable under Section 34 or 149 IPC can also be compounded in the same manner. A person who is under 18 years of age or is an idiot or a lunatic is not competent to contract compounding of offence but the same can be done on his behalf with the permission of the court. If a person is otherwise competent to compound an offence is dead, his legal representatives may also compound the offence with the permission of the court. Where the accused has been committed for trial or he has been convicted and the appeal is pending, composition can only be done with the leave of the court to which he has been committed or with the leave of the appeal court, as the case may be. The Revisional Court is also competent to allow any person to compound any offence who is competent to compound. The consequence of the composition of an offence is acquittal of the accused. Sub-section (9) of Section 320 mandates that no offence shall be compounded except as provided by this section. Obviously, in view thereof the composition of an offence has to be in accord with Section 320 and in no other manner.

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

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

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

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim *quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest*. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. *Ex debito justitiae* is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

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

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

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

relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed.

59. *B.S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji* [(2011) 10 SCC 705] do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in *B.S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji* this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment.

60. We find no incongruity in the above principle of law and the decisions of this Court in *Simrikhia, Dharampal, Arun Shankar Shukla, Ishwar Singh, Rumi Dhar* and *Ashok Sadarangani*. The principle propounded in *Simrikhia* that the inherent jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In *Dharampal* the Court observed the same thing that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Similar statement of law is made in *Arun Shankar Shukla*. In *Ishwar Singh* the accused was alleged to have committed an offence punishable under Section 307 IPC and with reference to Section 320 of the Code, it was held that the offence punishable under Section 307 IPC was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In *Rumi Dhar* although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for the commission of the offences under Sections 120-B/420/467/468/471 IPC along with the bank officers who were being prosecuted under Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act. The Court refused to quash the charge against the accused by holding that the Court would not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. *Ashok Sadarangani* was again a case where the accused persons were charged of having committed the offences under Sections 120-B, 465, 467, 468 and 471 IPC and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilised such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in *B.S. Joshi, Nikhil Merchant and Manoj Sharma* and it was held that *B.S. Joshi* and *Nikhil Merchant* dealt with

different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in *Ashok Sadarangani* was more on the criminal intent than on a civil aspect. The decision in *Ashok Sadarangani* supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing.

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominately civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

62. In view of the above, it cannot be said that *B.S. Joshi*, *Nikhil Merchant* and *Manoj Sharma* were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the Bench(es) concerned.

State of M.P. v. Deepak
(2014) 10 SCC 285

DR A.K. SIKRI, J.— Leave granted. As counsel for both the parties expressed their willingness to argue the matter finally at this stage, we heard the appeal finally.

2. This appeal is preferred by the State of Madhya Pradesh against the judgment and order dated 10-5-2013 [*Deepak v. State of M.P.*, MCRC No. 3527 of 2013, decided on 10-5-2013 (MP)] passed by the High Court in the petition filed by Respondents 1 and 2, herein. The said petition was filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as “the Code”) for compounding/quashing of criminal proceedings arising out of Crime No. 171 of 2013 under Sections 307/34 IPC registered at Police Station Kotwali, District Vidisha (M.P.) and consequent criminal proceedings bearing Criminal Case No. 582 of 2013 pending before the Chief Judicial Magistrate, Vidisha. The FIR was registered at the instance of Respondent 3 (hereinafter referred to as “the complainant”).

3. The complainant (Respondent 3), Deepak Ghenghat s/o Laxminarayan Ghenghat, had alleged that on 11-3-2013 at about 9.45 p.m., while he was going to Baraipura Chauraha for buying gutkha for his mother, Deepak Nahariya and Mukesh Nahariya (Respondents 1 and 2) met him near Sweeper Mohalla, Gali 1. On being asked by Respondent 1, in an abusive language, as to where he was proceeded to, the complainant protested against the use of such foul language. At this, Respondent 1 took out the sword which he was carrying and with an intention to kill the complainant, he inflicted a blow on his forehead by shouting “*you have lodged the report against my elder brother, today I will kill you*”. Respondent 1, thereafter, inflicted blows above the ear on the back side of the head and on the left arm. When the complainant informed that he would lodge a report with the police, Respondent 2 caught hold of him and threatened that if he lodges the report, then he would not let the complainant reside in the mohalla. By that time, brother of the complainant Suraj and one Preeti reached the spot and rescued the complainant.

4. On the same date, the complainant lodged FIR No. 171 of 2013 at Police Station Kotwali, Vidisha (M.P.) for the offence punishable under Section 307 IPC read with Section 34 IPC which triggered the criminal investigation and complainant Deepak Ghenghat was sent for medical examination. Thereafter, on 12-3-2013 the police reached on the spot and prepared the spot map, recorded the statements of the witnesses under Section 161, arrested the accused persons and seized certain articles.

5. On 14-4-2013, articles which were seized were sent for forensic examination. After due and proper investigation a charge-sheet was filed on 6-4-2013 for the offences punishable under Section 307 IPC read with Section 34 IPC. The respondent filed Misc. Criminal Case No. 3527 of 2013 before the High Court of Madhya Pradesh, Bench at Gwalior under Section 482 CrPC for quashing the criminal proceedings, arising out of FIR No. 171 of 2013 against the respondent on the basis of compromise, registered on 11-3-2013 under Section 307 IPC read with Section 34 IPC.

6. The High Court has accepted the said compromise after taking note of the submissions made before it at the Bar, and the fact that the complainant had also submitted that he did not wish to

prosecute the accused persons as he had settled all the disputes amicably with them. For quashing the proceedings, the High Court has referred to the judgment of this Court in *Shiji v. Radhika* [(2011) 10 SCC 705].

7. Aggrieved by the aforesaid order, the State is before us in the present appeal. It is primarily submitted by the learned counsel for the State that the judgment in *Shiji* is not applicable to the facts of the present case inasmuch as the incident in question had its genesis and origin in a civil dispute between the parties and having regard to the same the Court had accepted the settlement and quashed the proceedings when it found that the parties had resolved the said dispute between them. It was pleaded that on the contrary, in the present case the accused persons are habitual offenders and they had threatened the complainant and extracted the compromise which was not voluntary. The learned counsel also referred to the injuries suffered by the complainant which are described in the report as a result of the medical examination carried out on the person of the complainant immediately after the incident. He pleaded that the offence under Section 307 IPC was, prima facie, made out and for such a heinous crime the High Court should not have exercised its discretion under Section 482 CrPC and quashed the proceedings as the offence in question was non-compoundable under Section 320 of the Code.

8. The learned counsel for the accused on the other hand submitted that since the parties had settled the matter, the High Court had rightly accepted the compromise between the parties. This action of the High Court was justified as parties had buried the hatchet and wanted to live peacefully. He thus, pleaded that this Court should not interfere with the aforesaid exercise of discretion by the High Court.

9. After examining the facts of this case and the medical record, we are of the opinion that it was not a case where the High Court should have quashed the proceedings in exercise of its discretion under Section 482 of the Code. We may, at the outset, refer to the judgment of this Court in *Gulab Das v. State of M.P.* [(2011) 10 SCC 765] wherein following view was taken: (SCC p. 767, paras 8-9)

“8. In the light of the submissions made at the Bar the only question that falls for determination is whether the prayer for composition of the offence under Section 307 IPC could be allowed having regard to the compromise arrived at between the parties. Our answer is in the negative.

9. This Court has in a long line of decisions ruled that offences which are not compoundable under Section 320 of the Code of Criminal Procedure cannot be allowed to be compounded even if there is any settlement between the complainant on the one hand and the accused on the other. Reference in this regard may be made to the decisions of this Court in *Ram Lal v. State of J&K* [(1999) 2 SCC 213] and *Ishwar Singh v. State of M.P.* [(2008) 15 SCC 667] We have, therefore, no hesitation in rejecting the prayer for permission to compound the offence for which Appellants 2 and 3 stand convicted.”

10. A similar situation, as in the present case, was found to have arisen in *State of Rajasthan v. Shambhu Kewat* [(2014) 4 SCC 149] . In that case also, the High Court had accepted the settlement between the parties in an offence under Section 307 read with Section 34 IPC and set the accused at large by acquitting them. The settlement was arrived at during the pendency of appeal before the High Court against the order of conviction and sentence of the Sessions Judge holding the accused persons guilty of the offence under Sections 307/34

IPC. Some earlier cases of compounding of offence under Section 307 IPC were taken note of, noticing that under certain circumstances, the Court had approved the compounding whereas in certain other cases such a course of action was not accepted. In that case, this Court took the view that the High Court was not justified in accepting the compromise and setting aside the conviction. While doing so, following discussion ensued: (*Shambhu Kewat case* (SCC pp. 154-56, paras 12-15))

“12. We find in this case, such a situation does not arise. In the instant case, the incident had occurred on 30-10-2008. The trial court held that the accused persons, with common intention, went to the shop of the injured Abdul Rashid on that day armed with iron rod and a strip of iron and, in furtherance of their common intention, had caused serious injuries on the body of Abdul Rashid, of which Injury 4 was on his head, which was of a serious nature.

13. Dr Rakesh Sharma, PW 5, had stated that out of the injuries caused to Abdul Rashid, Injury 4 was an injury on the head and that injury was ‘grievous and fatal for life’. PW 8, Dr Uday Bhomik, also opined that a grievous injury was caused on the head of Abdul Rashid. Dr Uday conducted the operation on the injuries of Abdul Rashid as a neurosurgeon and fully supported the opinion expressed by PW 5 Dr Rakesh Sharma that Injury 4 was ‘grievous and fatal for life’.

14. We notice that the gravity of the injuries was taken note of by the Sessions Court and it had awarded the sentence of 10 years' rigorous imprisonment for the offence punishable under Section 307 IPC, but not by the High Court. The High Court has completely overlooked the various principles laid down by this Court in *Gian Singh v. State of Punjab* [(2012) 10 SCC 303], and has committed a mistake in taking the view that the injuries were caused on the body of Abdul Rashid in a fight occurred on the spur in the heat of the moment. It has been categorically held by this Court in *Gian Singh* that the Court, while exercising the power under Section 482 CrPC, must have ‘due regard to the nature and gravity of the crime’ and ‘the societal impact’. Both these aspects were completely overlooked by the High Court. The High Court in a cursory manner, without application of mind, blindly accepted the statement of the parties that they had settled their disputes and differences and took the view that it was a crime against ‘an individual’, rather than against ‘the society at large’.

15. *We are not prepared to say that the crime alleged to have been committed by the accused persons was a crime against an individual, on the other hand it was a crime against the society at large.* Criminal law is designed as a mechanism for achieving social control and its purpose is the regulation of conduct and activities within the society. Why Section 307 IPC is held to be non-compoundable, is because the Code has identified which conduct should be brought within the ambit of non-compoundable offences. Such provisions are not meant just to protect the individual but the society as a whole. The High Court was not right in thinking that it was only an injury to the person and since the accused persons (sic victims) had received the monetary compensation and settled the matter, the crime as against them was wiped off. Criminal justice system has a larger objective to achieve, that is, safety and protection of the people at large and it would be a lesson not only to the offender, but to the individuals at large so that such crimes would not be committed by anyone and money would not be a substitute for the crime committed against the society. Taking a lenient view on a serious offence like the present one, will leave a wrong impression about the criminal justice system and will encourage

further criminal acts, which will endanger the peaceful coexistence and welfare of the society at large.” (emphasis supplied)

11. We would like to mention at this stage that in some cases the offences under Section 307 IPC are allowed to be compounded, whereas in some other cases it is held to be contrary. This dichotomy was taken note of by referring to those judgments, in *Narinder Singh v. State of Punjab* [(2014) 6 SCC 466], and by reconciling those judgments, situations and circumstances were discerned where compounding is to be allowed or refused. To put it simply, it was pointed out as to under what circumstances the Courts had quashed the proceedings acting upon the settlement arrived at between the parties on the one hand and what were the reasons which had persuaded the Court not to exercise such a discretion. After thorough and detailed discussion on various facets and after revisiting the entire law on the subject, following principles have been culled out in the said decision: (SCC pp. 482-84, para 29)

“29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. *Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.*

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.”

(emphasis supplied)

12. It is clear from the reading of the passages extracted above, that the offence under Section 307 is not treated as a private dispute between the parties inter se but is held to be a crime

against the society. Further, guidelines are laid down for the Courts to deal with such matters when application for quashing of proceedings is filed, after the parties have settled the issues between themselves.

13. When we apply the ratio/principle laid down in *Narinder Singh case* [(2014) 6 SCC 466] to the facts of the present case, we find that the injuries inflicted on the complainant were very serious in nature. The accused was armed with sword and had inflicted blows on the forehead, ear, back side of the head as well as on the left arm of the complainant. The complainant was attacked five times with the sword by the accused person out of which two blows were struck on his head. But for the timely arrival of the brother of the complainant and another lady named Preeti, who rescued the complainant, the attacks could have continued. In a case like this, the High Court should not have accepted the petition of the accused under Section 482 of the Code.

14. As a result of the aforesaid discussion, this appeal is allowed and the order [*Deepak v. State of M.P.*, MCRC No. 3527 of 2013, decided on 10-5-2013 (MP)] of the High Court is set aside. The Magistrate concerned shall proceed with the trial of the case.

THE END

Satender Kumar Antil v. Central Bureau of Investigation

(2022) 10 SCC 51

M. M. SUNDRESH, J.

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 (S.37), PMLA (S.45), UAPA (S.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 Vs. State of UP, 2021 SCC online SC 615))

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 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 S.37, 45 PMLA, 212(6) Companies Act 43 d(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 vs. CBI, (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.

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.

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.

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*, (2018) 11 SCC 1, held that:

“19. In *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (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*, 1923 SCC OnLine Cal 318 : 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*, 1931 SCC OnLine All 60 : 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*, 1931 SCC OnLine All 14 : 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 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.

28. Coming nearer home, it was observed by Krishna Iyer, J., in **Gudikanti Narasimhulu v. State** [*Gudikanti Narasimhulu v. State*, (1978) 1 SCC 240] 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.’

Section 167(2) of the Code

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*, (2021) 2 SCC 485.

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 437 of the Code

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***, (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.*, 2011 SCC OnLine Bom 1261: “13. At this stage, it may be useful to quote the observations of this Court in *"Ambarish Rangshhi Patnigere v. State of Maharashtra"* referred supra, which reads thus

*“17. It may be noted here that the learned Counsel for intervenor contended that the Magistrate did not have jurisdiction to grant bail because the offences under Sections 467 and 409 IPC, 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) Cr.P.C., unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including **Prahlad Singh Bhati v. NCT, Delhi and Anr.** 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 offence 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 Cr.P.C., both these offences are triable by a Magistrate of First Class. It appears that there are several offences including under sec. 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) Cr.P.C. 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** 27 Cri.L.J. 1926 page 1063 and also by the Judgment of the Kerala High Court in *Satyan v. State* 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**, AIR 1925 129 : (1925) 26 Cri LJ 427 while interpreting the phrase "an offence punishable with death or transportation for life" in Section 497 Cr.P.C. 1898. But that case was dissented from in **Mahammed Eusoof v. Emperor**, 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**, (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 I.P.C. 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 S. 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 Singh 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 IPC, 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 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

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.

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.

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 2017 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.

Rakesh Kumar Paul v. State of Assam

(2017) 15 SCC 67

Madan B. Lokur, J. --- In Measure for Measure, the Duke complains (in the given situation): “And liberty plucks justice by the nose”.¹ The truth is that personal liberty cannot be compromised at the altar of what the State might perceive as justice; justice for one might be perceived as injustice for another. We are therefore unable to agree with learned counsel for the State that the petitioner is not entitled to his liberty through what is commonly referred to as ‘default bail’ or that the justice of the case should persuade us to decide otherwise.

The facts of the case

2. The facts in these petitions are not in dispute and we need not go into them in any great detail since we are really concerned with the interpretation of the words “imprisonment for a term not less than ten years” appearing in clause (i) of proviso (a) to Section 167(2) of the Code of Criminal Procedure, 1973 as amended in 1978.

4. Ordinarily, the maximum period of detention during the course of investigation (without a charge sheet or challan being filed) would be 60 days in terms of clause (ii) of proviso (a) to Section 167(2) of the Code of Criminal Procedure, 1973 (for short ‘the Cr.P.C.’). In the petitioner’s case, this period would come to an end on 3rd January, 2017. However, according to the State, since the petitioner had committed offences which could result in “imprisonment for a term not less than ten years” he could be kept in custody for a period of 90 days in terms of clause (i) of proviso (a) to Section 167(2) of the Cr.P.C. Therefore, the question before us is whether, pending investigation, the petitioner could be kept in custody for a maximum period of 60 days in terms of clause (ii) of proviso (a) to Section 167(2) of the Cr.P.C. or for 90 days in terms of clause (i) of proviso (a) to Section 167(2) of the Cr.P.C. without a charge sheet being filed.

6. Subsequently, on or about 11th January, 2017 (after the expiry of 60 days of detention but before the expiry of 90 days of detention), the petitioner applied for bail before the Gauhati High Court, but that application was rejected on 11th January, 2017. The prayer made in the application for bail was for grant of “regular bail” under Section 439 of the Cr.P.C. This is of some importance because, according to learned counsel for the State, assuming the petitioner could be detained only for a maximum period of 60 days during investigations, he had not

applied for 'default bail', that is bail in default of the prosecution filing a charge sheet against him soon after that 60 day period of detention, but had only applied for "regular bail".

7. At this stage, it may be mentioned that even though the petitioner had not applied for 'default bail' he did contend before the High Court that he was entitled to 'default bail' since no charge sheet had been filed against him within 60 days of his arrest during investigations. This submission was considered by the High Court but rejected, not on the ground that the petitioner had not applied for 'default bail' but on the ground that he could be detained for 90 days without a charge sheet being filed and that period of 90 days had not yet come to an end.

History behind the enactment of section 167 of the CrPC

10. The Code of Criminal Procedure enacted in 1898 contained Section 167 which laid down the procedure to be followed in the event the investigation into an offence is not completed within twenty-four hours. What is significant is that the legislative expectation was that the investigation would ordinarily be completed within twenty-four hours. Incidentally, this legislative expectation continues till today. Whatever be the anxiety of the Legislature in 1898, there can be no gainsaying that investigation into an offence deserves an early closure, one way or the other. Therefore, when Section 167 was enacted in the Code of Criminal Procedure, 1898 it was premised on the conclusion of investigations within twenty-four hours or within 15 days on the outside, regardless of the nature of the offence or the punishment. Section 167 of the Code of Criminal Procedure, 1898 reads as follows:

167. [Marginal Note: Procedure when investigation cannot be completed in twenty-four hours] (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not 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 no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the State Government shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

11. Unfortunately, all laws tend to be misused whenever opportunity knocks, and Section 167 of the Code of Criminal Procedure, 1898 was no exception. Since there was a practical difficulty in completing investigations within the 15 day time limit, the prosecution often took recourse to the provisions of Section 344 of the Code of Criminal Procedure, 1898 and filed a preliminary or incomplete report before the Magistrate to keep the accused in custody. The Law Commission of India noted this in its 41st Report (after carefully studying several earlier Reports) and proposed to increase the time limit for completion of investigations to 60 days, acknowledging that “such an extension may result in the maximum period becoming the rule in every case as a matter of routine: but we trust that proper supervision by the superior courts will prevent that.”

13. Accordingly, Section 167 of the Code of Criminal Procedure, 1973 (the Cr.P.C.) was enacted as follows, with the recommended time limit and again regardless of the nature of the offence or the punishment.

167. [Marginal Note: Procedure when investigation cannot be completed in twenty-four hours] (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such

Magistrate. (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole: and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that (a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exists for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every

14. A few years later in 1978, a need was felt to amend Section 167 of the Cr.P.C. by not only extending the period for completing investigation but also relating that period to the offence. Therefore, a shift was proposed to grant an aggregate period of 90 days for completing the investigation in cases relating to offences punishable with death, imprisonment for life or “imprisonment for not less than ten years or more” and up to 60 days in any other case, as stated in the Notes on Clauses accompanying the Statement of Objects and Reasons dated 9th May, 1978 for amending the statute. What is of significance (for our purposes) is the use of the words “imprisonment for not less than ten years or more”. In our opinion, the use of the words “or more” gives a clear indication that the period of 90 days was relatable to an offence punishable with a minimum imprisonment for a period of not less than ten years, if not more. The Notes on Clauses reads as follows:

Clause 13.- Section 167 is being amended to empower the Magistrate to authorise detention, pending investigation, for an aggregate period of 90 days in cases where the investigation relates to offences punishable with death, imprisonment for life or imprisonment for not less than ten years or more and up to 60 days in any other case. These amendments are intended to remove difficulties which have been actually experienced in relation to the investigation of offences of a serious nature.

15. When Section 167 of the Cr.P.C. was enacted, it was perhaps felt that the words “or more” were superfluous (as indeed we believe that they are in the context of the use of the words “not less than”) and Section 167 came to read:

167. Procedure when investigation cannot be completed in twenty-four hours -

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that, —

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and

does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention 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 paragraph (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. (2A) to (6) Not relevant for the present purposes

16. The significance of the period of 60 days or 90 days, as the case may be, is that if the investigation is not completed within that period then the accused (assuming he or she is in custody) is entitled to 'default bail' if no charge sheet or challan is filed on the 60th or 90th day, the accused applies for 'default bail' and is prepared to and does furnish bail for release. As can be seen from the narration of facts, no charge sheet or challan was filed against the petitioner on the 60th day but was filed before the conclusion of 90 days. Consequently, was the petitioner entitled to 'default bail' after 60 days? According to the petitioner the answer is in the affirmative since he had not committed an offence punishable with imprisonment for

not less than ten years, but according to the State he had committed an offence punishable with imprisonment for ten years.

18. So, what was the offence allegedly committed by the petitioner? According to the State he was liable for punishment for an offence, inter alia, under Section 13(1) of the PC Act, the offence being “punishable with imprisonment for a term which shall be not less than four years but which may extend to ten years” and fine. Therefore, the view of the State is that since the petitioner could face imprisonment that could extend to 10 years, the date for applying for ‘default bail’ would commence on the expiry of 90 days. However, according to the petitioner, the date for obtaining ‘default bail’ would commence on the expiry of 60 days that is on or about 3rd January, 2017.

Discussion on Interpretation

19. To answer the primary question before us, we need to first decide the meaning of the expression “punishable with imprisonment for not less than ten years” occurring in Clause (i) to proviso (a) of Section 167(2) of the Cr.P.C. Its interpretation stirred considerable debate and discussion before us.

20. Learned counsel for the petitioner relied upon *Rajeev Chaudhary v. State (NCT) of Delhi* to contend that “not less than” 10 years imprisonment must mean a minimum of 10 years imprisonment. In that decision, the offence was punishable under Section 386 of the IPC which provides that an accused, if found guilty, shall be punished with imprisonment for a term “which may extend to 10 years”.³ This Court contrasted that expression with the words “not less than” occurring in Clause (i) to proviso (a) of Section 167(2) of the Cr.P.C. Juxtaposing the two expressions, this Court concluded that the words “not less than” in Clause (i) would mean that the imprisonment should be 10 years or more and would cover only those offences for which punishment of imprisonment could be for a clear period of 10 years or more.

24. In the context of the word “punishable” occurring in Clause (i) and the meaning attached to this word taken from several dictionaries, this Court held in *Bhupinder Singh* that where a minimum and maximum sentence is prescribed, both are impossible depending upon the facts of the case. Therefore, if an offence is punishable with imprisonment that may extend upto or beyond or including 10 years, then the period available for completing investigations would be 90 days before the provision for ‘default bail’ kicks in. It was said in paragraph 15 of the Report:

“Where minimum and maximum sentences are prescribed, both are imposable depending on the facts of the cases. It is for the court, after recording conviction, to impose appropriate sentence. It cannot, therefore, be accepted that only the minimum sentence is imposable and not the maximum sentence. Merely because minimum sentence is provided that does not mean that the sentence imposable is only the minimum sentence.”

25. While it is true that merely because a minimum sentence is provided for in the statute it does not mean that only the minimum sentence is imposable. Equally, there is also nothing to suggest that only the maximum sentence is imposable. Either punishment can be imposed and even something in between. Where does one strike a balance? It was held that it is eventually for the court to decide what sentence should be imposed given the range available. Undoubtedly, the Legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum is laid down, the sentencing judge has no option but to give a sentence “not less than” that sentence provided for. Therefore, the words “not less than” occurring in Clause (i) to proviso (a) of Section 167(2) of the Cr.P.C. (and in other provisions) must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 167 of the Cr.P.C. these words must relate to an offence punishable with a minimum of 10 years imprisonment.

27. It is true that an offence punishable with a sentence of death or imprisonment for life or imprisonment for a term that may extend to 10 years is a serious offence entailing intensive and perhaps extensive investigation. It would therefore appear that given the seriousness of the offence, the extended period of 90 days should be available to the investigating officer in such cases. In other words, the period of investigation should be relatable to the gravity of the offence – understandably so. This could be contrasted with an offence where the maximum punishment under the IPC or any other penal statute is (say) 7 years, the offence being not serious or grave enough to warrant an extended period of 90 days of investigation. This is certainly a possible view and indeed the Cr.P.C. makes a distinction in the period of investigation for the purposes of ‘default bail’ depending on the gravity of the offence. Nevertheless, to avoid any uncertainty or ambiguity in interpretation, the law was enacted with two compartments. Offences punishable with imprisonment of not less than ten years have been kept in one compartment equating them

with offences punishable with death or imprisonment for life. This category of offences undoubtedly calls for deeper investigation since the minimum punishment is pretty stiff. All other offences have been placed in a separate compartment, since they provide for a lesser minimum sentence, even though the maximum punishment could be more than ten years imprisonment. While such offences might also require deeper investigation (since the maximum is quite high) they have been kept in a different compartment because of the lower minimum imposable by the sentencing court, and thereby reducing the period of incarceration during investigations which must be concluded expeditiously. The cut-off, whether one likes it or not, is based on the wisdom of the Legislature and must be respected.

Default Bail as an Indefeasible Right

34. What is forgotten is that the indefeasible right for 'default bail' accrued to the petitioner when the period of 60 days for completing the investigation and filing a charge sheet came to an end on 3rd or 4th January, 2017 and that the indefeasible right continued till 24th January, 2017. The question is whether during this interregnum the petitioner was entitled to 'default bail' or not? Ordinarily, the answer would be "yes" but in the present case, the petitioner was not granted bail and a charge sheet was filed against him on 24th January, 2017. Was his indefeasible right completely taken away?

38. This Court also dealt with the decision rendered in Sanjay Dutt and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohamed Iqbal Madar Sheikh v. State of Maharashtra¹² wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the

indefeasible right of the accused for ‘default bail’ during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court.

Procedure for Obtaining Default Bail

40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for ‘default bail’ on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court – he made no specific application for grant of ‘default bail’. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact been filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore, it is not as if the petitioner did not make any application for default bail – such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for ‘default bail’ or an oral application for ‘default bail’ is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

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.

42. In *Sunil Batra II v. Home Secretary, Delhi Administration* this Court accepted a letter, which was treated as petition, written by a prisoner in Tihar Jail, Delhi complaining of inhuman torture inflicted on another prisoner by the Jail Warder. In *Hussainara Khatoon v. State of Bihar* a number of writ petitions, some by way of a letter, were

grouped together and treated as habeas corpus petitions. In *Rubabbuddin Sheikh v. State of Gujarat*¹⁵ the brother of the deceased wrote a letter to the Chief Justice of India complaining of a fake encounter and subsequent disappearance of his sister-in-law. This was treated as a habeas corpus petition. In *Kishore Singh Ravinder Dev v. State of Rajasthan* the petitioners sent a telegram to a learned judge of this Court complaining of solitary confinement of prisoners. The telegram was treated as a habeas corpus petition and the concerned persons were directed to be released from solitary confinement. In *Paramjit Kaur (Mrs.) v. State of Punjab* a telegram received at the residential office of a learned judge of this Court alleging an incident of kidnapping by the police was treated as a habeas corpus petition. In *Bandhua Mukti Morcha v. Union of India* a petition addressed to a learned judge of this Court relating to the inhumane and intolerable conditions of stone quarry workers in many States and how many of them were bonded labour was treated as a writ petition on the view that the “Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight-jacket formula”. In *People’s Union for Democratic Rights v. Union of India* a letter addressed to a learned Judge of this Court concerning violation of various labour laws in the construction projects connected to the Asian Games was treated as a writ petition. In *Dr. Upendra Baxi (I) v. State of Uttar Pradesh* a letter relating to inhuman conditions in the Agra Protective Home for Women was treated as a writ petition and in *Sheela Barse v. State of Maharashtra* a letter addressed by a journalist complaining of custodial violence against woman prisoners in Bombay was treated as a writ petition. These cases are merely illustrative of the personal liberty jurisprudence of this Court and in matters pertaining to Article 21 of the Constitution of India this Court has consistently taken the view that it is not advisable to be ritualistic and formal. However, we must make it clear that we should not be understood to suggest that procedures must always be given a go-by – that is certainly not our intention.

Duty of the Courts

43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, it is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right. In *Khatril v. State of Bihar* the Judicial Magistrate did not provide legal representation to the accused since they did not ask for it. It was held by this Court that this was unacceptable and that

the Magistrate or the Sessions Judge before whom an accused appears must be held under an obligation to inform the accused of his or her entitlement to obtain free legal assistance at the cost of the State. *In Suk Das v. Union Territory of Arunachal Pradesh* the accused was tried and convicted without legal representation, due to his poverty. He had not applied for legal representation but notwithstanding this, this Court held that the trial was vitiated and the sentence awarded was set aside, particularly since the accused was not informed of his entitlement to free legal assistance, nor was an inquiry made from him whether he wanted a lawyer to be provided at State expense. In *Rajoo @ Ramakant v. State of Madhya Pradesh* the High Court dismissed the appeal of the accused without enquiring whether he required legal assistance at the expense of the State even though he was unrepresented.

Application of the Law to the Petitioner

46. It was submitted that as of today, a charge sheet having been filed against the petitioner, he is not entitled to 'default bail' but must apply for regular bail the 'default bail' chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4th January, 2017 and 24th January, 2017 when no charge sheet had been filed, during which period he had availed of his indefeasible right of 'default bail'. It would have been another matter altogether if the petitioner had not applied for 'default bail' for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for 'default bail' during the interregnum between 4th January, 2017 and 24th January, 2017 as is evident from the decision of the High Court rendered on 11th January, 2017. On the contrary, he had availed of his right to 'default bail' which could not have been defeated on 11th January, 2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of opinion that the petitioner had satisfied all the requirements of obtaining 'default bail' which is that on 11th January, 2017 he had put in more than 60

days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

Conclusion

49. The petitioner is held entitled to the grant of 'default bail' on the facts and in the circumstances of this case. The Trial Judge should release the petitioner on 'default bail' on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case.

50. We allow the petition and set aside the judgment and order of the High Court.

State of Gujarat v. Kishanbhai

CRIMINAL APPEAL NO. 1485 OF 2008

Jagdish Singh Khehar, J.---- A complaint was lodged at Navrangpura Police Station, Ahmedabad, alleging the kidnapping/abduction of a six year old girl child Gomi daughter of Keshabhai Mathabhai Solanki and Laliben on 27.2.2003 at around 6:00 p.m. by the accused Kishanbhai son of Velabhai Vanabhai Marwadi. It was alleged, that the accused had enticed Gomi with a “gola” (crushed ice, with sweet flavoured syrup), and thereupon had taken her to Jivi’s field, where he raped her. He had murdered her by inflicting injuries on her head and other parts of the body with bricks. In order to steal the “jhanjris” (anklets) worn by her, he had chopped off her feet just above her ankles. The aforesaid complaint was lodged, after the body of the deceased Gomi was found from Jivi’s field, at the instance of the accused Kishanbhai. He had then covered her body with his shirt, and had left Jivi’s field. Kishanbhai the accused, then took the anklets stolen by him to Mahavir Jewellers, a shop owned by Premchand Shankerlal. He pledged the anklets at the above shop, for a sum of Rs.1,000/-. The accused Kishanbhai was confronted by Baghabhai and others constituting the search party, whilst he was on his way back to his residence. Kishanbhai, despite stating that he had not taken her away, had informed those searching for Gomi, that she could be at Jivi’s field. On the suggestion of Kishanbhai, the search party had gone to Jivi’s farm, where they found the body of Gomi.

4. Based on the aforesaid fact situation, confirmed through the investigation carried on by the Police, a charge-sheet was framed against the accused Kishanbhai under Sections 363, 369, 376, 394, 302 and 201 of the Indian Penal Code, and Section 135(1) of the Bombay Police Act. The above charge-sheet was filed before the Metropolitan Magistrate, Ahmedabad. Since the offences involved could be tried only by a Court of Session, the Metropolitan Magistrate, committed the matter to the Court of Session. On 8.3.2004, the Sessions Court to which the matter came to be assigned, for trial, framed charges. Since the accused Kishanbhai denied his involvement in the matter, the court permitted the prosecution to lead evidence.

5. The prosecution examined 14 witnesses. The statement of the accused Kishanbhai was thereafter recorded under Section 313 of the Code of Criminal Procedure. In his above statement, the accused Kishanbhai denied his involvement. Even though an opportunity was afforded to Kishanbhai, he did not lead any evidence in his defence. After examining

the evidence produced by the prosecution, the Trial Court vide its judgment dated 18.8.2004, arrived at the conclusion that prosecution had successfully proved its case beyond reasonable doubt. By a separate order dated 18.8.2004 the Trial Court sentenced Kishanbhai to death by hanging, subject to confirmation of the said sentence by the High Court of Gujarat at Ahmedabad (hereinafter referred to as the 'High Court') under Section 366 of the Code of Criminal Procedure.

6. In the above view of the matter, the proceedings conducted by the Court of Session, were placed before the High Court at the behest of the State of Gujarat, as Confirmation Case No. 7 of 2004. Independently of the confirmation proceedings, the accused Kishanbhai, aggrieved by the judgment and order of sentence dated 18.8.2004, in Sessions Case No. 346 of 2003, filed Criminal Appeal No. 1549 of 2004 before the High Court.

7. The criminal appeal filed by the accused Kishanbhai was accepted by the High Court. Kishanbhai was acquitted by giving him the benefit of doubt. The Confirmation Case No. 7 of 2004 was turned down in view of the judgment of acquittal rendered by the High Court while allowing Criminal Appeal no. 1549 of 2004.

8. Dissatisfied with the order passed by the High Court, the State of Gujarat approached this Court by filing Petition for Special Leave to Appeal (Crl.) No. 599 of 2006. On 11.9.2008 leave to appeal was granted. Thereupon, the matter came to be registered as Criminal Appeal No. 1485 of 2008.

9. Before this Court, learned counsel for the appellant, in order to substantiate the guilt of the accused-respondent Kishanbhai, has tried to project that the prosecution was successful in demonstrating an unbroken chain of circumstances, clearly establishing the culpability of the accused. In fact, the endeavour at the hands of the learned counsel for the appellant was to project an unbroken chain of circumstances to establish the guilt of the accused. Despite the defects in investigation and the prosecution of the case, as also, the inconsistencies highlighted by the High Court in the evidence produced by the prosecution, learned counsel for the State expressed confidence, to establish the guilt of the accused-respondent. In this behalf, it is essential to record the various heads under which submissions were advanced at the hands of the learned counsel for the appellant-State. We shall, therefore, briefly summarise all the contentions, and while doing so, refer to the evidence brought to our notice by the learned counsel for the appellant, to establish

the guilt of the accused-respondent, Kishanbhai. The submissions advanced before us are accordingly being recorded hereunder :

a) First and foremost, learned counsel for the appellant, in order to connect the accused with the crime under reference, extensively relied upon the evidence produced by the prosecution to show that the accused- respondent Kishanbhai was last seen with the victim. He was seen taking away the victim Gomi. For the above, reliance was placed on the statement of Naranbhai Manabhai Solanki PW5, who had deposed that he had seen the deceased Gomi with the accused-respondent Kishanbhai on 27.2.2003 at around 6:00 p.m. As per his deposition, he had seen Gomi eating a “gola” outside his (the witness’s) residence. At the same juncture, he had also seen the accused-respondent Kishanbhai coming from the side of Polytechnic. Kishanbhai, according to the deposition of PW5, had approached Gomi. Thereafter, as per the statement of PW5, the accused had carried away Gomi towards the side of the Polytechnic. In his testimony, Naranbhai Manabhai Solanki PW5, had also stated, that at about 9:00 pm, when he had again seen the accused-respondent Kishanbhai coming from the road leading to the Gulbai Tekra Police Chowki, he was asked, by those who were searching for Gomi, about her whereabouts. The accused was also asked about the whereabouts of Gomi, by Naranbhai Manabhai Solanki PW5 and by the son of PW 5 i.e., by Bababhai Naranbhai Solanki PW2. To the aforesaid queries, according to Naranbhai Manabhai Solanki PW5, the accused-respondent Kishanbhai had stated, that she might be sitting in Jivi’s field. In addition to the testimony of Naranbhai Manabhai Solanki PW5, reference was also made to the testimony of Dinesh Karshanbhai Thakore PW6. PW6, during his deposition, had asserted, that the accused-respondent Kishanbhai had come to his “lari” (handcart used by hawkers, to sell their products) for purchasing a “dabeli”. It was pointed out by Dinesh Karshanbhai Thakore PW6, that he had noticed the accused carrying a child aged about seven years, wearing a red frock. In his statement, he also affirmed that the accused-respondent Kishanbhai, had asked him for a knife but he had declined to give it to him. Thereupon, whilst leaving his “lari”, Kishanbhai had stolen a knife from his “lari”. It was also pointed out, that the knife recovered at the instance of the accused-respondent Kishanbhai, was identified by him as the one stolen from his “lari”. According to the learned counsel for the appellant, the last seen evidence referred to above stands duly corroborated by the deposition of Bababhai Naranbhai Solanki PW2, not only in his deposition before the Trial Court, but also in the

complaint filed by him at the first instance at Navrangpur Police Station, Ahmedabad, immediately after the recovery of the dead body of Gomi from Jivi's field.

b) learned counsel for the appellant also laid emphasis on the recovery of the weapon of offence, i.e., a blood-stained knife, at the instance of none other than the accused-respondent Kishanbhai himself. In order to substantiate the instant aspect of the matter, learned counsel placed reliance on the testimony of Dinesh Karshanbhai Thakore PW6, who deposed that the accused had visited his "lari" on the evening of 27.2.2003 for the purchase of a "dabeli". Additionally it was submitted, that the accused had led the police to Jivi's field, from where he got recovered the murder weapon, i.e., the same knife which he had stolen from the "lari" of Dinesh Karshanbhai Thakore PW6. The above knife had a blade measuring eight inches, including a steel handle of four inches. At the time of recovery of the knife, the same had stains of blood. The above knife was recovered by the police on 1.3.2003, in the presence of an independent witness, namely, Rameshbhai Lakhabhai Bhati PW1, who in his deposition clearly narrated, that the knife in question was recovered from Jivi's field, from under some stones at the instance of the accused-respondent Kishanbhai.

c) Learned counsel for the appellant, then referred to the medical evidence produced by the prosecution, so as to contend that the wounds inflicted on the person of Gomi, were with the murder weapon, i.e., the knife recovered at the instance of the accused-respondent Kishanbhai. For this, learned counsel placed reliance on the statement of Dr. Saumil Premchandbhai Merchant PW8, who had conducted the post-mortem examination of the deceased Gomi on 28.2.2003. In the post-mortem report, according to learned counsel, mention was made about several incised injuries which could have been inflicted with the knife stolen by the accused-respondent Kishanbhai. In this respect, reference was made to serial No.14 of the post-mortem notes (Exhibit 29) proved by Dr. Saumil Premchandbhai Merchant PW8, clearly indicating, that the injuries caused to the victim which have been referred to at serial No.7, could have been caused with the knife (muddamal Article No.19), i.e., the same knife, which had been recovered at the instance of the accused. Even in the inquest panchnama (Exhibit 14), it was recorded that both legs of the victim Gomi were mutated from just above the ankle with a sharp weapon, with the object of removing the anklets in the feet of the victim Gomi. This document, according to the learned counsel, also indicates the use of a knife in the occurrence under reference.

d) It was also the submission of the learned counsel for the appellant, that at the time of recovery of the body of the victim from Jivi's field, the same was found to be covered with a shirt with stripes. It was submitted, that the aforesaid shirt was identified as the shirt worn by the accused-respondent Kishanbhai, when he was seen carrying away the victim Gomi, on 27.2.2003. In this behalf, reliance was placed by the learned counsel for the appellant, on the testimony of Naranbhai Manabhai Solanki PW5. The above witnesses had identified the shirt as a white shirt with lines. To give credence to the testimony of Naranbhai Manabhai Solanki PW5, learned counsel also pointed out, that when the accused was found coming from the direction of the police station after the commission of the crime, he was seen wearing a black T-shirt. The statement of Naranbhai Manabhai Solanki PW5, was sought to be corroborated with the statement of Dinesh Karshanbhai Thakore PW6. The accused respondent is stated to have approached the "lari" of Dinesh Karshanbhai Thakore PW6 for purchasing a "dabeli", and at that juncture, the accused-respondent is stated to have been wearing a white lined shirt, and a green trouser. On the recovery of the shirt and trouser, they were marked as Mudammal Articles 8 and 14 respectively. Dinesh Karshanbhai Thakore PW6 had identified the shirt, as also, the trouser during the course of his deposition before the Trial Court. The green trouser worn by the accused-respondent was also identified by Bababhai Naranbhai Solanki PW2. Additionally, Bababhai Naranbhai Solanki PW2 deposed that a black colour T-shirt was worn by the accused-respondent when he was apprehended and brought to the police station. The above articles were also identified by Angha Lalabhai Marwadi PW12 and Naranbhai Lalbhai Desai PW13 who were the panch witnesses at the time of seizure of the abovementioned clothing.

e) It was also the submission of the learned counsel for the appellant, that the report of the forensic science laboratory was sufficient to confirm, that the accused respondent was the one who was involved in the commission of the crime under reference. In this behalf, it was pointed out that the victim Gomi was shown to have blood group "B+ve". According to the report of the Forensic Science Laboratory, the bricks recovered from the place of occurrence (which had been used in causing injuries on the head and other body parts of the victim), the panties worn by the deceased victim Gomi, the white shirt which was found on the body of the victim at the time of its recovery from Jivi's field, the T-shirt and the green trouser worn by the accused respondent Kishanbhai (at the time he was apprehended), and even the weapon of the crime, namely, the knife recovered at the

instance of the accused-respondent, were all found with blood stains. The forensic report reveals that the blood stains on all the above articles were of blood group “B+ve”. It was, therefore, the submission of the learned counsel for the appellant, that the accused-respondent was unmistakably shown to be connected with the crime under reference.

e) In order to substantiate the motive of the accused-respondent, learned counsel for the appellant relied upon the statement of the investigating officer Ranchhodji Bhojrajji Chauhan PW14, who had stated in his deposition that the owner of Mahavir Jewellers, i.e., Premchand Shankarlal Mehta had presented himself at the police station. The abovementioned jeweler is stated to have informed the police, that the accused respondent Kishanbhai had pawned the anklets belonging to the victim Gomi with him for a sum of Rs.1,000/-. Insofar as the identification of the anklets is concerned, reference was made to the statement of Keshobhai Madanbhai Solanki PW7, i.e., father of the victim who had identified the anklets marked as Muddamal Article No.18, as belonging to his daughter Gomi, which she was wearing when she had gone missing. Reference was also made to the statement of Jagdishbhai Bhagabhai Marwadi PW11, as also, the panchnama of recovery of the silver anklets which also, according to learned counsel, connects the accused to the crime.

f) Last but not the least, learned counsel for the appellant invited this Court’s attention to the statement tendered by the accused under Section 313 of the Code of Criminal Procedure. During the course of his above testimony, he was confronted with the evidence of the relevant witnesses depicting, that the victim Gomi was last seen in his company at 6:00 p.m. on 27.2.2003. He was also confronted with the fact, that he himself had informed the search party, that Gomi may be found at Jivi’s field. It is submitted, that the accused-respondent Kishanbhai, who had special knowledge about the whereabouts of the deceased, was bound to explain and prove when and where he had parted from the company of the victim Gomi. It was submitted that during the course of his deposition under Section 313 of the Code of Criminal Procedure, the accused could not tender any satisfactory explanation.

Based on the above evidence, it was the submission of the learned counsel for the appellant, that even in the absence of any eye witness account, the prosecution should be held to have been successful in establishing the guilt of the accused-respondent Kishanbhai through circumstantial evidence. The claim of circumstantial evidence

emerging from different witnesses summarized above, according to the learned counsel, leads to one and only one conclusion, namely, that the accused-respondent Kishanbhai alone had committed the criminal acts under reference. It was submitted, that the chain of circumstantial evidence, was sufficient to establish, that none other than the accused-respondent could have committed the alleged criminal actions. It was also contended, that no link in the chain of circumstantial evidence was missing, so as to render any ambiguity in the matter.

11. We would first of all, like to deal with the lapses committed by the investigating and prosecuting agencies in the process of establishing the guilt of the accused before the Trial Court. It will be relevant to mention that all these lacunae/deficiencies, during the course of investigation and prosecution, were pointed out by the High Court, in the impugned judgment. These constitute relevant aspects, which are liable to be taken into consideration while examining the evidence relied upon by the prosecution. We have summarised the aforesaid lapses, pointedly to enable us to correctly deal with the submissions advanced at the behest of the State. Since the guilt of the accused in the instant case is to be based on circumstantial evidence, it is essential for us to determine whether or not a complete chain of events stand established from the evidence produced by the prosecution. The above deficiencies and shortcomings are being summarised below:

a) According to the prosecution case, the jeweller had gone to the police station with the anklets on his own, after having read newspaper reports to the effect, that a girl had been raped and murdered and her anklets had been taken away. He had approached the police station under the suspicion, that the anklets pledged with him, might have belonged to the girl mentioned in the newspaper reports. One of the panch witnesses, namely, Jagdishbhai Marwari PW15 had deposed, that above Premchand Shankerlal had identified the accused Kishanbhai, as the very person who had pledged the anklets with him. In this behalf it is relevant to mention, that Premchand Shankerlal was not produced as a prosecution witness. It is important to notice, that the anklets handed over to the Police, were successfully established by the prosecution as the ones worn by the deceased Gomi. The lapse of the prosecution on account of not producing Premchand Shankerlal as prosecution witness, according to the High Court, resulted in a missing link in the chain of events which would have established the link of the accused Kishanbhai, with the anklets, and thereby convulsively connecting him with the crime.

b) The prosecution story further discloses, that Premchand Shankerlal the owner of Mahavir Jewellers, had executed a receipt with the accused Kishanbhai, depicting the pledging of the anklets for a sum of Rs.1,000/-. The above receipt according to Premchand Shankerlal, was thumb marked by the accused Kishanbhai. Even though the receipt indicates the name of the person who had pledged the anklets as Rajubhai, the same could clearly be a false name given by the person who pledged the anklets. Certainly, there could be no mistake in the identity of the thumb mark affixed on the said receipt. The prosecution could have easily established the identity of the pledger, by comparing the thumb impression on the receipt (exhibit), with the thumb impression of the accused-respondent Kishanbhai. This was however not done. The lapse committed by the prosecution in not producing Premchand Shankerlal as a witness, could have easily been overcome by proving the identity of the person who had pledged the anklets, by identifying the thumb impression on the receipt (exhibit 52), in accordance with law. In case the thumb impression turned out to be that of the accused Kishanbhai, he would be unmistakably linked with the crime. In case it was found not to be the thumb impression of the accused Kishanbhai, his innocence could also have been inferred. According to the High Court this important lapse in proving the prosecution case before the Trial Court, had resulted in a major obstacle in establishing the guilt/innocence of the accused.

c) It is also the case of the prosecution, that when the accused Kishanbhai was apprehended, a sum of Rs.940/- was recovered from his possession. According to the prosecution story the accused Kishanbhai had pledged the anklets at Mahavir Jewellers with Premchand Shankerlal for a sum of Rs. 1,000/-. In order to link the money recovered from his possession at the time of his detention, it was imperative for the prosecution to establish how and why a sum of Rs.940/- only, was recovered from the possession of the accused Kishanbhai. He ought to have been in possession of at least Rs.1,000/- i.e., the amount given to him by Premchand Shankerlal when he pledged the anklets at his shop, even if it is assumed that he had no money with him when he had pawned the anklets. This important link having not been established by the prosecution, breaks the chain of events necessary to establish the guilt of the accused Kishanbhai, and constitutes a serious lapse in the prosecution evidence.

d) It is apparent from the prosecution story, that the victim Gomi was raped. In establishing the factum of the rape the prosecution had relied upon the note prepared at the time of conducting the post-mortem examination of the deceased Gomi. The same inter alia

reveals, that dry blood was present over the labia, and deep laceration of subcutaneous tissues was present on the left margin of the vaginal opening, just above the posterior commission. The hymen was also found ruptured at 3 and 6,O' clock. It is therefore, that the accused was deputed for being subjected to medical examination, during the course of investigation. For the above purpose he was examined by Dr. P.D. Shah. In fact Dr. P.D. Shah was a cited witness before the Trial Court. Despite the above Dr. P.D. Shah was not examined as a prosecution witness. Clearly a vital link in a chain of events, to establish the rape of the victim Gomi came to be broken consequent upon by the non-examination of Dr. P.D. Shah as a prosecution witness.

f) The High Court having noticed the injuries suffered by Gomi, a six year old girl child on her genitals, had expressed the view, that the same would have resulted in reciprocal injuries to the male organ of the person who had committed rape on her. It was pointed out, that if the accused Kishanbhai had been sent for medical examination the testimony or the report of the medical officer would have revealed the presence of smegma around the corona-glandis, which would have either established innocence or guilt of the accused, specially if the accused had been medically examined within 24 hours. In the instant case the sequence of the events reveal, that the occurrence had been committed between 6:00 p.m. to 8:00 p.m. on 27.2.2003. At the time of recovery of the body of deceased Gomi from Jivi's field, at about 9:00 pm, it came to be believed that she had been subjected to rape. The accused Kishanbhai was shown to have been formerly arrested at 6:40 a.m. on 28.2.2003 (even if the inference drawn by the High Court, that the accused Kishanbhai was in police custody since 9:00 p.m. on 27.2.2003 itself, is ignored). The accused could have been medically examined within a period of 24 hours of the occurrence. The prosecution case does not show whether or not such action was taken. This lapse in the investigation of the case, had also resulted the omission of a vital link in the chain of events which would have unquestionably established the guilt of the accused Kishanbhai of having committed rape (or possibly his innocence).

g) It needs to be noticed, that when the accused Kishanbhai was arrested, there were several injuries on his person. The said injuries were also depicted in his arrest panchnama. At 7:15 am on 28.2.2003, the accused Kishanbhai filed a first information report alleging, that he was beaten by some of the relatives of the victim Gomi, as also, by some unknown persons accompanying the search party, under the suspicion/belief, that he was responsible for the occurrence. In the above first information report, the accused Kishanbhai had also

depicted the nature of injuries suffered by him. The statement of the investigating officer Ranchodji Bhojrajji Chauhan PW14 reveals, that the accused Kishanbhai had been sent to Civil Hospital, Ahmedabad, for his medical examination. Neither the doctor who had examined the accused was produced as a prosecution witness, nor the report/certificate given by the medical officer disclosing the details of his observations/findings was placed on record. This evidence was vital for the success of the prosecution case. According to the High Court, blood of group "B +ve" was found on the clothes of the accused Kishanbhai. The important question to be determined thereupon was, whether it was his own blood or blood of the victim Gomi. The statement of the medical officer who had examined the accused Kishabhai, when he was sent for medical examination to Civil Hospital, Ahmedabad, would have disclose whether or not accused Kishanbhai had any bleeding injuries. The importance of nature of the injuries suffered by the accused Kishanbhai emerges from the fact, that both the accused Kishanbhai and the victim Gomi had the same blood group "B +ve". An inference could have only been drawn that the blood on his clothes was that of the victim, in case it was established that the accused-respondent Kishanbhai had not suffered any bleeding injuries, and therefore, the possibility of his own blood being on his clothes was ruled out. This important link in the chain of events is also missing from the evidence produced by the prosecution, and constitutes a serious lapse in the investigation/prosecution of the case.

In view of the above factual position, the High Court made the following observations "Looking to the advancement in the field of medical science, the investigating agency should not have stopped at this stage. Though ABO system of blood grouping is one of the most important system, which is being normally used for distinguishing blood of different persons, there are about 19 genetically determined blood grouping systems known to the present day science, and it is also known that there are about 200 different blood groups, which have been identified by the modern scientific methods (Source: McGraw-Hill Encyclopedia of Science and Technology, Vol.2). Had such an effort been made by the prosecution, the outcome of the said effort would have helped a lot to the trial Court in ascertaining whether the accused had in fact visited the scene of offence." This also constitutes a glaring lapse in the investigation of the crime under reference.

There has now been a great advancement in scientific investigation on the instant aspect of the matter. The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim

Gomi was, in fact on the clothes of the accused-respondent Kishanbhai. This scientific investigation would have unquestionably determined whether or not the accused-respondent was linked with the crime. Additionally, DNA profiling of the blood found on the knife used in the commission of the crime (which the accused-respondent, Kishanbhai had allegedly stolen from Dinesh Karshanbhai Thakore PW6), would have uncontrovertibly determined, whether or not the said knife had been used for severing the legs of the victim Gomi, to remove her anklets. In spite of so much advancement in the field of forensic science, the investigating agency seriously erred in carrying out an effective investigation to genuinely determine the culpability of the accused-respondent Kishanbhai.

h) It is also apparent from the complaint submitted by Bababhai Naranbhai Solanki PW 2, that he had been informed by one Kalabhai Ganeshbhai, that he had seen the accused Kishanbhai taking away Gomi. In such an event, the proof of the fact of the accused-respondent having abducted Gomi could have only been substantiated, through the statement of Kalabhai Ganeshbhai who had allegedly actually seen the accused Kishanbhai taking her away. According to the High Court, for the reasons best known to it, the prosecution did not produce Kalabhai Ganeshbhai as a witness. Even though according to the High Court the above-mentioned Kalabhai Ganeshbhai was a resident in one of the peon quarters, and was also a government servant, the absence of the evidence of the above factual position, results in a deficiency in the confirmation of a factual position of substantial importance, from the chain of events necessary for establishing the last seen evidence.

i) It is also apparent, that there is no dispute about the recovery of a green blood stained “dupatta”, from the person of the victim. The green blood stained “dupatta” (veil) was found by the medical officer while conducting the post-mortem examination on Gomi. The existence of the green “dupatta” was also duly mentioned in the post-mortem report. According to the High Court, none of the prosecution witnesses had referred to the factum of the victim having worn a green “dupatta”. According to the prosecution evidence, the deceased was wearing a red frock and panties, whereas, the accused was wearing a full sleeve white shirt and green trousers. According to the High Court, if neither the victim nor the accused had a green “dupatta”, a question would arise, as to how the green blood stained “dupatta” was found on the dead body of the victim. Even leading to the inference of the presence of a third party at the time of occurrence. The above omission in not

explaining the presence of the green “dupatta”, has also been taken by the High Court, as a glaring omission at the hands of the prosecution in the process of investigation/prosecution of the charges levelled against the accused Kishanbhai.

14. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant, which have been duly noticed in paragraph 9 hereinabove. It is also relevant for us to record, that the learned counsel for the appellant did not advance a single submission in addition to the contentions we have noticed in paragraph 9 above. The submissions advanced at the hands of the learned counsel for the appellant, were sought to be supported by judgments rendered by this Court, all of which have been referred to in paragraph 13 above. The submissions advanced at the hands of the learned counsel for the appellant, based on each of the judgments cited, have also been recorded by us in the said paragraph. Having considered the totality of the facts and circumstances of this case, specially the glaring lapses committed in the investigation and prosecution of the case (recorded in paragraph 11 of the instant judgment), as also the inconsistencies in the evidence produced by the prosecution (summarized in paragraph 12 hereinabove), we are of the considered view, that each one of the submissions advanced at the hands of the learned counsel for the appellant is meritless. For the circumstantial evidence produced by the prosecution, primary reliance has been placed on the statements of Bababhai Naranbhai Solanki PW2, Naranbhai Manabhai Solanki PW5, and Dinesh Karshanbhai Thakore PW6. By demonstrating inconsistencies and infirmities in the statements of the above witnesses, their statements have also been rendered suspicious and accordingly unreliable. There is also a serious impression of fudging and padding at the hands of the agencies involved. As a matter of fact, the lack of truthfulness of the statements of witnesses has been demonstrated by means of simple logic emerging from the factual position expressed through different prosecution witnesses (summarized in paragraphs 11 and 12 above). The evidence produced to prove the charges, has been systematically shattered, thereby demolishing the prosecution version. More than all that, is the non production of evidence which the prosecution has unjustifiably withheld, resulting in dashing all the States efforts to the ground. It is not necessary for us to record our detailed determination on the submissions advanced at the hands of the learned counsel for the appellant, for such reasons clearly emerge from the factual position noticed in paragraphs 11 and 12 hereinabove. Recording of reasons all over again, would just be

a matter of repetition. In view of the above, we find no merit in this appeal and the same is accordingly dismissed.

15. The investigating officials and the prosecutors involved in presenting this case, have miserably failed in discharging their duties. They have been instrumental in denying to serve the cause of justice. The misery of the family of the victim Gomi has remained unredressed. The perpetrators of a horrendous crime, involving extremely ruthless and savage treatment to the victim, have remained unpunished. A heartless and merciless criminal, who has committed an extremely heinous crime, has gone scot-free. He must be walking around in Ahmedabad, or some other city/town in India, with his head held high. A criminal on the move. Fearless and fearsome. Fearless now, because he could not be administered the punishment, he ought to have suffered. And fearsome, on account of his having remained unaffected by the brutal crime committed by him. His actions now, know of no barriers. He could be expected to act in an unfathomable savage manner, uncomprehend able to a sane mind.

16. As we discharge our responsibility in deciding the instant criminal appeal, we proceed to apply principles of law, and draw inferences. For, that is our job. We are trained, not to be swayed by mercy or compassion. We are trained to adjudicate without taking sides, and without being mindful of the consequences. We are required to adjudicate on the basis of well-drawn parameters. We have done all that. Despite thereof, we feel crestfallen, heartbroken and sorrowful. We could not serve the cause of justice, to an innocent child. We could not even serve the cause of justice, to her immediate family. The members of the family of Gomi must never have stopped cursing themselves, for not adequately protecting their child from a prowler, who had snatched an opportunity to brutalise her, during their lapse in attentiveness. And if the prosecution version about motive is correct, the crime was committed for a mere consideration of Rs.1,000/-.

17. Every time there is an acquittal, the consequences are just the same, as have been noticed hereinabove. The purpose of justice has not been achieved. There is also another side to be taken into consideration. We have declared the accused-respondent innocent, by upholding the order of the High Court, giving him the benefit of doubt. He may be truly innocent, or he may have succeeded because of the lapses committed by the investigating/prosecuting teams. If he has escaped, despite being guilty, the investigating and the prosecution agencies must be deemed to have seriously messed it all up. And if

the accused was wrongfully prosecuted, his suffering is unfathomable. Here also, the investigating and prosecuting agencies are blameworthy. It is therefore necessary, not to overlook even the hardship suffered by the accused, first during the trial of the case, and then at the appellate stages. An innocent person does not deserve to suffer the turmoil of a long drawn litigation, spanning over a decade, or more. The expenses incurred by an accused in his defence can dry up all his financial resources – ancestral or personal. Criminal litigation could also ordinarily involve financial borrowings. An accused can be expected to be under a financial debt, by the time his ordeal is over.

18. Numerous petitions are filed before this Court, praying for anticipatory bail (under Section 438 of the Code of Criminal Procedure) at the behest of persons apprehending arrest, or for bail (under Section 439 of the Code of Criminal Procedure) at the behest of persons already under detention. In a large number of such petitions, the main contention is of false implication. Likewise, many petitions seeking quashing of criminal proceeding (filed under Section 482 of the Code of Criminal Procedure) come up for hearing day after day, wherein also, the main contention is of fraudulent entanglement/involvement. In matters where prayers for anticipatory bail or for bail made under Sections 438 and 439 are denied, or where a quashing petition filed under Section 482 of the Code of Criminal Procedure is declined, the person concerned may have to suffer periods of incarceration for different lengths of time. They suffer captivity and confinement most of the times (at least where they are accused of serious offences), till the culmination of their trial. In case of their conviction, they would continue in confinement during the appellate stages also, and in matters which reach the Supreme Court, till the disposal of their appeals by this Court. By the time they are acquitted at the appellate stage, they may have undergone long years of custody. When acquitted by this Court, they may have suffered imprisonment of 10 years, or more. When they are acquitted (by the trial or the appellate court), no one returns to them; what was wrongfully taken away from them. The system responsible for the administration of justice, is responsible for having deprived them of their lives, equivalent to the period of their detention. It is not untrue, that for all the wrong reasons, innocent persons are subjected to suffer the ignominy of criminal prosecution and to suffer shame and humiliation. Just like it is the bounden duty of a court to serve the cause of justice to the victim, so also, it is the bounden duty of a court to ensure that an innocent person is not subjected to the rigours of criminal prosecution.

19. The situation referred to above needs to be remedied. For the said purpose, adherence to a simple procedure could serve the objective. We accordingly direct, that on the completion of the investigation in a criminal case, the prosecuting agency should apply its independent mind, and require all shortcomings to be rectified, if necessary by requiring further investigation. It should also be ensured, that the evidence gathered during investigation is truly and faithfully utilized, by confirming that all relevant witnesses and materials for proving the charges are conscientiously presented during the trial of a case. This would achieve two purposes. Only persons against whom there is sufficient evidence, will have to suffer the rigors of criminal prosecution. By following the above procedure, in most criminal prosecutions, the concerned agencies will be able to successfully establish the guilt of the accused.

20. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance of the above purpose, it is considered essential to direct the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilized for crystalizing mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/prosecution officials course- content drawn from the above consideration. The same should also constitute course-content of refresher training programmes, for senior investigating/prosecuting officials. The above responsibility for preparing training programmes for officials, should be vested in the same committee of senior officers referred to above. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course content will be reviewed by the above committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the standing committee while examining failures, in unsuccessful prosecution of cases. We

further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, they would not be able to feign innocence, when they are made liable to suffer departmental action, for their lapses.

21. On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly, we direct, the Home Department of every State Government, to formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months.

22. A copy of the instant judgment shall be transmitted by the Registry of this Court, to the Home Secretaries of all State Governments and Union Territories, within one week. All the concerned Home Secretaries, shall ensure compliance of the directions recorded above. The records of consideration, in compliance with the above direction, shall be maintained.

23. We hope and trust the Home Department of the State of Gujarat, will identify the erring officers in the instant case, and will take appropriate departmental action against them, as may be considered appropriate, in accordance with law.

24. The instant criminal appeal is accordingly disposed of.

Sushila Aggarwal and Others v. State (NCT of Delhi) and Another

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M.R. SHAH, J.--- In the light of the conflicting views of the different Benches of varying strength, more particularly in the cases of *Shri Gurbaksh Singh Sibbia and others v. State of Punjab* (1980) 2 SCC 565; *Siddharam Satlingappa Mhetre v. State of Maharashtra* (2011) 1 SCC 694; *Bhadresh Bipinbhai Sheth v. State of Gujarat* (2016) 1 SCC 152 on one side and in the cases of *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (1996) 1 SCC 667, subsequently followed in the case of *K.L. Verma v. State and another* (1998) 9 SCC 348; *Sunita Devi v. State of Bihar* (2005) 1 SCC 608; *Nirmal Jeet Kaur v. State of M.P.* (2004) 7 SCC 558; *HDFC Bank Limited v. J.J. Mannan* (2010) 1 SCC 679; and *Satpal Singh v. State of Punjab* (2018) 4 SCC 303, the following questions are referred for consideration by a larger Bench:

- (1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.
- (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

2. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae relying upon the decision of this Court in the case of *Balchand Jain v. State of M.P.* (1976) 4 SCC 572 has submitted that though the expression “anticipatory bail” has not been defined in the Code, as observed by this Court in the aforesaid decision, “anticipatory bail” means “bail in anticipation of arrest”. It is submitted that in the aforesaid decision, this Court has further observed that the expression “anticipatory bail” is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. It is submitted that when a competent court grants “anticipatory bail”, it makes an order that in the event of arrest, a person shall be released on bail. It is submitted that there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting “anticipatory bail” becomes operative.

2.1 Shri Raval, learned Amicus Curiae has taken us to the historical perspective on the inclusion of Section 438 of the Cr. P.C. It is submitted that on the recommendation of the Law Commission of India in its 41st Report dated 24.09.1969, the Parliament introduced a new provision in the form of “anticipatory bail” under Section 438 of the Cr.P.C. It is submitted

that the Law Commission of India in its 41st Report stated in paragraph 39.9 the justification for power to grant “anticipatory bail”. It is submitted that as per the Law Commission 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. It is submitted that the Law Commission further observed that 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 to be no justification to require him to first submit to custody, remain in prison for some days, and then apply for bail.

2.2 It is further submitted that power to grant “anticipatory bail” vests only in the High Courts or the Courts of Sessions. It is submitted that the “anticipatory bail” can be applied at different stages. It is submitted that even in a case where no FIR is lodged and a person is apprehending his arrest in case the FIR is lodged, in that case, he can apply for “anticipatory bail” and after notice to the Public Prosecutor the Court can grant “anticipatory bail”. It is submitted that even in a case where the FIR is lodged but the investigation has not yet begun, i.e., pre investigation stage, the “anticipatory bail” can be applied. It is submitted that “anticipatory bail” can also be applied at post investigation stage. It is submitted that after exercising the discretion judiciously, the High Court or the Sessions Court grants “anticipatory bail” and that too after hearing the Public Prosecutor. It is submitted that therefore once the bail is granted in anticipation of the arrest, there is no reason to limit the same till the summon is issued by the Court and/or there is no reason to limit the period of bail in anticipation granted.

2.5 It is submitted that, as such, the aforesaid questions are not res integra in view of the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia* (supra). It is submitted that in the case of *Gurbaksh Singh Sibbia* (supra), a Constitution Bench of this Court has held that there is no limit to the currency of an order of anticipatory bail. The Court is vested with absolute discretion to direct the duration of the trial which can vary from a few weeks to even such duration until charge sheet has been filed and which may also extend to the entire duration of the trial. It is submitted that it is further observed that the sole consideration must be with a view to balance the two competing interests, viz., protecting the liberty of the accused and the sovereign power of the police to conduct a fair investigation.

2.6. It is further submitted by Shri Raval that in the subsequent decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)*, this Court has taken the view that the order of anticipatory bail once granted ordinarily subsists during the entire duration of the trial. It is submitted that it is further observed that by that the power of the Sessions Court or that of the High Court to revisit its order granting anticipatory bail is curtailed, in case circumstances exist or new exigencies arise which merit interference.

It is submitted that *Siddharam Satlingappa Mhetre (supra)* proceeded to hold that the anticipatory bail shall subsist during the entire currency of the trial and specifically rejected the notion that anticipatory bail could be for a limited time as well, on the expiry of which the accused must surrender and apply for a regular bail.

2.7 It is further submitted by Shri Raval, learned Amicus Curiae that the discretion of the Sessions Court and the High Court is absolute, and no limitations whatsoever have been imposed by the legislature. It is submitted that the discretion therefore can be exercised to even limit the duration of the anticipatory bail, in order to ensure that the accused also cooperates with the investigation, or that relevant discoveries to secure incriminating material could be made under Section 27 of the Evidence Act, or in view of new incriminating circumstances which establish complicity of the accused. It is submitted that therefore the view taken by this Court in *Siddharam Satlingappa Mhetre (supra)* that the anticipatory bail to subsist for the entire duration of the trial, curtails the discretion of the Sessions Court or the High Court to limit such duration of anticipatory bail. It is submitted that such an interpretation is in absolute contravention of the law declared by the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)*.

4.1 It is further submitted by Shri Tushar Mehta, learned Solicitor General of India that so far as the second reference, namely, whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court is concerned, it is submitted that there cannot be a straightjacket formula. It is submitted that in a case wherein the anticipatory bail is granted for a limited time period, the life would extinguish accordingly. It is submitted that in a case wherein the anticipatory bail is granted without conditions, the life may terminate upon the circumstances warranting cancellation of such bail or such interference. It is submitted that the statute does not contemplate an automatic cancellation upon filing of charge sheet and therefore the judgment of this Court in the case of *HDFC Bank Limited (supra)*, to that extent, may not lay down the correct law. It is submitted that, at the same time, the Hon'ble

Courts have deprecated the practice of blanket orders of bail/anticipatory bail. It is submitted that there are eventualities arising in every case may be different and therefore are required to be dealt with accordingly, in the facts and circumstances of each case. It is submitted that even while granting the anticipatory bail, the right of the investigating agency to seek custodial interrogation cannot be hampered mechanically.

5. Relying upon the decisions of this Court in the cases of *HDFC Bank Ltd.* (supra) and *Satpal Singh* (supra), it is submitted by Shri Vikramjit Banerjee, learned Additional Solicitor General of India that as held by this Court in the aforesaid decisions, the purpose of Section 438 is providing protection only during the process of investigation and the accused should seek regular bail upon submission of the charge sheet against him from the court where entire material is placed. It is submitted that in any case grant of the prearrest bail under Section 438 Cr.P.C. shall not affect the right of the investigating agency to seek custodial interrogation and in conducting further investigation.

5.1 It is further submitted by Shri Banerjee, learned ASG that as held by this Court in the case of *Uday Mohanlal Acharya v. State of Maharashtra* (2001) 5 SCC 453, that even when accused is found to be on bail at the stage of committal proceedings, the committing Magistrate has the power to cancel the bail and commit him to custody, if he considers it necessary to do so. It is submitted that as observed and held by this Court in the aforesaid decisions that an interpretation that an order of protection from arrest under Section 438 will remain operational till the end of the trial will effectively make Section 209 (b) of Cr.P.C. otiose.

5.2. At the end, Shri Banerjee, learned ASG has submitted that there should necessarily be conditions imposed in granting a prearrest bail order and it cannot be a blanket order; in terms of the Cr.P.C. under Section 209(b) and Section 240(2), the accused can be remanded to custody by the Magistrate during the stage of inquiry, if he considers it necessary to do so at the stage of the submission of the final report/ charge sheet or committal proceedings. It is submitted that it is imperative therefore that if the accused takes prearrest bail during the earlier state of criminal investigation, the power of the Magistrate under the said provisions of Cr.P.C. should be maintained including the power of the Magistrate to send the accused to the custody.

7.3 After considering the scheme of “anticipatory bail” under Section 438, Cr.P.C., and while not agreeing with the Full Bench, this Court has observed and held as under:

The provisions of Sections 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 para 39.9 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 on 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. Subsection (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 provides 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 subsection (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, insofar 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 nonbailable 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.

13. 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 subsection (1) of that section says that the court “may, if it thinks fit” issue the necessary direction for bail, subsection (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 subsection. 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.

18. 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 fit" 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 rewriting 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 therefor 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.

19. 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. 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 subsection (2)(i) and (ii) which require the applicant to cooperate 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 [AIR 1960 SC 1125 : (1961) 1 SCR 14, 26 : 1960 Cri LJ 1504] 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 so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure 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.

21. The High Court says in its fourth proposition that 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. 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 hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

33. 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 ground 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.

35. 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 nonbailable 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 nonbailable 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 will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

36. 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.

37. 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 FIR is not yet filed.

38. Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

39. 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, insofar 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.

41. 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. 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.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the 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 reexamined 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 time? 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 FIR 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 FIR 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.

43. 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 FIR 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

7.4 The aforesaid decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia* (supra) holds the field for number of years and the same has been followed by all the Courts in the country. While granting anticipatory bail, normally following conditions are imposed by the court/courts which as such are in consonance with the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia* (supra) and Section 438(2) read with Section 437(3) of the Cr.P.C:

1. the applicant namely _____ shall furnish personal bond of Rs. _____ with his recent self attested photograph and surety of the like amount on the following conditions at the satisfaction of the Investigating Officer;
2. the applicant shall remain present before the concerned police station on _____ between _____;
3. the applicant shall cooperate with the investigation and make himself available for interrogation whenever required;
4. the applicant shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;
5. the applicant shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;
6. the applicant shall not leave the territory of _____, without prior permission of the court, till trial is over;
7. the applicant shall mark his presence before concerned police station on _____ between _____ for the period of six months, from the date of this order;
8. the applicant shall maintain law and order;
9. the applicant shall, at the time of execution of the Bond, furnish his address and mobile number to the Investigating Officer, and the Court concerned, and shall not change the residence till the final disposal of the case;
10. the applicant shall surrender his passport, if any, before the Investigating Officer within a week and, if he does not possess any passport, he shall file an affidavit to that effect before the Investigating Officer;

11. the applicant shall regularly remain present during the trial, and cooperate the Honourable Court to complete the trial for the above offences.

If breach of any of the above conditions is committed, the order of anticipatory bail would be cancelled. It would be open to the Investigating Officer to file an application for remand, and the concerned Magistrate would decide it on merits, without influenced by the grant of anticipatory bail order.

However, in the case of *Siddharam Satlingappa Mhetre (supra)*, despite the specific observations by the Constitution Bench of this Court in *Gurbaksh Singh Sibbia (supra)* that the normal rule should be not to limit the operation of the order in relation to a period of time, in other words in an appropriate case and looking to the facts and circumstances of the case and the stage at which the prearrest bail application was made, the court concerned can limit the operation of the order in relation to a period of time, on absolute misreading of the judgment in the case of *Gurbaksh Singh Sibbia (supra)* and just contrary to the observations made in paragraphs 42 and 43, an absolute proposition of law is laid down that the life of the order under Section 438, Cr. P.C. granting bail cannot be curtailed. Despite the clear cut observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43, in the case of *Salauddin Abdulsamad Shaikh (supra)*, a three Judge Bench of this Court has observed and held that the order of “anticipatory bail” has to be necessarily limit in time frame. In many cases subsequently the decision in the case of *Salauddin Abdulsamad Shaikh (supra)* has been followed, despite the specific observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43 which, as such, are just contrary to the view taken in subsequent decisions in the cases of *Siddharam Satlingappa Mhetre (supra)* and *Salauddin Abdulsamad Shaikh (supra)*. At this stage, it is required to be noted that in the case of *Salauddin Abdulsamad Shaikh (supra)*, this Court had not at all considered the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)*. It cannot be disputed that the decision of this Court in the case of *Gurbaksh Singh Sibbia (supra)* is a Constitution Bench decision which is binding unless it is upset by a larger Bench than the Constitution Bench. Therefore, considering the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)* and the relevant observations, reproduced hereinabove, the decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)* to the extent it takes the view that the life of the order under Section 438 Cr.P.C. cannot be curtailed is not a correct law in light of the observations made by the Constitution Bench in paragraphs 42 and 43 in *Gurbaksh Singh Sibbia (supra)*. The decision of this Court in the case

of *Salauddin Abdulsamad Shaikh (supra)* which takes an extreme view that the order of “anticipatory bail” has to be necessarily limited in time frame is also not a good law and is against and just contrary to the decision of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, which is a Constitution Bench judgment.

26. Thus, considering the observations made by the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, the court may, if there are reasons for doing so, limit the operation of the order to a short period only after filing of an FIR in respect of the matter covered by order and the applicant may in such case be directed to obtain an order of bail under Sections 437 or 439 of the Code within a reasonable short period after the filing of the FIR. The Constitution Bench has further observed that the same need not be followed as an invariable rule. It is further observed and held that normal rule should be not to limit the operation of the order in relation to a period of time. We are of the opinion that the conditions can be imposed by the concerned court while granting prearrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the “anticipatory bail” application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the investigation is complete and the charge sheet is filed. However, as observed hereinabove, the normal rule should be not to limit the order in relation to a period of time.

Conclusion

- (1) Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr. PC should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.
- (2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

1. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

- (1) Consistent with the judgment in *Shri Gurbaksh Singh Sibbia and others v. State of Punjab*⁵⁴, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.
- (2) It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.
- (3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified – and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

- (4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.
- (5) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.
- (6) An order of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.
- (7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted prearrest bail.
- (8) The observations in Sibbia regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia (supra) had observed that “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*.”
- (9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.
- (10) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances.

(11) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.* (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra* and subsequent decisions (including *K.L. Verma v. State & Anr*; *Sunita Devi v. State of Bihar & Anr*; *Adri Dharan Das v. State of West Bengal*; *Nirmal Jeet Kaur v. State of M.P. & Anr*; *HDFC Bank Limited v. J.J. Mannan*; *Satpal Singh v. the State of Punjab* and *Naresh Kumar Yadav v Ravindra Kumar* which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.