

CRIMINAL CASE LAW DIGEST

BY

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CRIMINAL LAW

FAIR TRIAL:- Criminal trial is meant for doing justice not only to the victim but also to the accused and the Society at large. (Ambika Pd. V. State (Delhi Administration)-2000 SCC CrL.522)

The public interest demands that criminal justice is swift and sure, that the guilty is punished while events are still fresh in the public mind and that the innocent is absolved as early as is consistent with a fair and impartial trial. (**M.S.Sherif v. State of Madras- 1954 CrL.L.J.1019**).

The Hon'ble Apex Court in **Rang Bahadur Singh V. State of U.P.** reported in **AIR 2000 SC 1209** has held as follows : "The time-tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits."

State of U.P. V. Ram Veer Singh and Another reported in **2007 (6) Supreme 164** the Hon'ble Apex Court has held as follows: "**The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.** The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. **A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.** In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not."

If unmerited acquittals become the general rule, they tend to lead to a cynical disregard of the law. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. **Vide Gangadhar Behera V. State of Orissa- 2000 (3) CrL.L.J.41 SC and Shivaji Sahebrao Bobade v. State of Maharashtra- AIR 1988 SC 1998.**

WITNESS PROTECTION:- Swaran Singh v. State of Punjab- AIR 2000 SC 2017 wherein it has been observed as follows: "It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not

treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter is adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. The appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the courts, district courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recordings".

On 8th August 2003, in the case of National Human Rights Commission v. State of Gujarat, the Supreme Court regretted that "no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses." Later on in the case of Zahira v. State of Gujarat, while transferring what is known as the Best Bakery Case, to Mumbai by its Order dated 12th April, 2004, directed: "The State of Gujarat shall also ensure that the witnesses are produced before the concerned court, whenever they are required to attend 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."

IMP PRINCIPLES OF CRIMINAL LAW:- One of the cardinal principles which should always be kept in our system of administration of justice in criminal cases is that a person arraigned as an accused is presumed to be innocent unless and until proved otherwise.

One of the components of fair procedure in the administration of criminal justice is that the accused has the opportunity of making his defence by a legal practitioner of his choice.

Another golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case- one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused is to be accepted.

The criminal jurisprudence, no doubt, requires a high standard of proof for imposing punishment to an accused. But it is equally important that on hypothetical grounds and surmises prosecution evidence of a sterling nature should not be brushed aside and disbelieved to give undue benefit of doubt to the accused. (**Vide State of U.P. v. Ram Sevak and others-2003 (1) Crimes 461 (SC).**)

The law should not be stretched morbidly to embrace every hunch hesitancy and degree of doubt. Our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic – (**Vide Shivaji v. State of Maharashtra – AIR 1973 SC 2622**).

Sec.225 Cr.P.C. enjoins that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor. When the accused appears or is brought before court pursuant to the commitment of the case, the Public Prosecutor should open the case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. After considering the record of the case and the documents submitted along with such record and after hearing the submissions of the accused and the prosecution, if the judge considers that there are no sufficient grounds for proceeding against the accused, he shall discharge the accused giving reasons for doing so.

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If, however, the judge is of the opinion that there is ground for presuming that the accused has committed the offence he may frame the charge against the accused in writing. At this stage the Sessions Judge is entitled to consider only the documents produced by the prosecution along with the charge sheet. The accused is not entitled to produce or cause production of any document at this stage for the consideration of the Sessions Judge. The charges shall be read over to the accused and explained to him and he shall be asked as to whether he pleads guilty of the offence charged or whether he claims to be tried for the charge.

If the judge is of opinion that notwithstanding the conclusions of the police, the offence that is actually made out is not one exclusively triable by a court of Sessions then he shall frame a charge against the accused and transfer the case for trial to the Chief Judicial Magistrate who shall try the case as if it were a warrant case instituted on a police report.

Even though Sec.229 Cr.P.C. gives discretion to the judge to convict the accused, in case he pleads guilty, the charge in a sessions case being for grave offences, it is desirable that the accused is not straightaway convicted. The proper course would be to call upon the prosecution to prove its case by adducing evidence. Where the accused does not plead guilty the court shall call upon the prosecution to adduce evidence in support of its case. Evidence for the prosecution shall be taken on a day-to-day basis.

After the conclusion of the prosecution evidence, the accused is to be examined under Sec.313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution.

After the examination of the accused the court has to post the case for hearing under Sec.232 Cr.P.C. If after hearing the prosecution and the defence the judge considers that there is no evidence to indicate that the accused committed the offence with which he is charged the judge can record an order of acquittal under Sec.232 Cr.P.C. This is a very vital stage of the sessions trial and observance of Sec.232 Cr.P.C. and Sec. 233 Cr.P.C. at the appropriate stage is mandatory.

After hearing under Sec.232 if the accused is not acquitted thereunder, the accused shall be called upon to enter on his defence and to adduce any evidence which he might have in support thereof. After the conclusion of the defence evidence, if any, the case has to be taken up for arguments. After hearing the arguments, the court has to pass the judgment in accordance with Secs.353 and 354 Cr.P.C.

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If the judgment is one of conviction and the judge does not proceed to invoke the benevolent provision of the Probation of Offenders Act, 1958, he shall hear the accused on the question of sentence and then pass a sentence in accordance with law. This in short is the procedure to be followed in the ordinary murder trials before a Court of Session.

Sessions Judges should remember that the power of the judge to put questions to any of the witnesses or parties under Sec. 165 of the Evidence Act is a wide power. The only functionary in the criminal trial who can ask even irrelevant questions is the presiding judge. Hence, whenever the presiding judge finds that a particular point emanating from the case needs elucidation or a further probe, he should not hesitate to intervene and clarify the position. He can also press into service Section 311 Cr.P.C. in his endeavour to arrive at the truth. **Ram Chandra v. State of Haryana - AIR 1981 SC 1036).**

Hearsay evidence is not acceptable as legal evidence in view of the implied prohibition under Sec. 60 of the Evidence Act.

WHEN ACCUSED IS OF UNSOUND MIND

Supposing an accused person who is of unsound mind is committed to the court of Session, it is an illegal committal because it is for the committal Magistrate himself to conduct an enquiry under Sec. 328 Cr.P.C. In a case of wrong committal the Sessions Judge does not have the power to set aside the committal and send it back to the committal court. He can only refer the matter to the High Court by invoking the power under Sec. 395 (2) Cr.P.C.

The ordinary presumption about a witness is that every witness testifying on oath before a court of law is a truthful witness unless he is shown to be unreliable or untruthful on any particular aspect. Witnesses solemnly deposing on oath in the witness box during a trial upon a grave charge of murder must be presumed to act with a full sense of responsibility of the consequence of what they state **(Vide State of Punjab v. Hari Singh - AIR 1984 SC 1168).**

CHARACTERISTICS OF ORDINARY WITNESS

In Bhogin Bhai Kirji v. State of Gujrat - AIR 1983 SC 753, the apex court observed certain characteristics about an ordinary witness.

1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

- 2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore, cannot be expected to be attuned to absorb the details.
- 3) The powers of observation differ from person to person. What one may notice, another may not. An object, or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- 4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- 5) In regard to the exact time of an incident or the time duration of an occurrence, usually people make their estimates by guess work on spur of the moment at the time of interrogation and one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time sense of individuals which varies from person to person.
- 6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.
- 7) A witness though wholly truthful, is liable to be overawed by the court atmosphere and piercing cross-examination made by counsel and out of nervousness mixes up facts, gets confused regarding sequence of events, or fills up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of psychological defence mechanism activated on the spur of the moment.

Every person who witnesses a murder reacts in his own way. Some are stunned, some become speechless and some stand rooted to the spot. Some become hysteric and start wailing, some start shouting for help. Those others who run away to keep themselves as far removed from the spot as possible are not necessarily incredible yet others rush to the rescue of the victim even going to the extent of counter attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that they did not react in a particular manner is to appreciate the evidence in a wholly unrealistic unimaginative way. **(Rana Pratap v. State of Haryana - AIR 1983 S.C. 680).**

The court cannot insist that the accused shall keep on standing during the trial particularly when the trial is long and arduous. **(Avatar Singh v. M.P. - 1982 SC 1260).** The Supreme Court directed all High Courts to make provision in this regard in their criminal manuals.

The court has, under the proviso to Sec. 327 (1) Cr.P.C., the power to order that any particular person, witness or police officer not under examination shall not remain in the court room. A general direction can be given to the Public Prosecutor that occurrence witnesses to be examined are not allowed to remain in the court hall till their turn arrives. When the accused objects to the presence of a police officer or other person inside the court hall, the trial judge has to consider his objections, having regard to the intelligence and the susceptibilities of the class to which he belongs and such other relevant circumstances **(See State v. Charulata Joshi - AIR 1999 SC 1373)**

In **Shylendra Kumar v. State of Bihar - 2002 SCC Cri. 230 = AIR 2002 SC 270** the apex Court has directed that the investigating officer must be present at the time of trial of murder cases and if he fails to be present, the Sessions Judge must issue summons to him.

Courts should make deprecatory remarks about serious lacuna or irregularity in the investigation by an investigating officer only when it is absolutely necessary. Courts should bear in mind the time constraints of the police officer in the present system, the ill-equipped machinery they have to cope with, the traditional apathy of respectable persons to come forward for giving evidence in criminal cases etc. which are realities which the police force has to encounter with while conducting investigation. **State of West Bengal v. Mir Muhammed Omar - AIR 2000 SC 2988**).

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Criminal justice should not be allowed to become a causality for the wrongs committed by the investigating officers. The conclusion of the court in a criminal trial cannot be allowed to depend solely on the probity of investigation. Even if the investigation is illegal or even suspicious, the court can independently scrutinize the rest of the evidence uninfluenced by ill motivated investigation. Otherwise, criminal trial will plummet to the level of investigating officers ruling to roost. **State of Karnataka v. Yarappa Reddy -AIR 2000 SC 185**

The evidence of witnesses shall ordinarily be taken down in the form of a narrative. **(Section 276 (2) Cr.P.C.)** After recording the evidence of each witness it has to be read over to the witness in the presence of the accused as enjoined by Sec. 278 (1) Cr.P.C. If the witness denies the correctness of any part of the evidence then the correction should not be carried out in the deposition but instead the judge has to make a memorandum incorporating the objection raised by the witness and the remarks of the judge. (See Sec. 278 (2) Cr.P.C.). The record of evidence should be signed both by the witness as well as by the judge.

EXAMINATION OF CHILD WITNESS

Sec. 118 of the Evidence Act states that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them or giving rational answers to those questions by reason of tender age, extreme old age or disease whether of body or mind, or any other cause of the same kind.

As per the provisions of the Oaths Act, 1969, oath or affirmation has to be made by all witnesses who may be lawfully examined or who may give or be required to give evidence before a court of law. However, the proviso to Sec. 4(1) of the Oaths Act says that where the witness is a child under 12 years of age and the court is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of oath or affirmation, then such witness need not make any oath or affirmation and the absence of such oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of such witness to state the truth. Thus if the child witness is above 12 years of age, oath or affirmation, as the case may be, is a must. But if the child witness is below 12 years of age then the court has to ascertain whether the witness understands the nature of the oath or affirmation. In order to evaluate the testimonial competence of the child witness in this behalf, the

court has to conduct a *voire dire* examination of the child witness. The record of such examination also should be part of the deposition of such child witness.

The Sessions Judge can take cognizance of the offence only against those accused persons who are committed to him by the Magistrate concerned. If he has to add a new accused person whose complicity is discernible from the prosecution records, then the Sessions Judge will have to address the High Court for correction of the committal order or will have to wait until the stage for exercise of his power under Sec. 319 Cr.P.C. is reached. **(Vide AIR 1998 SC 3148).**

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Even when an accused person is acquitted on the ground of unsoundness of mind, the judgment should, as enjoined by Sec. 334 Cr.P.C., record a finding whether such accused committed the acts (such as causing the death by stabbing or other means) attributed to him. In such a case the court shall not forthwith set him at liberty or release him from custody. He will have to be directed to be detained in a Government mental health centre or ordered to be delivered to any relative or friend upon an application by such relative or friend and on his furnishing security to the satisfaction of the court as provided under Sec. 335 Cr.P.C. This is because of the homicidal or dangerous propensities already exhibited by the accused. Such accused ordered to be detained in the mental health center will be subject to further orders of the State Government under Sec. 339 Cr.P.C.

Imprisonment of life means imprisonment for the remainder of the biological life of the convict unless the sentence is commuted or remitted by the appropriate authority. Hence the life imprisonment does not expire at the end of 14 years or 20 years. **(AIR 1961 SC 600; AIR 1980 SC 2147; 1976 (3) SCC 470; 1991 SCC (Cri) 845 and AIR 1991 SC 2296).**

FIR

FIR is not a substantial piece of evidence - It can only be used for corroborating or contradicting its maker - It cannot be used to corroborate or contradict other witnesses - **Baldev Sings vs. State of Punjab - (1990) 4 SCC 692 ; State of Gujarat vs. Anirudhsing - (1997) 6 SCC 514.**

INVESTIGATION LAPSES AND CONSEQUENCES

Supreme Court in *State of Karnataka v. K. Yarappa Reddy*, (1999) 8 S.C.C. 715, at page 720: "But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs

committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

DOUBTS ON FIR

In *Nirmal Singh v. State of Bihar* (2005) 9 SCC 725, the defence raised doubts about the F.I.R and the nature of the prosecution case. After an elaborate discussion of the evidence, the Supreme Court held, at para 19, page 732: "... we do not feel persuaded to discard the case of the prosecution only on account of some infirmities which we have noticed earlier. There appears to be no reason why so many eye witnesses should falsely implicate the appellants, and there is in fact, nothing on record to suggest that the witnesses had any reason to falsely implicate them."

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HOSTILE WITNESS

The Hon'ble Supreme Court has held in various cases that merely because a witness is declared hostile, his entire evidence does not get excluded or rendered unworthy of consideration. One such is the case reported in 1989 SCC (CrI) 388 (*State of U.P. v. Chet Ram*). The Court should see the reality of the situation and come to rescue to do justice.

It is useful to refer the principles laid down by the Supreme Court in assessing the evidence tendered by witnesses, who later become hostile. In *Khujji v. State of M.P.*, 1991 (3) SCC 627, the Supreme Court declared thus: " 6. ... It seems to be well settled by the decisions of this Court *Bhagwan Singh v. State of Haryana* (1976 (1) SCC 389), *Rabindra Kumar Dey v. State of Orissa* (AIR 1977 SC 170) and *Syad Akbar v. State of Karnataka* ((1980) 1 SCC 30) -- that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

At what stage can a prosecution witness be declared hostile ? It is enough if the witness deviates from his previous statements made to the police or when the Court considers it necessary to grant the permission under Sec. 154 of the Evidence Act from the witness's demeanour, temper, attitude, bearing, tenor or tendency of his answers or otherwise. The discretion conferred by the above provision should be liberally exercised. (**Vide *Sat Paul v. Delhi Administration* - AIR 1976 SC 294**)

It is open to the party who calls the witness to seek permission of the court under Sec. 154 of the Evidence Act at any stage of the examination. (***Dahyabhai Chhaganbhai Thakker v. State of Gujarat* - AIR 1964 S.C. 1563**).

The P.P. can request the court to declare such a witness as hostile. Merely because the Court gave permission to the P.P. to cross-examine his own witness by declaring him hostile, it does not mean that the evidence of such a witness is completely effaced. (**Vide *Anil Rai v. State of Bihar* - AIR 2001 SC 3173**).

When the P.P. makes a request in this behalf, the court is actually granting permission under two separate provisions of law. The first permission that is granted is under Sec. 154 of the Evidence Act permitting the P.P. to put questions to his own witness which

might be put in cross-examination by the adverse party. The second permission which is granted is one under the proviso to Sec. 162 (1) Cr.P.C. wherein the P.P. is permitted to confront the witness with his case diary statements made to the police.

WHEN TO TREAT WITNESS AS HOSTILE

Section 5 of the Evidence Act speaks about evidence to be given on facts in issue and relevant facts. It reads as follows: "Evidence may be given of facts in issue and relevant facts.- Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others. Explanation.--This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure".

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Under Section 154 of the Evidence Act, the question of permitting the party to be questioned to his own witness is provided for. Section 154 reads as follows: "Question by party to his own witness.--The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party".

The above rule prohibiting and asking of leading questions to a party of his own witness on the assumption that the witness is always biased in favour of the party calling him. Section 142 of the Evidence Act makes it clear that leading questions must not be asked, except with the permission of the Court. Section 142 reads as follows: "When they must not be asked.--Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved".

This rule must of necessity to be relaxed when the witness exhibits an opposite feeling, namely, when he by his conduct, attitude, demeanour or unwillingness to give answers or to disclose the truth shows that he is hostile or friendly to the party calling him. The Court in such a case may in its discretion, permit a party to put any question to his own witness which might be put in cross-examination by his opponent, that is, may permit him to lead. This in effect means that the Court may in a fit case permit a party to cross-examine his own witness as provided for under Section 137 of the Evidence Act, which is extracted below:

"Examination-in-chief.--The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.--The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.--The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination".

It is to be noted that this discretion of the Court to permit the putting of leading questions, or in other words permit to cross-examination, is absolute and is independent of any question of hostility or adverseness. Cuming, J., in *Bikram v R*, has

considered that Section 150 read with Section 143 provided that the Court may allow the party to put leading questions to his own witness. But that I do not think necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examine him that he cannot rely on his evidence. Putting leading questions to one's own witness or rather cross-examining him is different from discrepancy or contradicting witness. In *Sat Paul v Delhi Administration*, the Supreme Court laid down that the discretion is unqualified and untrammelled and is quite apart from any question of the hostility or otherwise of the witness. However, it is liberally exercised. The discretion must be judiciously and properly exercised in the interest of justice. The inference that the witness has turned hostile is to be inferred from the answers given by the witness.

A distinction must be drawn between a true witness and a hostile witness. If exhibition of hostile animus were the sole test of declaring a witness adverse, the object would be frustrated in many instances. A shrewd and composed witness might, by concealing his real sentiments or hostile attitude, give unfavourable evidence and make statements contrary to the facts, known to him. Merely giving unfavourable testimony cannot also be enough to declare a witness adverse, for he might be telling the truth which goes against the party calling him. He is hostile if he tries to injure the party's case by prevaricating or suppressing the truth. The Court has by this section been given a very wide discretion and is at liberty to allow a party to cross-examine his witness. When his temper, attitude and demeanour in the witness-box show a distinctly antagonistic feeling or a mind hostile to the party calling him.

In the case of Baikuntha Nath Chatteraj v Prasannamoyi Debya, it has been held as follows: "Where the purpose of the production of the document at the time of cross-examination of a witness seemed to have been well understood by him and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was not at a particular place on the alleged date as was clear from the document and where on re-examination no attempt was made to elicit any explanation. Held, the witness was properly contradicted".

The dictum in *State of Mysore v Raju Shetty*, is to the following effect: "Ordinarily when a party puts a witness in the box, he can be taken to represent to the Court that the said witness is expected to state the truth. On the ground of policy a party should not be permitted to treat a witness as hostile the moment he gives any answers adverse to his case. It is entirely for the Court to decide whether in given circumstances a witness has turned hostile and whether permission should be granted to the party calling him to cross-examine him. Hence, even if a party calling a witness wants to treat him as hostile, his opinion as to the hostility or otherwise of the witness or the truth or otherwise of his evidence, is not final and not binding on the Court. The very object of taking evidence is to discover the truth as far as it is humanly possible for the presiding judicial officer to do. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the Court of its own high duty of attempting to discover the truth. Even when a witness deposes in favour of the case of the party calling him, the Court on a consideration of his evidence is entitled to either believe or disbelieve him. The rule does not change if the evidence given by such a witness is adverse to the case of the party calling him. Even in such a case, the Court has power and duty of deciding whether or not to believe

him. It is, therefore, not light to proceed on the basis that whatever is stated by a witness which is not in favour of the case of the party calling him should necessarily be believed as if it were an admission made and binding upon the party calling him".

In Saraswathamma v Bhadramma , the following proposition is relied upon: "A witness cannot be treated as hostile merely because his evidence is favourable to the other side, and the fact that the witness has become hostile has to be established by eliciting information such as could give an indication of hostility. It is not possible for Court to say without giving reason that he will not believe a witness after permission for treating the witness as hostile has been refused by the Court unless the Civil Judge himself comes to the conclusion that he has turned hostile".

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The dictum in Sat Paul's case, supra, is to the following effect: "The discretion conferred by Section 154 on the Court is unqualified and untrammelled and is apart from any question of hostility. It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expression, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts. Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto".

DELAY IN RECORDING STATEMENT OF WITNESS

Supreme Court in Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106, wherein, it is stated as follows: " 10. ... It is true that there was a delay of nearly 2-1/2 months in recording his statement but it goes explained as the investigation did not proceed in the desired lines initially and only after P.W.16 took over the investigation, he recorded the statement of P. W.6.

It is true that this Court in Balakrushna Swain v. State of Orissa, AIR 1971 SC 804 held that the evidence of witness recorded at late stage must be received with a pinch of salt. Delay defeats justice.

DELAY IN LODGING FIR

The Honourable Supreme Court, in Harbans Kaur v. State of Haryana 2005 SCC (Cri) 1213, held that even long delay in lodging the FIR could be condoned, if there is absence of motive for falsely implicating the accused and plausible explanation for the delay. Thus, if the delay is explained, then it is not fatal.

JURISDICTION OF COURT

In State of Madhya Pradesh v. Bhooraji and others 2001(2) ALD (Crl) 604 (SC), the Supreme Court while dealing with Section 14 of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 held that the Sessions Judge taking cognizance of the offence without the case being committed by the Magistrate is a procedural irregularity. The Supreme Court further observed: "The expression "a Court of competent jurisdiction" envisaged in Section 465 Cr.P.C. is to denote a validly constituted Court conferred with jurisdiction to try the offence or offences. Such a Court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance of the procedural requirement. The inability to take cognizance of an offence without a committal order does not mean that a duly constituted Court became an incompetent Court for all purposes. If objection was raised in that Court at the earliest occasion on the ground that the case should have been committed by a Magistrate, the same specified Court has to exercise a jurisdiction either for sending the records to a Magistrate for adopting committal proceedings or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. Even this could be done only because the Court has competence to deal with the case. Sometimes, that Court may have to hear arguments to decide that preliminary issue." "The bar against taking cognizance of certain offences or by certain Courts cannot govern the question whether the Court concerned is a "a Court of competent jurisdiction". The condition precedent for taking cognizance is not a standard to determine whether the Court concerned is a Court of competent jurisdiction."

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Sec.193 Cr.P.C. provides that except as otherwise expressly provided by the Cr.P.C. or any other law, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Cr.P.C.

There are statutes like the N.D.P.S.Act, 1985, wherein it is provided that the special court manned by a Sessions Judge shall take cognizance of an offence under the Act without the case being committed to it. In such cases it may be permissible for the Sessions Court to take cognizance of the offence without a committal of the case by the Magistrate concerned. But there are other enactments such as the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989 which are silent regarding commitment. Trial under those statutes is also to be conducted by a Court of Session.

In **Gangula Ashok v. State of A.P. – 2000(1) KLT 609** the Supreme Court of India held that the mandate under Sec. 193 Cr.P.C. is applicable to the special courts manned by Sessions Judges trying offences under the SC/ST (Prevention of atrocities) Act, 1989 and that those courts cannot take cognizance of the offences under the said Act without the case being committed to them by the Magistrates concerned.

In *Vidyadharan v. State of Kerala*, 2003 (2) ALD (Crl) 1019 (SC), the Supreme Court while referring to Section 3(1) (xi) of S.C. & S.T. (P.O.A) Act and Section 193 of the Criminal Procedure Code held that a Special Court under the SC and ST (POA) Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act. The Sessions Court in the case at hand, undisputedly has acted as one of original jurisdiction and the requirements of Section 193 of the Code were not met.

The Supreme Court in the above decision further observed: "The inevitable conclusion is that the learned Sessions Judge, as the undisputed factual position goes to show, could not have convicted the appellant for the offence relatable to Section 3(1) (xi) of the Act in the background of legal position noted supra. That is accordingly set aside. However, for the offence under Sections 354 and 448 I.P.C., custodial sentence for the period already undergone which as the records reveal is about three months, would meet the ends of justice considering the background facts and the special features of the case.

In *M.A. Kuttappan v. E. Krishnan Nayanar and another*, 2004 Cri.L.J. 1770, the Supreme Court while considering the scope of Section 3(1) (x) and Section 14 of SC/ST Act and Section 193 of the Code of Criminal Procedure Code held: "The Special Judge has no jurisdiction to entertain the complaint directly and to issue process after taking cognizance without the case being committed to it by a competent Magistrate. The question is no longer *res intergra* and, therefore, it must be held that the Special Judge in the instant case erred in entertaining a complaint filed before it alleging offence under the Act and in issuing process after taking cognizance without the case being committed to it for trial by a competent Magistrate."

In *Moly and another V. State of Kerala*, 2004 Cri.L.J. 1812 SC (Kerala), the Supreme Court, while considering the scope of Section 14 of the SC/ST Act and following *Vidyadharan* (7 supra) and *Gangula Ashok v. State of A.P.*, 2000 SCC (Cri) 488, held: "The Act contemplates only the trial to be conducted by the Special Court. The added reason for specifying a Court of Session as a Special Court is to ensure speed for such trial. 'Special Court' is defined in the Act as 'a Court of Session specified as a Special Court in Section 14'. Thus the Court of Session is specified to conduct a trial and no other Court can conduct the trial of offences under the Act. In view of S.193 of the Code of Criminal Procedure, unless it is positively and specifically provided differently, no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate. Neither in the Code nor in the Act is there any provision whatsoever, nor given by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as court of original jurisdiction without the case being committed to it by a Magistrate. If that be so, there is no reason to think that the charge-sheet or a complaint can straightway be filed before such Special Court for offences under the Act."

WHEN ANY ADVERSE REMARKS TO BE MADE AGAINST A PERSON

State of Uttar Pradesh v. Mohammad Naiem (AIR 1964 SC 703), It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in

question is before the court or has an opportunity of explaining or defending himself ; (b) whether there is evidence on record bearing on that conduct justifying the remarks ; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.

The Criminal Courts have full power and authority to pass adverse remarks against the Investigating Agency and witnesses and also has power for issuing direction to the concerned authority to take necessary action in accordance with law, but while doing so, the Criminal Courts are required to follow the three norms as laid down by the Supreme Court in the case of Mohammad Naiem (supra). The adverse remarks should be passed against the Investigating Agency with a view to point out their inherent illegality and lapses in investigation which give benefit to the guilty person, so that they may improve in future and their superior authority may also know about the way and working of subordinates and they may also provide them proper facility and guidance for proper and effective investigation in accordance with law so that the guilty person may not escape from the eye of law.

In the State of Uttar Pradesh v. Mohammad Naim, AIR 1964 SC 703 it has been held as follows (at page 553) : "If there is one principles of cardinal importance in the administration of justice, it is this : the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by any body, even by the Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrate must be guided by considerations of justice, fairplay and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve".

In Naranjan Patnaik v. Sashibusan Kar, (1986) 3 Crimes 57 : (1986 Cri LJ 911) the Supreme Court has held as follows :- "It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before courts of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct. We hold that the adverse remarks made against the appellant were neither justified nor called for".

In Mudkappa v. State of Karnataka, ILR 1985 Kant 3275 this Court has held as follows : "Petitioner-complainant sought expunction of passage in judgment on grounds it was

wholly irrelevant and unjustifiable and that the retention of the passage containing adverse remarks on record will cause serious harm to complainant a police constable."

FALSE CASTE CERTIFICATES

In KUMARI MADHURI PATIL v. ADDL. COMMISSIONER, and DIRECTOR OF TRIBAL WELFARE v. LAVETI GIRI, AIR 1995 SC 1506, the Hon'ble Supreme Court denounced the practice of persons claiming benefits conferred on STs by producing fake, false and fraudulent certificates, and observed thus: The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate,

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In UNION OF INDIA v. M. BHASKARAN, 1955 Supp. (4) SCC 100, the respondents produced bogus and forged 'casual labour service cards' and obtained employment in railway service. The Supreme Court observed that they were guilty of misrepresentation and fraud perpetrated on the employer while getting employment in railway service, and that once fraud was detected, it was open for the employer to remove those who obtained employment by playing fraud. It is necessary to excerpt the following: Therefore, it is too late in the day for the respondents to submit that production of such bogus or forged service cards had not played its role in getting employed in railway service. It was clearly a case of fraud on the appellant-employer. If once such fraud is detected, the appointment orders themselves which were found to be tainted and vitiated by fraud and acts of cheating on the part of employees, were liable to be recalled and were at least voidable at the option of the employer concerned.

DEFECTIVE INVESTIGATION CANNOT BE GROUND TO ACQUIT ACCUSED:-

Apex Court in the case of Prithvi Manraj 2005 SCC CrL. 198 has held that faulty investigation could hardly be a ground for rejection of testimony of eyewitnesses which had a ring of truth in it. In fact, in the aforesaid decision, the Apex Court has also referred to an earlier decision and has observed thus: The defect in the investigation holding it to be shaky and creating doubts also appears to be the result of imaginary thought of the trial court. Otherwise also defective investigation by itself cannot be made a ground for acquitting the accused.

The Apex Court in the case reported in 2004 SCC (Cri.) 851 has observed as thus: Criminal Procedure Code, 1973 - Sections. 157, 160 to 168 - Investigation -- Defective investigation - Effect of - Not fatal to prosecution where ocular testimony is found credible and cogent - Court has to be circumspect while evaluating the evidence in a case of such type - Thus, accused cannot be acquitted solely on account of defect in investigation

State Of Karnataka vs Krishnappa ILR 1994 KAR 89 It is observed “ The Supreme Court in the case of VIJAYEE SINGH AND ORS. v. STATE OF U.P. 1990 SC (Crl) 378, clearly pointed out what a doubt in a criminal case means. It is not of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It is that of an alert mind arrived at after due application of mind. The trial Court appears to have become over conscious of burden of proof, thus in that process forgetting for a moment that the circumstances are strong enough to find that it was the accused and the accused alone who was guilty of this diabolical act.

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Unjust acquittal is as bad as unjust conviction as held by the Supreme Court in the case of SATHI PRASAD v. THE STATE OF U.P 1973 Crl .L.J. 344. It has been strongly urged that because the two children were not examined and the blood stained articles were not sent for Chemical Analysis that benefit should go to the accused. It cannot be so, the truth of a case should not depend on the whims and fancies of an Investigating Officer. If he has failed in his duty to subject the blood stained articles after examining some material witnesses, his way of handling the investigation may come for severe criticism but not at the cost of truth, if the evidence of PW.1 and other circumstances could be held sufficient to bring home the guilt to the accused then mere non-examination of the two small children present in the house will not be of much consequence.” “It is well settled that if the police records become suspect and investigation perfunctory it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored.”

ANGER OF ACCUSED OVER DECEASED

The Registrar General, High Court Of Karnataka vs Talawara Venkatappa ILR 2003 KAR 4933 DB Thus the evidence on record would show that the accused had some ire towards the deceased. When the prosecution has succeeded in showing the possibility of some ire or anger of the accused towards the deceased, the inability to further put on record the manner in which such ire or anger would have swelled up in the mind of the accused to such a degree as to impel him to commit the murder of the deceased cannot be considered as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unraval the full dimension of the mental disposition of the accused towards the deceased. This is a case where however the prosecution has succeeded in showing that accused had some reason for anger or dislike towards the deceased. We cannot fathom the mental disposition of the accused towards the deceased at the time of the commission of the offence, nor could we rule out the possibility of some cause of immediate provocation for the accused. Having regard to the circumstances under which the incident in question had occurred, it could be known only to the deceased and the accused. The deceased is not alive to tell us what was the provocation. The accused did not disclose it to us. So we are unable to appreciate the contention that the provocation was not sufficient enough for the ghastly act perpetrated by the accused.

WITHDRAWAL FROM PROSECUTION

SHEONANDAN PASWAN VS STATE OF BIHAR AIR 1983 SC 194 :- From the Supreme Court's enunciation of the legal position governing the proper exercise of the power contained in Section 321, (WITHDRAWAL FROM PROSECUTION) three or four things became clear :

(i) Though withdrawal from prosecution is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the court's supervisory function. In fact being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action; the authority with whom the discretion is vested 'must genuinely address itself to the matter before it, must not act under the dictates of another body, must not do what it has been forbidden to do, must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or the spirit of the legislation that gives it power to act arbitrarily or capriciously.'

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(ii) Since the trial court's supervisory function of either granting or refusing to grant the permission is a judicial function the same is liable to correction by the High Court under its revisional powers both under the old and present Code of Criminal Procedure, and naturally the Supreme Court would have at least coextensive jurisdiction with the High Court in an appeal preferred to it by special leave or upon a certificate by the High Court.

(iii) No dichotomy as such between political offences or the like on the one hand and common law crimes on the other could be said to have been made by the Supreme Court for purposes of Section 321, for, even in what are called political offences or the like, committing common law crimes, is implicit, for the withdrawal from the prosecution of which the power under Section 321 has to be resorted to. But the decisions do lay down that when common law crimes are motivated by political ambitions or considerations or they are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or like situations involving emotive issues giving rise to an atmosphere surcharged with violence, the broader cause of public justice, public order and peace may outweigh the public interest of administering criminal justice in a particular litigation and withdrawal from the prosecution of that litigation would become necessary, a certainty of conviction notwithstanding, and persistence in the prosecution in the name of vindicating the law may prove counter-productive.

In other words, in case of such conflict between the two types of public interests, the narrower public interest should yield to the broader public interest, and, therefore, an onerous duty is cast upon the court to weigh and decide which public interest should prevail in each case while granting or refusing to grant its consent to the withdrawal from the prosecution. For, it is not invariably that whenever crime is politically motivated or is committed in or is followed by any explosive situation involving emotive issue that the prosecution must be withdrawn. In other words, in each case of such conflict the court has to weigh and decide judiciously. But it is obvious that unless the crimes in question are per se political offences like sedition or are motivated by political considerations or are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or the like situations involving emotive issues giving rise to an atmosphere surcharged with violence, no

question of serving any broader cause of public justice, public order or peace would arise and in the absence thereof the public interest of administering criminal justice in a given case cannot be permitted to be sacrificed, particularly when a highly placed person is allegedly involved in the crime, as otherwise the common man's faith in the rule of law and democratic values would be sheltered.

(iv) When paucity of evidence or lack of prospect of successful prosecution is the ground for withdrawal the court has not merely the power but a duty to examine the material on record without which the validity and propriety of such ground cannot be determined.

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SHEONANDAN PASWAN VS STATE OF BIHAR AIR 1983 SC 194 In this country, the scheme of criminal justice places the prime responsibility of prosecuting serious offences on the executive authority. The investigation, collection of requisite evidence and the prosecution for the offences with reference to such evidence are the functions of the executive. The function of the court in this respect is a limited one and intended only to prevent the abuse. The function of the court in according its consent to withdrawal is, however, a judicial function. It, therefore, becomes necessary for the court before whom the application for withdrawal is filed by the public prosecutor to apply its mind so that the appellate court may examine and be satisfied that the court has not accorded its consent as a matter of course but has applied its mind to the grounds taken in the application for withdrawal by Public Prosecutor.

LAPSES IN INVESTIGATION AND PROSECUTION

The State Of Karnataka vs B. Ramesh 2006 (4) KarLJ 635 In the light of the foregoing reasons, the investigating agency as well as the prosecuting agency having failed to place necessary evidence before the court, though available, but not placed and thus, has contributed to the case ending up in acquittal. At the stage, sitting in appeal over a case which ended in acquittal almost 7 years back and no effort being made by the prosecuting agency at any stage of the Trial proceedings to secure the important witnesses viz., ASI Rachaiah and the medical officer, who were present during the dying declaration made by the deceased, we are left with no other option than to express our displeasure over the manner in which the entire case has been handled right from the inception. We do hope that the observations made above would open eyes of the concerned authorities, particularly the Commissioner of Police and we are of the considered opinion that the Commissioner of Police will have to order an enquiry to find out the reasons for the lapses in the investigation and we also direct the Director of Public Prosecutions to examine the records of this case in the light of our observations and initiate necessary enquiry against the concerned Public Prosecutor for not discharging his duties in proper manner.

We part with this case with the hope that in future all the concerned agencies will take necessary care and discharge their duty with an utmost responsibility to ensure that miscarriage of justice never takes place and ensure that aim of criminal justice system to see that the really guilty persons do not escape from punishment, becomes, a reality.

TENDENCY OF APPLYING PRESSURE THROUGH CRIMINAL PROSECUTION

Indian Oil Corporation V. NEPC India Ltd. (2006) 6 SCC 736 "While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged."

In *G. Sagar Suri vs. State of UP* [2000 (2) SCC 636], this Court observed : "It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which 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."

In *Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore, Cochin* [AIR 1953 SC 478], this Court held : "to constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit."

In *Jaswantrao Manilal Akhaney v. State of Bombay* [AIR 1956 SC 575], this Court reiterated that the first ingredient to be proved in respect of a criminal breach of trust is 'entrustment'. It, however, clarified : "... But when S. 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event."

RAREST OF RARE CASES

The test of rarest of rare case was laid down by this Court for the first time in the case of *Bachan Singh v. State of Punjab* reported in 1980 (2) SCC 684.

"(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a persons vis-a vis whom the murderer is in dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

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(3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

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

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

The findings of the rarest of rare case would have to be judged in the light of the circumstances brought about and proved by the prosecution. Supreme Court in **Om Prakash v. State of Haryana reported in 1999 (3) SCC 19**, while dealing with the accused who had committed seven murders, observed as under: "17. Considering the aforesaid background of the matter, the question would be whether the case of the appellant could be one of the "rarest of the rare" cases so that death sentence is required to be imposed. In our view, even though this is a gruesome act on the part of the appellant, yet it is a result of human mind going astray because of constant harassment of the family members of the appellant as narrated above. It could be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the accused was feeling morally justifiable on his part. Hence, it would be difficult to term it as the "rarest of the rare" cases. Further this is not a crime committed because of lust for wealth or women, that is to say, murders are neither for money such as extortion, dacoity or robbery; nor even for lust and rape; it is not an act of anti-social element kidnapping and trafficking in minor girls or of an anti-social element dealing in dangerous drugs which affects the entire moral fibre of the society and kills number of persons; nor is it crime committed for power or political ambitions or part of organized criminal activities. It is a crime committed by the accused who had a cause to feel aggrieved for injustice meted out to his family members at the hands of the family of the other party who according to him were strong enough physically as well as economically and having influence with the authority which was required to protect him and his family. The bitterness increased to a boiling point and because of the agony suffered by him and his family members at the hands of the other party and for not getting protection from the police officers concerned or total inaction despite repeated written prayers goaded or compelled the accused to take law in his own hands which culminated in gruesome murders; may be that his mind got derailed of the track and went astray or beyond control because of extreme mental disturbances for the constant harassment and disputes. Further considering the facts and circumstances, it cannot be said that he would be menace to the society; there is no reason to believe that he cannot be reformed or rehabilitate and that he is likely to continue criminal acts of

violence as would constitute as continuing threat to the society. He was working in BSF as a disciplined member of the armed forces aged about 23 at the relevant time, having no criminal antecedents."

In the case of Chaman Vs. State of NCT- (2001) 2 SCC 28, the Court after finding the commission of crime held that a girl of 1 and = years was raped and killed but did not approve of the death sentence imposed on him by the Courts below and imposed on him a life sentence as this Court found that the appellant is not a dangerous person to endanger the society and the case is not coming within the parameters of the 'rarest of rare case'.

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In the case of Bantu @ Naresh Giri Vs. State of Uttar Pradesh- AIR 2002 S.C. 70, the accused was sentenced to death for the rape and murder of a 6 year old child. In Para 8 of the said judgment, the Learned judges after considering the age of the accused and also the fact that he did not have any past criminal record held that the accused will not be a grave danger to society and further held that the case does not fall under the rarest of rare cases and death sentence was commuted to life sentence.

In Surendra Pal Singh Vs. State of Gujarat- (2005) 3 SCC 127, a minor girl was raped and killed and the Sessions Court imposed death penalty and the High Court of Gujarat also affirmed the same. But this Court found that the case does not fall under the rarest of rare cases and considering that the appellant was 36 years old and has no previous criminal record, held that he was not a menace to society. This Court held that it was not a rarest of rare cases and confirmed the conviction but commuted the sentence from death sentence to life imprisonment.

In Amrit Singh Vs. State of Punjab- AIR 2002 SC 132, the accused was found guilty of rape of a minor girl and also of her death. Death occurred not as a result of strangulation but due to excessive bleeding from her private parts. In that case, the Trial Court sentenced the accused to death sentence which was confirmed by the High Court of Punjab and Haryana in a reference proceeding before it. In para 21 of page 136 of the judgment, this Court held that the imposition of death sentence in such cases was improper and it cannot be put in the category of rarest of rare cases and the Court imposed a sentence of rigorous imprisonment for life on that ground.

In the case of Kulwinder Singh Vs. State of Punjab- AIR 2007 SC 2868, Hardip Kaur was found to have been raped by the accused and on her protest, she was found to have been strangled as a result of which she died. Another person, Joginder Kaur also died in the same incident as a result of injuries received from gandashi blows inflicted on the neck by the accused. In that case, the death sentence was commuted to imprisonment for life as the Court found that it cannot be brought in the category of rarest of rare cases.

WHERE THE DEATH SENTENCE AWARDED BY THE TRIAL AND THE APPELLATE COURT WAS CONFIRMED BY SUPREME COURT.

- (I) MAHESH S/O RAM NARAIN & ORS. VS. STATE OF MADHYA PRADESH REPORTED IN 1987 (3) SCC 80.
- (II) SEVAKA PERUMAL & ORS. VS. STATE OF TAMIL NADU REPORTED IN 1991 (3) SCC 471.
- (III) JAI KUMAR VS. STATE OF MADHYA PRADESH REPORTED IN 1999 (5) SCC 1.
- (IV) RAMDEO CHAUHAN ALIAS RAJNATH CHAUHAN VS. STATE OF ASSAM REPORTED IN 2007 (7) SCC 455
- (V) SURESH & ANR. VS. STATE OF UTTAR PRADESH ETC. REPORTED IN 2001 (3) SCC 673.
- (VI) KRISHNA MOCHI & ORS. VS. STATE OF BIHAR ETC. REPORTED IN 2001 (6) SCC 81.
- (VII) OM PRAKASH @ RAJU VS. STATE OF UTTARANCHAL REPORTED IN 2003 (1) SCC 648.
- (VIII) GURDEV SINGH & ANR. VS. STATE OF PUNJAB ETC. REPORTED IN 2003 (7) SCC 258.
- (IX) PRAVEEN KUMAR VS. STATE OF KARNATAKA REPORTED IN 2003 (12) SCC 199.
- (X) HOLIRAM BORDOLOGI VS. STATE OF ASSAM REPORTED IN 2005 (3) SCC 793.
- (XI) UNION OF INDIA & ORS. VS. DEVENDRA NATH RAI REPORTED IN 2006 (2) SCC 243.
- (XII) BABU @ MUBARIK HUSSAIN VS. STATE OF RAJASTHAN REPORTED IN 2006 (13) SCC 116.
- (XIII) RAM SINGH VS. SONIA & ORS. REPORTED IN 2007 (3) SCC 1.
- (XIV) SHIVU & ANR. VS. REGISTRAR GENERAL, H.C. OF KAR & ANR. REPORTED IN 2007 (4) SCC 713.
- (XV) PRAJEET KUMAR SINGH VS. STATE OF BIHAR REPORTED IN 2008 (4) SCC 434.
- (XVI) MOHAN ANNA CHAVAN VS. STATE OF MAHARASHTRA REPORTED IN 2008 (7) SCC 561.

GUJARATH HIGH COURT CASE HAVING VERY GREAT DISCUSSION ON CAPITAL PUNISHMENT

JUSTICE B Shethna, JUSTICE Vora IN State Of Gujarat vs Surendrapal Shivabalakpal COFIRMING DEATH SENTENCE DISCUSSED BELOW JUDGEMENTS OF SUPREME COURTS REGARDING 'rarest of rare cases' AND FINALLY OBSERVED THAT : **GUJARATH HIGH COURT** (2004) 3 GLR 628

A question arises, if not capital punishment then what ? Solitary confinement ? That would be a living death. The other alternative is life-imprisonment. Could a life term on one hand and a cold-blooded sadistic criminal on the other hand be meted out with the same term of punishment ? Could that be a balanced justice ?

There have been cases where capital punishment is converted to life imprisonment, and on finishing the term, the released convict commits a grave offence of murder of the like. So who is to assure to cure such a criminal ?

Considering the conditions in India, the vastness of its area, the variety of social upbringing, disparity in the level of education, diversity in its population, and the need for maintaining law and order at the present juncture, India cannot risk the experiment of abolishment of capital punishment.

Capital punishment may not assure to stop grievous offences but it can surely refrain one from contemplating them and more so make it tough for the offenders to get away with his crime.

It is said that just as one cannot permit that which is prohibited, similarly, one cannot prohibit that which should be permitted and capital punishment cannot be prohibited as it is rightly permitted

Coming to the facts of this case, which is narrated hereinabove in extensio, it is clear that the accused by his pervert, ghoulis and depraved act has brought an abrupt and early end of an innocent child who had hardly seen seven summers of her life, in the most ghastly and dastardly manner and left behind grisly sovereign of his crime. The victim was an innocent child whereas the accused was the human monster and this heinous and odious crime committed by him is an unpardonable pillage of human virtues, values and tenets of humanity. Such gruesome plundering of an innocent human life not only warrants the highest punishment provided under the law, but it also prompts repugnance from our sense of humanity and surety. We must have heard and decided hundreds of horrendous cases of aggravated assault in life, but this one has sent a chilling shock through our spine. It is no doubt true that the human life must be valued, but not of a human monster, who has got an end of human life of an innocent girl child hardly aged 7 years in a most barbaric manner after committing rape on her in the most brutal manner. Therefore, on facts of this case, if learned Judge has awarded death sentence to the accused then it cannot be said even by stretch of imagination that the learned Judge was blood thirsty.

CASES DISCUSSED BY HON'BLE JUSTICES

In the matter of *Kamta Tiwari vs. State of M.P.*, reported in AIR 1996 SC 2800, the accused was charged for the offence under sec. 376 as well as 302 of IPC of committing rape on his niece aged 7 years and then committed her murder. The entire case was based on circumstantial evidence but the tell-tale circumstances firmly established were not compatible with any other reasonable hypothesis except that the accused after kidnapping "Pinky" committed rape on her and then strangled her and committed her murder. The Hon'ble Supreme Court held that : "When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes". While confirming the death sentence in *Kamta Tiwari's* case (supra), the Hon'ble Supreme Court also considered its earlier land mark judgments (1) in the case of *Bachan Singh vs. State of Punjab* reported in AIR 1980 SC 898 and (2) in the case of *Machhi Singh vs. State of Punjab* reported in AIR 1983 SC 957.

In case of **Laxman Naik vs. State of Orissa**, reported in AIR 1995 SC 1387, the Hon'ble Supreme court confirmed the death sentence of the accused, who, first

committed rape on the minor daughter aged 7 of his brother. The case was based purely on circumstantial evidence and then killed her. After considering the the judgment of Bachan Singh's case (supra), the Apex Court observed in para-26 that : ".....While discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the Legislative Policy in the form of the provisions contained in Sections 253(2) and 354(3) of the Code of Criminal Procedure. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case....." It has further observed in para 27 that: ".....the victim was totally a helpless child there being no one to protect her in the desert where she was taken by the appellant misusing his confidence to fulfil his lust. It appears that the appellant had pre-planned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act." Ultimately, the Hon'ble Supreme court held that: "The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare case attracting no punishment other than the capital punishment and consequently, we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code."

In the case of **Molai and another vs. State of Madhya Pradesh, reported in AIR 2000 SC 177**, teenage girl aged 16 years was all alone in the house preparing for her exams. Both the accused took disadvantage of the said fact and committed rape on her and strangled her by using her undergarments and caused injuries on her person with sharp edged weapon and after committing her murder threw her dead body into septic tank at the backside of the house. In absence of mitigating circumstances, the Hon'ble Supreme court held that in a case of this nature, capital punishment to both the accused was the only proper punishment and accordingly the death sentence was confirmed.

In the case of Javed **Ahmed Abdulhamid Pawala vs. State of Maharashtra reported in AIR 1983 SC 594**, the accused was convicted for the offence under sec. 302 of IPC. He was only 22 years old and case rested upon circumstantial evidence, however, murder was perpetrated in a cruel, callous and fiendish fashion. Therefore, Hon'ble Supreme Court confirmed the death sentence and held that it was a "rarest of the rare cases".

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In the case of **Govindasami vs. State of Tamil Nadu, reported in AIR 1998 SC 2889**, the accused was convicted for the offence under sec. 302 for grabbing properties. No

mitigating circumstance was pointed out. Considering the judgment of the Hon'ble Supreme Court in Bachan Singh's case (supra) held that: "Nonetheless we looked into the record to find out whether there was (were) any extenuating or mitigating circumstances in favour of the appellant but found none. If, in spite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy."

In the case of **Smt. Shashi Nayar vs. Union of India and others reported in AIR 1992 SC 395**, the Hon'ble Supreme Court has already set at rest the challenge to the death sentence to be awarded for the offence under sec. 302 of IPC by holding that it does not violate mandate of Article 21, therefore, if it is a rarest of rare cases than the death sentence can always be awarded.

In case of **Bantu alias Naresh Giri vs. State of M.P. reported in AIR 2002 SC 70**, on the facts of that case, the Hon'ble Supreme Court held that it was not the rarest of the rare cases where the accused was required to sentence to death. It was the case in which the accused first committed rape on the minor girl aged 6 years and then committed her murder. The only aspect of the case which seems to have weighed with the Hon'ble Supreme Court for not awarding the death sentence to the accused for such heinous offence was that he had no past criminal record.

In the case of **Raju vs. State of Haryana reported in AIR 2001 SC 2043**, the accused first committed rape on minor girl 11 years and then committed her murder. Accused had caused two injuries on head and mouth with bricks as she threatened the accused that she would report about the incident at home and the accused inflicted injuries on spur of moment. He had no criminal past record. Considering the facts of that case, the Hon'ble Supreme court held that it was not the rarest of the rare cases. Therefore, commuted the death sentence to life imprisonment.

In the case of **Mohd. Chaman vs. State (NTC of Delhi) reported in (2001)2 SCC 28**, the accused first committed rape on minor child 1 and 1/2 years and in that process of committing rape, inflicted injuries on her liver, apart from other injuries which resulted in death of the child. However, considering the guidelines laid down by the Apex Court in its earlier judgment reported in Bachan Singh's case (supra) and Machhi Singh's case (supra) and balancing the aggravating and mitigating circumstances emerging from the evidence on record, the Supreme Court held that it was not the case which can be said to be "rarest of the rare cases". Accordingly, the death sentence was commuted to life imprisonment.

In the case of **Kumudi Lal vs. State of U.P. reported in AIR 1999 SC 1699**, the girl aged 14 years was first raped by the accused and when she raised shouts, the accused tied Salwar around her neck and thereby caused her murder. On facts of that case, the Hon'ble Supreme Court commuted the death sentence in life imprisonment.

AIR 2003 SC 3131 in the case of Amit alias Ammu vs. State of Maharashtra, wherein also, the accused committed rape on school going girl aged 12 years and than committed her murder. On facts of that case, the Hon'ble Supreme Court held that it was not the rarest of the rare cases and accordingly the death sentence was commuted to life imprisonment.

DEATH IN POLICE CUSTODY

State Of M.P. vs Shyamsunder Trivedi And Or (1995) 4 SCC 262 JUSTICE A Anand, M Mukherjee The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not care less' attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts, must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

The State Of Karnataka vs S. Dhandapani Modalaiar 1992 CriLJ 24, ILR 1991 KAR 2040, 1991 (2) KarLJ 486 (DB) :- "Section 246 of the Criminal P.C. provides that after recording of evidence, if the Magistrate is of the opinion that there is a ground for presuming that the accused has committed an offence triable under this Chapter, he shall frame in writing a charge against the accused. The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon. Further, sub-section (4) of S. 246 lays down that if the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted on a plea of guilt, he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. It is, therefore, apparent from the scheme of S. 246 of the Criminal P.C. that the law provides the accused an opportunity of thinking over the matter in the light of the evidence that has been adduced before the Court and then to inform the Court whether

he wishes to cross-examine the witnesses already examined by the prosecution before framing of the charge. Obviously, such an opportunity is to be given to the accused because in large number of cases they are ignorant of the law and must need advice before he can make up his mind whether to further cross-examine the witnesses already examined by the prosecution. The express words employed in S. 246(4) viz., 'at the commencement of the next hearing of the case' emphasises this aspect of the matter, so that the accused is not compelled to make a decision on the spot immediately after framing of charge. It is worth remembering that the evidence that is adduced before the framing of charge is only directed to establish a case which if unrebutted would lead to the conviction of the accused. Since that is the limited purpose for which evidence is adduced before framing of the charge, the accused may not feel it necessary to cross-examine such witnesses at length so as to make out his defence. The stage for serious consideration on this aspect of the matter arises only if the court decides to frame a charge and actually frames a charge against the accused. It is therefore of significance that law provides for some time to intervene between the date on which the charge is framed and the date on which the accused is required to state as to whether he wishes to cross-examine any or all the witnesses examined by the prosecution before the framing of the charge."

NO THIRD DEGREE METHOD IN INVESTIGATION

In D.K. Basu v. State of West Bengal (1997) 1 SCC 416, directions were given to "Arrest and Detention" in criminal cases. The Court opined: "28. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it."

There are instances of torture and death in custody of these authorities as well. In **In Re: Death of Sawinder Singh Grover, 1995 Supp. (4) SCC 450** (to which Kuldip Singh, J. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge an FIR and initiate criminal proceedings against all persons named in the report of the Additional District judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs 2 lakhs to the widow of the deceased by way of ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

CRIMINAL APPEAL NO. 174 OF 2009 (Arising out of SLP [Criminal] No.3173 of 2006) Surendra Kumar Bhatia Vs. Kanhaiya Lal & Ors. DECIDED ON January 30, 2009. BY SUPREME COURT OF INDIA BY JUSTICE R.V.RAVEENDRAN, J.

Only Judges (as defined in section 19 IPC) acting judicially are entitled to the protection under Section 77 IPC. The Collector is neither a Judge as defined under Section 19 nor does he act judicially, when discharging any of the functions under the Act. Therefore he is not entitled to the protection under Section 77 IPC.

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The question whether the Collector/Land Acquisition Officer while making an enquiry and award under the Act, acts in a judicial capacity or not, has been considered in a series of judgments. (Raja Harish Chandra Raj Singh vs. The Dy. Land Acquisition Officer - 1962 (1) SCR 676; M/s. Boman Behram v. State of Mysore - 1974 (2) SCC 316; Mrs. Khorshed Shapoor Chenai vs. Controller of Estate Duty - 1980 (2) SCC 1; Sharda Devi v. State Government of Bihar - 2003 (3) SCC 128, and Kiran Tandon v. Allahabad Development Authority - 2004 (10) SCC 745) The well settled principles are :

(a) Any inquiry as to the market value of property and determination of the amount of compensation by the Collector, is administrative and not judicial in nature, even though the Collector may have power to summon and enforce the attendance of witnesses and production of documents. In making an award or making a reference or serving a notice, the Collector neither acts in judicial nor quasi judicial capacity but purely in an administrative capacity, exercising statutory powers as an agent and representative of the Government/Acquiring Authority.

(b) The award by a Collector is merely an offer of the amount mentioned as compensation, on behalf of the Government/Acquiring Authority to the person/s interested. It is neither an executable decree, nor binds the owners or persons interested in the acquired property.

(c) The Collector does not function as a Judicial Officer who is required to base his decision only on the material placed in the enquiry in the presence of parties, but functions as a valuer who ascertains the market value on material collected from all sources, personal inspection and his own knowledge and experience.

313 STATEMENT OF ACCUSED IN THE COURT

In Mohan Singh v. Prem Singh and another (2003 SCC (Crl.) 1514), the Apex Court has held : The statement of accused under Section 313 of Cr.P.C. is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in the case of Nishi Kant (Supra) by this Court if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 of Cr.P.C cannot be made the sole basis of his conviction.

The question as to whether an accused could be found guilty and convicted solely on the basis of his statement under Section 313 of the Criminal Procedure Code came up for consideration before the Apex Court in the judgment in **Sampat Singh v. State of Rajasthan (1969) 1 SCC 367**. The said judgment was relied upon by the Apex Court in the subsequent judgment reported in 1998 SCC CrL 929, wherein in paragraph 10 the Apex Court has held as follows:- "Time and again this Court has pointed out that such answers of the accused can well be taken into consideration in deciding whether the prosecution evidence can be relied on and whether the accused is liable to be convicted of the offences charged against him." However, in the very same judgment, the Apex Court had made it clear that when the statement of the accused contain admission of circumstances put against him are not by themselves delinked from the evidence, such statement can be used for arriving at a finding that the accused had committed the offence. By the said finding, the Apex Court has held that the statement by themselves cannot be the sole basis for conviction.

Bishnu Prasad Sinha v. State of Assam reported as 2007 SCW 569: 2007 Cri LJ 1145 held that It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record.

CHILD WITNESS

Section 118 of Evidence Act (I of 1872) provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same mind. The competency of a witness is a rule and their incompetence is the exception. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. Under Section 118 of the Evidence Act a child is competent to testify, provided he can understand the questions put to him and giving rational answers thereto.

Apex Court in case titled as Baby Kandayanathil v. State of Kerala reported in AIR 1993 SC 2275 : 1993 Cri LJ 2605 held that the statement of a child is admissible evidence and can be acted upon when recorded after putting preliminary questions to him and satisfying that he was answering intelligently and fearlessly and also gave all details of occurrence and withstood test of cross-examination.

Apex Court in case titled as Ratansinh Dalsukhbhat Nayak v. State of Gujarat reported as AIR 2004 SC 23 : 2004 Cri LJ 19 held that testimony of child witness is reliable moreso, when it receives corroboration from the evidence relating to the recovery and, report of Forensic Science Laboratory. Further it is held in the judgment that a child who sticks to her statement recorded during investigation in all material particulars, the trial Court is within its jurisdiction and power, is justified in placing implicit reliance on her.

Dattu Ramrao Sakhare and Others Vs. State of Maharashtra - (1997) 5 SCC 341, had held that there is no rule of practice that the evidence of a child witness needs corroboration in order to base conviction on it. However, as a rule of prudence, the Court insists it is desirable to have corroboration from other dependable evidence.

In Suryanarayana Vs. State of Karnataka - (2001) 9 SCC 129, this Court held that corroboration of the testimony of a child witness is not a rule but is a measure of caution and prudence.

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NON EXAMINATION OF I.O

Apex Court in case titled as Bahadur Naik v. State of Bihar reported as AIR 2000 SC 1582 : 2000 Cri LJ 2466 held that non-examination of the Investigating Officer is of no consequence when defence has failed to shake credibility of the eye-witness.

Apex Court in case titled as Raj Kisnore Jha v. State of Bihar reported as held that if the Investigating Officer is dead, his non-examination will not affect the prosecution case in any way.

In Ram Dev v. State of U.P. 1995 Supp (1) SCC 547, it was noted that non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye-witnesses. It was, however, indicated that it is always desirable for the prosecution to examine the Investigating Officer. In the present case after examination-in-chief and partial cross-examination, the Investigating Officer had died. Therefore, this cannot be a case which can be stated to have caused any prejudice to the accused on account of Investigating Officer's non-examination. The prosecution cannot be attributed with any lapse or ulterior motives in such circumstances.

In Behari Parsad v. State of Bihar 1996 (2) SCC 316 : 1996 Cri LJ 1653 it was held that case of prejudice likely to be suffered mostly depends upon facts of each case and no universal straitjacket formula should be laid down that non-examination of Investigating Officer per se vitiates the criminal trial.

LAST SEEN THEORY

In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows: "The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

In Ramreddy Rajeshkhanna Reddy v. State of A.P. [2006 (10) SCC 172] it was noted as follows: "The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration".

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In Joseph and Poulo v. State of Kerala [2000(5) SCC 197] it was, inter alia, held as follows: "The formidable incriminating circumstances against the appellant, as far as we could see, are that the deceased was taken away from the convent by the appellant under a false pretext and she was last seen alive only in his company and that it is on the information furnished by the appellant in the course of investigation that jewels of the deceased which were sold to PW 11 by the appellant, were seized." "The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313 Cr.P.C. the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed.(See: State of Maharashtra v. Suresh). That missing link to connect the accused appellant, we find in this case provided by the blunt and outright denial of every one and all that incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause of the death of Gracy and for robbing her of her jewellery worn by her -- MOs 1 to 3, under Section 392. The deceased meekly went with the accused from the Convent on account of the misrepresentation made that her mother was seriously ill and hospitalised apparently reposing faith and confidence in him in view of his close relationship -- being the husband of her own sister, but the appellant seems to have not only betrayed the confidence reposed in him but also took advantage of the loneliness of the hapless woman. The quantum of punishment imposed is commensurate with the gravity of the charges held proved and calls for no interference in our hands, despite the fact that we are not agreeing with the High Court in respect of the findings relating to the charge under Section 376.

TRAP CASE AND COMPLAINANT WITNESS CREDIBILITY

State of U.P. v. Dr. G. K. Ghosh (1984) 1 SCC 254 has aptly observed that by and large a citizen is somewhat reluctant, rather than anxious, to complain to the Vigilance Department to have a trap arranged even if illegal gratification is demanded by a

Government official. The relevant para 9 at page 261 of the judgment reads as under: "9. By and large a citizen is somewhat reluctant, rather than anxious, to complain to the Vigilance Department and to have a trap arranged even if illegal gratification is demanded by a Government servant. There are numerous reasons for the reluctance. In the first place, he has to make a number of visits to the office of Vigilance Department and to wait for a number of officers. He has to provide his own currency notes for arranging a trap. He has to comply with several formalities and sign several statements. He has to accompany the officers and participants of the raiding party and play the main role. All the while he has to remain away from his job, work, or avocation. He has to sacrifice his time and effort whilst doing so. Thereafter, he has to attend the court at the time of the trial from day to day. He has to withstand the searching cross-examination by the defence counsel as if he himself is guilty of some fault. In the result, a citizen who has been harassed by a Government officer, has to face all these hazards. And if the explanation offered by the accused is accepted by the court, he has to face the humiliation of being considered as a person who tried to falsely implicate a Government servant, not to speak of facing the wrath of the Government servants of the department concerned, in his future dealings with the department. No one would therefore be too keen or too anxious to face such an ordeal. Ordinarily, it is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance, that he adopts the course of approaching the Vigilance Department for laying a trap. His evidence cannot therefore be easily or lightly brushed aside. Of course, it cannot be gainsaid that it does not mean that the court should be oblivious of the need for caution and circumspection bearing in mind that one can conceive of cases where an honest or strict Government official may be falsely implicated by a vindictive person to whose demand, for showing favours, or for according a special treatment by giving a go-bye to the rules, the official refuses to yield."

CONTEMPT PROCEEDINGS

In re: Nand Lal Balwani [(1999) 2 SCC 743], it was held that where an Advocate shouted slogans and hurled a shoe towards the Court causing interference with judicial proceedings and did not even tender an apology, he would be liable for contempt in the face of the Court. It was observed by the Bench of three Judges which heard the matter that law does not give a lawyer, unsatisfied with the result of any litigation, licence to permit himself the liberty of causing disrespect to the Court or attempting, in any manner, to lower the dignity of the Court.

In another decision of this Court in Charan Lal Sahu v. Union of India and another [(1988) 3 SCC 255], a petition filed by an experienced advocate of this Court by way of a public interest litigation was couched in unsavoury language and an intentional attempt was made to indulge in mudslinging against the advocates, the Supreme Court and other constitutional institutions. Many of the allegations made by him were likely to lower the prestige of the Supreme Court. It was also alleged that the Supreme Court had become a constitutional liability without having control over the illegal acts of the Government. This Court held that the pleadings in the writ petition gave the impression that they were clearly intended to denigrate the Supreme Court in the esteem of the people of India. In the facts of the case, the petitioner therein was prima facie held to be guilty of contempt of Court.

INVESTIGATION

In Naresh Kavarchand Khatri vs. State of Gujarat & Anr. [(2008) 8 SCC 300], this Court held: "6. The power of the court to interfere with an investigation is limited. The police authorities, in terms of Section 156 of the Code of Criminal Procedure, exercise a statutory power. The Code of Criminal procedure has conferred power on the statutory authorities to direct transfer of an investigation from one Police Station to another in the event it is found that they do not have any jurisdiction in the matter. The Court should not interfere in the matter at an initial stage in regard thereto. If it is found that the investigation has been conducted by an Investigating Officer who did not have any territorial jurisdiction in the matter, the same should be transferred by him to the police station having the requisite jurisdiction.

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In Dharmeshbhai Vasudevbbhai & Ors. vs. State of Gujarat & Ors. [2009 (7) SCALE 214], this Court held: 10 "9. Interference in the exercise of the statutory power of investigation by the Police by the Magistrate far less direction for withdrawal of any investigation which is sought to be carried out is not envisaged under the Code of Criminal Procedure. The Magistrate's power in this regard is limited. Even otherwise, he does not have any inherent power. Ordinarily, he has no power to recall his order. This aspect of the matter has been considered by this Court in S.N. Sharma v. Bipen Kumar Tiwari & Ors. [(1970) 1 SCC 653], wherein the law has been stated as under : "6. Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable. 7. It may also be further noticed that, even in sub-section (3) of Section 156, the only power given to the Magistrate, who can take cognizance of an offence under Section 190, is to order an investigation; there is no mention of any power to stop an investigation by the police. The scheme of these 11 sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate."

Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. [(1976) 3 SCC 252], this Court, upon comparison of the provision of the old Code and the new Code, held as under : "7. Section 156(3) occurs in Chapter XII, under the caption : "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading: "Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre- cognizance stage, the second at 13 the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks

upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre- cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is 14 empowered under Section 202 to direct, within the limits circumscribed by that section an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

Sakiri Vasu vs. State of Uttar Pradesh & Ors. [(2008) 2 SCC 409] while dealing with the power of the court to direct the police officer to record an FIR in exercise of power under Section 156(3) of the Code observed that the Magistrate had also a duty to see that the investigation is carried out in a fair manner

ACQUITTAL AND APPEAL

In K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355, the Court observed thus: "It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable. "A reasonable doubt", it has been remarked, "does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons.

In Tota Singh & Another v. State of Punjab (1987) 2 SCC 529, the Court reiterated the same principle in the following words: "This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a re-appreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the

conclusion 19 recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

In Sambasivan & Others v. State of Kerala (1998) 5 SCC 412, the Court observed thus: "The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

In Bhagwan Singh & Others v. State of M.P. (2002) 4 SCC 85, the Court repeated one of the fundamental principles of criminal jurisprudence that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court observed as under:- "The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided...."

In Harijana Thirupala & Others v. Public Prosecutor, High Court of A.P., Hyderabad (2002) 6 SCC 470, this Court again had an occasion to deal with the settled principles of law restated by several decisions of this Court. Despite a number of judgments, High Courts continue to fail to keep them in mind before reaching a conclusion. The Court observed thus: "The principles to be kept in mind in our system of administration of criminal justice are stated and restated in several decisions of this Court. Yet, sometimes High Courts fail to keep them in mind before reaching a conclusion as to the guilt or otherwise of the accused in a given case. The case on hand is one such case. Hence it is felt necessary to remind about the well-settled principles again. It is desirable and useful to remind and keep in mind these principles in deciding a case. In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of

the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon the facts of each case. Doubtless the High Court in appeal either against an order of acquittal or conviction as a court of first appeal has full power to review the evidence to reach its own independent conclusion. However, it will not interfere with an order of acquittal lightly or merely because one other view is possible, because with the passing of an order of acquittal presumption of innocence in favour of the accused gets reinforced and strengthened. The High Court would not be justified to interfere with the order of acquittal merely because it feels that sitting as a trial court it would have proceeded to record a conviction; a duty is cast on the High Court while reversing an order of acquittal to examine and discuss the reasons given by the trial court to acquit the accused and then to dispel those reasons. If the High Court fails to make such an exercise the judgment will suffer from serious infirmity. It is unfortunate that by the impugned order, the High Court has upset the well-reasoned order of acquittal passed by the trial court. It appears to us that the High Court while doing so, did not bear in mind the well-settled principles stated above as to what should be the approach in reversing an order of acquittal and under that circumstances it should be reversed.

In State of Rajasthan v. Raja Ram (2003) 8 SCC 180, this Court observed as under:

"Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. ... The principle to be followed by appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference."

In State of Goa v. Sanjay Thakran & Another, (2007) 3 SCC 755, this Court observed as under: "while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below...."

In Chandrappa & Others v. State of Karnataka (2007) 4 SCC 415, this Court held:

"(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on

questions of fact and of law. (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, a two Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with most of the cases referred in this judgment. The exercise of surveying relevant judgments has again been taken with the hope that the Appellate Courts would keep in view the settled legal position while dealing with the trial courts' judgments of acquittals. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.
2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.
3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.
4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.
5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

SANCTION TO PROSECUTE PUBLIC SERVANT

2009 (1) SCALE 374 , CRIMINAL APPEAL NO. 8 OF 2009 @ S.L.P. (Crl.) NO.2864 of 2007 Choudhury Parveen Sultana . Vs. State of West Bengal and Another 07.01.2009

All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. The underlying object of Section 197 Cr.P.C is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and

harassment to the said official. If the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 Cr.P.C. and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

Pukhraj v. State of Rajasthan [AIR 1973 SC 2591] where the same question was dealt with and it was held that assaulting the complainant and abusing him when the complainant came to submit his representation for cancellation of his transfer could not by any standard be said to be part of the official duties to be exercised by the authority concerned.

Bhagwan Prasad Srivastava v. N.P. Misra [(1971) 1 SCR 317] where a complaint had been filed that the accused, who was a civil surgeon, used defamatory and abusive words and got the complainant pushed out by the cook of the hospital. The question posed was whether the case was covered by Section 197 Cr.P.C. and whether previous sanction of the superior authority was necessary before the trial Court could take cognizance of the case. In the facts of the case, this Court was of the view that the case was not covered by Section 197 Cr.P.C. and that the object and purpose underlying Section 197 Cr.P.C. to afford protection to public servant against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. It was also observed that the Section 197 has been designed to facilitate effective and unhampered performance of their official duty by public servants by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution was a condition precedent to the taking of cognizance of the cases against them by the Courts. It was finally observed that the question whether a particular act is done by a public servant in the discharge of his official duties is substantially one of fact to be determined in the circumstances of each case.

As mentioned in Bhagwan Prasad Srivastava's case (supra), the underlying object of Section 197 Cr.P.C is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 Cr.P.C. and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

The Supreme Court held in *Harihar Prasad v. State of Bihar*, (1972) 3 SCC 89, that it was no part of duty of a public servant while discharging his official duties to enter into a criminal conspiracy or indulge in criminal misconduct. This position of law has been reiterated by the Supreme Court in *State of Bihar v. P.P. Sharma* (1991 Cri LJ 1438) and

Shambhoo Nath Misra v. State of U. P. (1997 Cri LJ 2491), and it has been held therein that it is not the official duty of a public servant to fabricate false record and misappropriate public funds, etc. and, therefore, no sanction was required under Section 197(1) of the Cr. P.C. for prosecuting a public servant for offences of fabrication of false records or misappropriation of public funds.

Choudhury Parveen Sultana v. West Bengal and Another. Criminal Appeal No. 8 of 2009.
Date of Judgment 07-01-09

1. All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. On the other hand
2. there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him.
3. the underlying object of Section 197 Cr.P.C is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment of the said official.
4. However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 Cr.P.C. and have to be considered de hors the duties which a public servant is required to discharge or perform.
5. Whether there is a misuse of authority is a question of fact

PUBLIC PROSECUTOR

In the case of P.G. Narayanakutty v. State of Kerala and Ors., 1982 Cri.L.J. 2085 (Ker.) a learned Judge of the Kerala High Court has held that, Special Public Prosecutor cannot be appointed with a view to secure conviction at all cost. Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased. In order that he discharges his duties properly, he should look to the State for remuneration for his services if he looks to a private party for his remuneration, his capacity and ability to perform his role as Public Prosecutor properly will be endangered. Government cannot appoint Special Public Prosecutor on such terms, abdicating their financial responsibility or directing him to receive his remuneration from any private individual or expecting him to work without remuneration.

On the role of the Prosecutor it was held that, he is an officer of the Court expected to assist the Court in arriving at the truth in a given case. The Prosecutor no doubt, has to vigorously and conscientiously prosecute the case so as to serve the high public interest of finding out the truth and in ensuring adequate punishment to the offender. At the same time, it is no part of his duty to secure by fair means or foul conviction in any case. He has to safeguard public interest in prosecuting the case; public interest also demands that the

trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including the Code. The Prosecutor, while being fully

aware of his duty to prosecute the case vigorously and conscientiously, must also be prepared to respect and protect the rights of the accused.

The Delhi High Court in the case of *Ajay Kumar v. State and Anr.*, 1986 Cri. L.J. 932 (Del.) dealing with the role of a Public Prosecutor held that, the Public Prosecutor is a functionary of the State appointed to assist the Court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure. It is no part of his obligation to secure conviction of an accused, in any event, or at all costs. Nor is he intended to play a partial role or become party to the prosecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. His plain task is to represent the State's point of view on the basis of the material which could be legitimately brought before the Court at the trial. If all State actions must be just, fair and reasonable, he would be under no less duty as a functionary of the State to discharge his functions as a Public Prosecutor in an equally just, fair and reasonable manner irrespective of the outcome of the trial. In that sense, he is part of the judiciary system, and an upright Public Prosecutor has no friends and foes in Court. He has no prejudices, preconceived notions, bias, hostility or his own axe to grind. He represents public interest but is not a partisan in the narrow sense of the term.

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A Public Prosecutor has no client or constituency apart from the State and State is not a party like any other party. He is not paid by an individual who may be aggrieved or by the accused who is on trial. He, therefore, does not have the disability of a dual personality, which is certainly true of an ordinary Advocate, who is torn, in the thick of his practice in Court, between the wider loyalty to public interest, to the Court system, claim of straight and rigid adherence to truth and discipline on the one hand, and his narrow, as also monetary, association with the individual litigant or the institution, whom he represents on the other. An Advocate-client relationship introduces a personal element from which the Public Prosecutor must be considered immune. He is above the personal loyalty. He does not have a dual capacity.

There is a clear distinction between a private Counsel engaged to assist a Public Prosecutor and private Counsel, who has been appointed as a Special Public Prosecutor by the State. In the latter case, he is a Public Prosecutor because he has been appointed as such while in the former case, he is a Public Prosecutor because he has been acting under the direction of a Public Prosecutor.

Public Prosecutors were expected to act in a "scrupulously fair manner" and present the case "with detachment and without anxiety to secure a conviction" and that the Courts trying the case "must not permit the Public Prosecutor to surrender his functions completely in favour of a private Counsel". Public Prosecutor for the State was not such a mouth piece for his client the State, to say what it wants or its tool to do what the State directs. "He owes allegiance to higher cause". He must not consciously "misstate the facts", nor "knowingly conceal the truth". Despite his undoubted duty to his client, the State, "he must sometimes disregard his client's most specific instructions if they conflicted with the duty in the Court to be fair, independent and unbiased in his views".

In *Prabhu Dayal Gupta v. State*, 1986 Cri. L.J.383 (Del.) a learned Judge of the Delhi High Court has observed that, the Prosecutor has to be fair in the presentation of the Prosecution case. He must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not one sided picture. He must not be partial to the prosecution or to the accused. He has to be fair to both sides in the presentation of the case.

This is because the office of the Public Prosecutor carries very great public importance in the scheme of criminal trials in Sessions Court.

The mere fact that the accused in a particular case are engaging a leading Criminal Lawyer is hardly sufficient to make it a special situation warranting appointment of a Special Public Prosecutor. If a norm is accepted by Government that a Special Public Prosecutor shall be appointed when accused engaged a competent or leading Advocate, it is likely to bring about anomalous situation because in very many sessions trials accused would engage leading criminal Lawyers to defend them. Then the Government would be obliged to appoint a Special Public Prosecutor in all cases in which accused engage a competent or a leading Advocate.

The Supreme Court in the case of *Shiv Kumar v. Hukam Chand and Anr.*, 1999 SCC (Cri.) 1277 : (1999)7 SCC 467 : 1999(7) Supreme 606 observed as under: A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence Counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge. A private

Counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

In *Medichetty Ramakistiah v. State, of Andhra Pradesh*, AIR 1959 AP 659 : 1959 Cri. L.J. 1404 (AP) the Andhra Pradesh High Court held as under: The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such Courts should be astute to suffer no inroad upon its integrity. Otherwise, there will be no guarantee that the trial will be as fair to the accused as a criminal trial

ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that Courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party and unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleading for a private party may degenerate into a legalised means for wreaking private vengeance.

In the case of *Abdul Khader Musliar v. Government of Kerala and Ors.*, 1993 Cri. L.J. 1249 it is held, a Special Public Prosecutor is not to be appointed in ordinary circumstances. Where an application for appointment of Special Public Prosecutor was made on the ground that the accused in a murder case had engaged a leading Lawyer as their Advocate to defend them and the appointment was made by the Government without conducting enquiry or without calling for remarks of any other officer, the appointment was bad in law as the mere fact that the accused in a particular case are engaging a leading Criminal Lawyer is hardly sufficient to make it a special situation warranting appointment of a Special Public Prosecutor. If a norm is accepted by Government that a Special Public Prosecutor shall be appointed when accused engage a competent or leading Advocate, it is likely to bring about anomalous situation because in very many sessions trial accused would engage leading Criminal Lawyers to defend them. Consequently the Government would be justified in rescinding such order on calling for and then considering the reports from Superintendent of Police, District Collector and Director General of Prosecution.

The Supreme Court in the case of *Mukul Dalal and Ors. v. Union of India and Ors.*, (1988)3 SCC 144 : 1988 SCC (Cri.) 566 has held, the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs on the basis of guidelines prescribed or to be prescribed and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case. There may be instances where a case instituted on a private complaint is really a public cause. In such a case the prosecution though initiated by a private individual is really one which should be taken over by the State. There may also be cases of private complainants where for various other reasons it would be appropriate for the State to support the prosecution by appointing a Public Prosecutor or a Special Public Prosecutor to look after the case. Similarly there may be cases where a powerful complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice. Therefore, it would not be appropriate to accept the position that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed. The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose and the same would be lost if the procedure adopted by Rule 22 of the Maharashtra Rules is accepted.

MURDER AND CULPABLE HOMICIDE :

SELLAPPAN VS STATE OF TAMIL NADU 2007 (2) SCR 46 IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 IPC as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304 IPC. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304 IPC.The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degrees of probability of death resulting from the intended

bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder.

IF TREATMENT GIVEN IN TIME HE MAY HAVE BEEN SAVED IS NO DEFENCE

SELLAPPAN VS STATE OF TAMIL NADU 2007 (2) SCR 46 The argument regarding the absence of proper medical treatment is clearly unsustainable in view of the Explanation to Section 299 of the Penal Code, 1860. The explanation clearly contemplates that where the death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

HEARING ACCUSED BEFORE SENTENCE

Even without referring to Bachan Singh, in Muniappan Vs. State of Tamil Nadu - (1981) 3 SCC 11, a two judge bench of Supreme Court emphasized on the importance of hearing the accused on the question of sentence under Section 235(2) CrPC and came to the conclusion that the question of hearing the accused on sentence was not to be discharged without putting formal questions to the accused. The obligation of hearing the accused under Section 235(2) CrPC has been explained as follows:- "The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence... question which the Judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction".

Relying on the principles laid down in Bachan Singh in Allauddin Mian Vs. State of Bihar - (1989) 3 SCC 5, the Supreme Court deprecated the practice of the trial Court which, after recording the finding of guilt and before the accused could "absorb and overcome the shock of conviction" asked the accused to say on the question of sentence. In the instant case, the same procedure was adopted as pointed out in Para 67 herein above. The learned Judges held that by doing so the purpose of Section 235(2) is not served.

Section 235(2) as interpreted by Supreme Court in Bachan Singh (supra), and quoted above, provides for a 'bifurcated trial'. It gives the accused (i) a right of pre-sentence hearing, on which he can (ii) bring on record material or evidence which may not be (iii) strictly relevant to or connected with the particular crime but (iv) may have

a bearing on the choice of sentence. Therefore it has to be a regular hearing like a trial and not a mere empty formality or an exercise in an idle ritual.

Allauddin Mian Vs. State of Bihar - (1989) 3 SCC 5, The learned judges held that the provision of Section 235(2) of the CrPC serves a dual purpose and those purposes are as follows: "...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".

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In a subsequent three judge bench judgment of Malkiyat Singh and others Vs. State of Punjab -(1991) 4 SCC 341, Supreme Court again reiterated "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 the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. Supreme Court in the aforesaid Allauddin and AnguSwamy cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law".

In Arshad v. State of Karnataka - (1994) 4 SCC 383, Supreme Court through Justice Anand (as his Lordship was then) again deplored the practice of proving guilt and sentencing on the same day.

SENTENCING

STATE OF PUNJAB VS PREM SAGAR & ORS. 2008 (7) SCC 550 Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality, would no doubt depend upon the facts and circumstance of each case. While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public health must be dealt with severely. For the said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India. There are certain offences which touch our social fabric. We must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences had been kept out of the purview thereof. While imposing sentences, the said principles should be borne in mind. A sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any

justice delivery system..... Sub-section (2) of Section 235, Sub-section (2) of Section 248, Section 325 as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them. Although a wide discretion has been conferred upon the court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant. What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.

Dhananjay Chatterjee Alias Dhana v. State of W.B. [(1994) 2 SCC 220], Supreme Court held: "...Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime..." *Gentela Vijayavardhan Rao and Another v. State of A.P. [(1996) 6 SCC 241]*, following *Dhananjay Chatterjee*, states the principles of deterrence and retribution but the same cannot be categorized as right or wrong. So much depends upon the belief of the judges.

Shailesh Jasvantbhai and Another v. State of Gujarat and Others [(2006) 2 SCC 359], Supreme Court opined: The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence.

State of Karnataka v. Raju [2007 (11) SCALE 114], where the facts of the case were that the Trial Court imposed custodial sentence of seven years after convicting the respondent for rape of minor under Section 376 of the Indian Penal Code; on appeal, the High Court reduced the sentence of the respondent to three and half years. This Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. It was, thus, opined that socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question. However, in India, the view always has been that the punishment must be proportionate to the crime. Applicability of the said principle in all situations, however, is open to question. Judicial discretion must be exercised objectively having regard to the facts and circumstances of each case.

ROAD ACCIDENTS AND SENTENCING

Dalbir Singh v. State of Haryana [(2000) 5 SCC 82], Supreme Court opined: "13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence, to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

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MEDICAL NEGLIGENCE AND OFFENCES

DR. SURESH GUPTA'S CASE AIR 2004 SC 4091: "304A. Causing death by negligence. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." "80. Accident in doing a lawful act. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution." "88. Act not intended to cause death, done by consent in good faith for person's benefit. Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm." "For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or recklessness". It is not merely lack of necessary care, attention and skill." Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable..... Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large

because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients..... Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

JACOB MATHEW CASE AIR 2005 SC 3180: In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence..... Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm. Section 92: ILLUSTRATIONS: (1) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence. (2) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.Section 93 saves from criminality certain communications made in good faith. ILLUSTRATION (1) A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death..... Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith

for person's benefit. ILLUSTRATION (1) : A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

REGISTRATION OF FIR AND INVESTIGATION

LALLAN CHAUDHARY & ORS VS STATE OF BIHAR & ANR, AIR 2006 SC 3376

Section 154 Cr.P.C. casts a statutory duty upon police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 Cr.P.C. is that at the stage of registration of a crime of a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. Reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 Cr.P.C.

SURESH CHAND JAIN Vs. STATE OF MADHYA PRADESH & ANOTHER AIR 2001 SC

571, 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 investigation 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.....

M.C. MEHTA (TAJ CORRIDOR SCAM) V. UNION OF INDIA & ORS. (2007) 1 SCC 110

was a public interest litigation in which Supreme Court, after noticing the precedents, held that when a cognizable offence is reported to the police, they may after investigation take action under Section 169 or Section 170 of the Code. If the officer-in-charge of the police station forms an opinion that there is no sufficient evidence against the accused, the officer-in-charge may, under Section 169 of the Code, release the accused from custody or, if the officer forms an opinion that there is sufficient evidence, he may, under Section 170 of the Code, forward the accused to a competent Magistrate. After analyzing the earlier judgments, this Court observed:...that there is a clear-cut and well-demarcated sphere of activities in the field of crime detection and crime punishment. Investigation of an offence is the field reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive is charged with a duty to keep vigilance over law and order situation. It is obliged to prevent crime. If an offence is committed allegedly, it is the State's duty to investigate into the offence and bring the offender to book. Once it investigates through the police department and finds an offence having been

committed, it is its duty to collect evidence for the purposes of proving the offence. Once that is completed, the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 Cr.P.C and his duty comes to an end."

IN M.C. ABRAHAM & ANR. V. STATE OF MAHARASHTRA & ORS. (2003) 2 SCC 649, Supreme Court observed: "Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection."

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D.VENKATASUBRAMANIAM & ORS. Vs. M.K.MOHAN KRISHNAMACHARI & ORS. 14-09-2009 Supreme Court observed: "The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation."

Sasi Thomas vs State & Ors. 2006(12)SCC421 Proper and fair investigation on the part of the investigating officer is the backbone of rule of law. A proper and effective investigation into a serious offence and particularly in a case where there is no direct evidence available assumes great significance as collection of adequate materials to prove the circumstantial evidence becomes essential. The Complainant has not been treated fairly. When a death has occurred in a suspicious circumstance and in particular when an attempt had been made to bury the dead body hurriedly and upon obtaining apparently an incorrect medical certificate, it was expected that upon exhumation of the

body, the investigating authorities of the State shall carry out their statutory duties fairly. It is clearly a matter of great concern that the authorities did not become alive to the situation. Although the dead body was buried on the premise that the deceased died of heart attack, a final report was submitted stating that she might have committed suicide. It is not known, on what material, such an opinion was arrived at by the investigating officer. It is only because of the persistent efforts on the part of the complainant to move the High Court, a further investigation was directed to be made by CB-CID. If the allegations made by the complainant are correct, the same depicts a sordid state of affairs. The job of the investigating officer is to make investigation in right direction. The investigation must be in consonance with the ingredients of the offence. It cannot be haphazard or unmethodical.

PRINCIPLES GOVERNING DYING DECLARATION

Supreme Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in **Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817)**:

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja & Anr. v. The State of Madhya Pradesh* (1976) 2 SCR 764]]
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* (AIR 1985 SC 416) and *Ramavati Devi v. State of Bihar* (AIR 1983 SC 164)]
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and Anr. v. The Public Prosecutor* (AIR 1976 SC 1994)]
- (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of Madhya Pradesh* (1974 (4) SCC 264)]
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kaka Singh v State of M.P.* (AIR 1982 SC 1021)]
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath and Ors. v. State of U.P.* (1981 (2) SCC 654)]
- (vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v. Krishnamurthi Laxmipati Naidu* (AIR 1981 SC 617)]
- (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Oza and Ors. v. State of Bihar* (AIR 1979 SC 1505).]
- (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanahau Ram and Anr. v. State of Madhya Pradesh* (AIR 1988 SC 912)].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v.State of Maharashtra (AIR 1982 SC 839)]."

APPEAL AGAINST ACQUITTAL

AIR 2006 SC 3010, Pulicherla Nagaraju @ Nagaraja Reddy VS State of A.P.

1. It is now well-settled that the power of the High Court in an appeal from acquittal is no different from its power in an appeal from conviction. It can review and consider the entire evidence and come to its own conclusions by either accepting the evidence rejected by the trial court or rejecting the evidence accepted by the trial court. However, if the High Court decided to depart from the conclusions reached by the trial court, it should pay due attention to the grounds on which acquittal was based and state the reasons as to why it finds the conclusions leading to the acquittal unacceptable.

2. It should also bear in mind that (i) the presumption of innocence in favour of the accused is fortified by the findings of the trial court; (ii) the accused is entitled to benefit of any doubt; and (iii) the trial court had the advantage of examining the demeanour of the witnesses. The crux of the matter, however, is whether the High court is able to give clear reasons to dispel the doubt raised and reject the reasons given by the trial court.

3. The Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality.

4. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances;

- (i) nature of the weapon used;
- (ii) whether the weapon was carried by the accused or was picked up from the spot;
- (iii) whether the blow is aimed at a vital part of the body;
- (iv) the amount of force employed in causing injury;
- (v) whether the act was in the course of a sudden quarrel or sudden fight or free for all fight;
- (vi) whether the incident occurs by chance or whether there was any pre-meditation;
- (vii) whether there was any prior enmity or whether the deceased was a stranger;
- (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;
- (ix) whether it was in the heat of passion;
- (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;
- (xi) whether the accused dealt a single blow or several blows.

The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.

MEDICAL EVIDENCE CONTRADICTIONS

In Pattipati Venkaiah v. State of Andhra Pradesh [(1985) 4 SCC 80], Supreme Court held: "Medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second."

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In Ram Udgar Singh v. State of Bihar [(2004) 10 SCC 443], Supreme Court held: "Plea relating to the time of death on the basis of medical evidence is concerned, emphasis is laid on the fact that rigor mortis could not have set in, in the dead body within two hours. The High Court has referred to several treatises on medical jurisprudence to conclude that the time which is usually three to four hours may vary according to climatic conditions. We find no infirmity in the conclusion."

CIRCUMSTANTIAL EVIDENCE

Ramreddy Rajeshkhanna Reddy & Anr. Vs State of Andhra Pradesh , AIR 2006 SC 1656, Supreme Court held: It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. It is, furthermore, well-known that motive by itself is not sufficient to prove the guilt. Furthermore, the solitary witness, to prove the alleged motive, namely, P.W.8 was examined by the police after two days. No reliance, thus, can be placed on his evidence.

ORDERS OF THE COURTS HAS TO BE SPEAKING, THERE IS A RIGHT TO REASON.

State of Haryana v. Surjit Singh, Criminal Appeal No. 195 of 2002. Date of Judgment 28-11-08

This case came before the SC as an appeal by the state on rejection of leave for appeal against the acquittal order of the trial court. The order of the HC do not offer any reasons for the rejection for leave.

The court uses this occasion to educate the HC about how to deal with an application for leave.

1. Since reasons could offer clarity, an order of the court has to be speaking.
2. Justice requires that the court should offer reasons for its decisions which in turn will be indicative of the application of mind.
3. Reasoned order is a judicial imperative.
4. Reasons could substitute subjectivity to objectivity.
5. Since the order of rejection is appealable, not offering reasons makes the appellate procedure virtually impossible.

6. There is a right to reason and it is an indispensable part of the judicial system.
7. It is only when reasons are offered that affected party can know why the decision has gone against her.

PRINCIPLES ELICITED REGARDING CORPORATE CRIMINAL LIABILITY :

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CONSTITUTION BENCH OF SUPREME COURT : IN ANZ Grindlays Bank Limited & Ors., etc. VS Directorate of Enforcement & Ors., etc. AIR 2005 SC 2622, :

1. There is no blanket immunity for any Company from any prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company.

2. A company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

3. In the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any 'person' who commits the prohibited act, and in many statutes the term 'person' is defined. Even if the person is not specifically defined, it necessarily includes a corporation.

4. A corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability. Inasmuch as all criminal and quasi-criminal offences are creatures of statute, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the actus reus subject to the defence of due diligence. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility.

5. It is true that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of. All penal provisions like all other statutes are to be fairly construed according to the Legislative intent as expressed in the enactment. The distinction between a strict construction and a more free one has disappeared in modern times and now the question is what is the intention of the legislature.

6. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

7. The legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. There are series of offences punishable under various statutes and also under IPC whereunder mandatory custodial sentence is prescribed for graver offences committed by corporate body. The submission that when an offence is punishable with imprisonment and fine, court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment can not be accepted. If the custodial sentence is the only punishment prescribed for the offence, the plea is acceptable but when the custodial sentence and fine are the prescribed mode of punishment, the court has to resort to the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. Further, if the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences involving the amount or value of more than one lakh whereas they could be prosecuted for minor offences involving an amount or value less than one lakh as the sentence prescribed therein is custodial sentence or fine. The intention of the Legislature was not to give complete immunity from prosecution to the corporate bodies for these grave offences.

8. It is only in a case requiring mens rea, a question arises whether a corporation could be attributed with requisite mens rea to prove the guilt. But as we are not concerned with this question in these proceedings, we do not express any opinion on that issue.

9. The question whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided continued to agitate the minds of the courts and jurists and the law continued to be the old law despite the recommendations of the Law Commission and the difficulties were expressed by the superior courts in many decisions. The question under consideration is that where an accused is found guilty and the punishment to be imposed is imprisonment and fine, whether the court has got the discretion to impose the sentence of fine alone.

10. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than one lakh, and that they could be prosecuted only when the offences involve an amount or value less than one lakh. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity

for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy . We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. We overrule the views expressed by the majority in Velliappa Textiles on this point and answer the reference accordingly.

11. It is an undisputed fact that for all the statutory offences, company also could be prosecuted as the "person" defined in these Acts includes "company, or corporation or other incorporated body." Even for offences under Section 56(1)(ii) FERA Act, the company could be prosecuted as the amount involved is less than rupees one lakh and there is no mandatory sentence of imprisonment and the prescribed punishment is imprisonment for a term which may extend to three years or with fine or with both. It is also pertinent to note that the object of the amendment was to have more stringent provisions where the amount involved in the offence is more than rupees one lakh. It is not reasonably possible to assume that amendment to the Section was carried out to give immunity to corporate bodies from prosecution for serious offences. The scheme of the Indian Penal Code also would show that for serious and graver offences, mandatory sentence of imprisonment is prescribed and for less serious offences the court is given a discretionary power of imprisonment or fine. In the case of penal code offences, for example under Section 420 of the Indian Penal Code, for cheating and dishonestly inducing delivery of property, the punishment prescribed is imprisonment of either description for a term which may extend to seven years and shall also be liable to fine; and for the offence under Section 417, that is, simple cheating, the punishment prescribed is imprisonment of either description for a term which may extend to one year or with fine or with both. If the appellants' plea is accepted that for the offence under Section 417 IPC, which is an offence of minor nature, a company could be prosecuted and punished with fine whereas for the offence under Section 420, which is an aggravated form of cheating by which the victim is dishonestly induced to deliver property, the company cannot be prosecuted as there is a mandatory sentence of imprisonment. So also there are several other offences in the Indian Penal Code which describe offences of serious nature whereunder a corporate body also may be found guilty, and the punishment prescribed is mandatory custodial sentence. There are series of other offences under various statutes where accused are also liable to punished with custodial sentence and fine. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out.

S.M.S. Pharmaceuticals Ltd. VS Neeta Bhalla and anr. AIR 2005 SC 3512, CORPORATE LIABILITY IN N.I. ACT: FULL BENCH ON REFERENCE HELD THAT:

Liability under Section 141 of the Negotiable Instrument Act, 1881 is cast on persons who may have something to do with the transaction complained of. A person, who is in charge of and responsible for conduct of business of a company, would know why the cheque in question was issued and why it got dishonoured. Analysing Section 141 of the Act, it is seen that it operates in cases where an offence under Section 138 of the Act is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. These words have been qualified by use of the words "who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc". What is required is that the persons who are sought to be made criminally liable under Section 141 of the Act should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company.

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Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that a director of a company, who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, is not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so.

Necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 of the Act has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Sections 141 of the Act, he would issue the process. Merely being described as a director in a company is not sufficient to satisfy the requirement of Sections 141 of the Act. Even a non director can be liable under Section 141 of the Act. The averments in the compliant would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

WHETHER SIGNATORY OF COMPANY CHEQUE IS SOLELY LIABLE WITHOUT IMPLEADING COMPANY AS PARTY:-

This question is being referred to three judge bench by division bench in Anita Hadda case, by referring court observed that, Section 141 of the Act raises a legal fiction. Such a legal fiction can be raised only when the conditions therefor are fulfilled; one of it being that company is also prosecuted. The Section uses the terms "as well as the company". The company which is, thus, the principal offender must be included in the category of the accused..... The trial court, in a given case although the company is not an accused, would have to arrive at a finding that it is guilty. Company, although a juristic person, is a separate entity. Directors may come and go. The company remains. It has its own reputation and standing in the market which is required to be maintained. Nobody, without any authority of law, can sentence it or find it guilty of commission of offence. Before recording a finding that it is guilty of commission of a serious offence, it may be heard. The Director who was in charge of the company at one point of time may have no interest in the company. He may not even defend the company. He need not even continue to be its Director. He may have his own score to settle in view of change in management of the company. In a situation of that nature, the company would for all intent and purport would stand convicted, although, it was not an accused and, thus, had no opportunity to defend itself..... Any person accused of commission of an offence, whether natural or juristic, has some rights. If it is to be found guilty of commission of an offence on the basis whereof its Directors are held liable, the procedures laid down in the Code of Criminal Procedure must be followed. In determining such an issue all relevant aspects of the matter must be kept in mind. The ground realities cannot be lost sight of. Accused persons are being convicted for commission of an offence under Section 138 of the Act inter alia on drawing statutory presumptions. Various provisions contained therein lean in favour of a drawer of the cheque or the holder thereof and against the accused. Sections 20, 118(c), 139 and 140 of the Act are some such provisions. The Act is a penal statute. Unlike offences under the general law it provides for reverse burden. The onus of proof shifts to the accused if some foundational facts are established. It is, therefore, in interpreting a statute of this nature difficult to conceive that it would be legally permissible to hold a company, the prime offender, liable for commission of an offence although it does not get an opportunity to defend itself. It is against all principles of fairness and justice. It is opposed to the Rule of Law. No statute in view of our Constitutional Scheme can be construed in such a manner so as to refuse an opportunity of being heard to a person. It would not only offend a common-sense, it may be held to be unconstitutional. Such a construction, therefore, should be avoided.

B REPORT AND COURT CONTROL OVER IT AND OTHER REQUIREMENTS

The Karnataka High Court in the case of J. Alexander v State ILR 1995 KAR 2578, has after considering large number of decisions held that: "At the stage of acceptance of 'B' report all that happens is that the Court accepts the 'B' report on the basis of the material as available then. Even if further fresh material is discovered which calls for further investigation and if such investigation is not allowed then such course would be stultification of law and logic resulting in miscarriage of justice. In a country where there is cancerous growth of corruption with close links between the bureaucracy and politicians and such acts being done under shrouded mystery, it is difficult to assume

that all facts could be revealed in one stroke. In such cases great effort is needed to discover material and after securing farther material, if the police seek to investigate the matter, the provisions of law cannot be interpreted to stifle such course of action. An order accepting the 'B' report is not an immunity granted to an accused person, but merely a temporary relief subject to further investigation in the event good and fresh material is secured and investigation done. It is also possible that a sloppy or a dishonest Investigating Officer connives with the accused and sends up a 'B' report and if the higher officers discover the same and collect fresh or further material could it be said that the mere acceptance of 'B' report sent by the junior officer would still stand even on discovery of such material and further investigation done by the police? Such a course would lead to startling results. We do not think that is the intention of the Criminal Procedure Code either under Section 173(4) or 173(8). A provision of law must be expected to read in such a manner that it advances the cause of justice and the interest of public, but not merely to bear in mind an action taken by the Court while supervising investigation. Such act though characterised as judicial is nevertheless of supervisory character because at different stages of investigation different kinds of control are exercised by the Court".

FURTHER INVESTIGATION AFTER B REPORT

In case of Lagamanna Gangappa Salagere vs Laxman and Ors. 2001(1) Kar. L.J. 189 : ILR 2000 Kar. 4015, has held that acceptance of 'B' report by Magistrate is only a tentative act and it does not amount to clean acquittal given to the accused as it is further open for the investigating agency to make further investigation in respect of the crime and submit the report different than the 'B' report already filed and as such reconsideration of such acceptance of 'B' report by the learned Magistrate is not an illegal act.

DEPARTMENTAL PROCEEDINGS AND CRIMINAL PROCEEDINGS

In L. Shankaregouda v. Karnataka Power Transmission Corporation Limited and Anr., 2001(4) Kar. L.J. 49 : ILR 2001 Kar. 229, wherein a learned Single Judge observed thus: "I have no hesitation in holding that once the 'B' report is accepted and an order is passed by a competent jurisdictional Magistrate, the management has no power or jurisdiction to initiate any proceedings either by way of departmental proceedings or by way of criminal proceedings on the very facts. Any initiation after acceptance of the 'B' Report by a learned Magistrate in respect of the same charges is without jurisdiction".

Another learned Judge of Karnataka High Court, before whom a petition came up for preliminary hearing, being of the view that L. Shankaregouda's case, was not correctly decided, referred the matter for consideration by a Division Bench, being of the following view: "It is well-settled law that the criminal proceedings stand on a different footing. Further, the standard of proof that may be applied by the Criminal Court is different from the standard of proof that may be applied in the departmental proceedings. Further, in a criminal proceedings, the proceedings are always by the State and not by the Management. Therefore, in the absence of management being a party in the criminal proceedings any order passed by the Criminal Court is not binding on the

management. The evidence given in one Court cannot be automatically treated as an evidence in other Court. Therefore, on the basis of any order passed by the Criminal Court, management cannot be compelled to continue its employee if the management has no confidence in such employee on certain charges. Therefore, I am not in agreement with the view expressed in the decision referred to above. Therefore, I feel it is a fit case to refer to the Division Bench for consideration".

ACCEPTANCE OF B REPORT IS A JUDICIAL ORDER AND NOT ADMINISTRATIVE ORDER

In State v. Muralidhar Govardhan, AIR 1960 Bom 240 lays the principle that the acceptance or refusal by a Magistrate "B" Report submitted by the police is a judicial order and not an administrative one. In that case, their Lordships of the Bombay High Court have stated that an order passed by the Magistrate on a report under section 173(1) Cr.P.C. requesting that summary "A", "B" or "C" be issued is in its very nature a judicial order and not an administrative order. This position is not controverted by the learned High Court Government Pleader. There is no doubt that an order passed by the Magistrate accepting the "B" report is a judicial order and not an administrative order.

SUPERIOR OFFICERS CAN ALSO BE DIRECTED TO INVESTIGATION UNDER 156(3) R/W 36

2001 (5) KarLJ 505 R.N. Shetty vs Vijaya Bank, Kasarakod Branch, Honnavara, Uttara Kannada And Another But, then the question arises whether the Magistrate whose power is so fettered under Section 156(3) of the Cr. P.C. is not competent to refer a private complaint to any Police Officer other than the one who is the officer in charge of the particular Police Station. If such a narrow construction of Section 156(3) of the Cr. P.C., is accepted as a binding law on the Magistrates, then it may lead to frustration of justice in certain situations where the investigation of a crime by the officer in charge of a Police Station would not at all be warranted. For instance, if a private complaint before a Magistrate is made under Section 200 of the Cr, P.C. against the very Police Officer in charge of a Police Station, or if such Police Officer has vested interest in the alleged crime, or for that matter, if any allegation of his being hands in glove with the accused is made, then in these circumstances, the dictate of justice warrants that such a complaint must be investigated by the Police Officer other than the one who is in actual charge of the Police Station. To meet such exigencies, the Legislature has provided the solution in Section 36 of the Cr. P.C., which states.

"Police Officers superior in rank to an officer in charge of a Police Station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station".

This significant provision conjointly read with sub-sections (1) and (3) of Section 156 of the Cr. P.C. makes the legal position abundantly clear that for the purposes of investigation and report under Section 156(3) of the Cr, P.C., every Police Officer who is superior to the Police Officer in charge of the particular Police Station shall also be deemed to be the Police Officer in charge of that Police Station, having authority to investigate into the alleged crime and submit his report to the jurisdictional Magistrate.

SANCTION TO PROSECUTE IS NOT REQUIRED FOR FABRICATION

S. Jayappa v. State of Karnataka, ILR 1999 Kant 3056 : (1999 Cri LJ 4475) when a public servant fabricates the document with a sole intention to cheat and misappropriate the public funds then prior sanction is not required to prosecute the Government servant.

BOTH CIVIL AND CRIMINAL PROCEEDINGS MAINTAINABLE

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Supreme Court reported in the case of Medchl Chemicals and Pharma (Private) Limited v Biological E. Limited and Ors, 2000(2) All India Criminal Law Reporter 119 wherein it was held that "It is now well-settled and one need not dilate on this score, neither do we intend to do so presently that the allegations in the complaint will have to be accepted on the face of it and truth or falsity of which would not be gone into by the Court at this earliest stage as noticed above: whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial". At page 280 it has observed as follows: ".....Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they "are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import".

COMPLAINT TRUTHFULNESS SHALL BE DECIDED ONLY AT THE TRIAL

Nagpur Steel & Alloys Pvt. Ltd. v. P. Radhakrishna [1997 SCC (Cri.) 1073] ought to be noticed. In paragraph 3 of the report this Court observed: 3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of a commercial transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in grave miscarriage of justice.

Time and again Supreme Court has been pointing out that quashing of FIR or a complaint in exercise of inherent powers of the High Court should be limited to very extreme exceptions [vide State of Haryana vs. Bhajan Lal AIR 1992 SC 604 and Rajesh Bajaj vs. State NCT of Delhi (1999(3) SCC 259)]. In the last referred case this court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations: It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.

Municipal Corporation of Delhi v. P. D. Jhunjwala (1983) 1 SCC 9 : AIR 1983 SC 158 : 1983 Cri LJ 172 it was made clear as to what would be the evidence against the accused is not a matter to consider at the stage of summoning and the matter would have to be left at the time of trial and only the allegations set forth in the complaint have to be seen and nothing further.

In another decision in Chandradeo Singh v. Prakash, Chand Bose alias Chabi Bose AIR 1963 SC 1430 : 1963 Cri LJ 397 it was held by the Apex Court that it is the bounden duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to protect the interest of an absent accused person but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has at that stage necessarily to be determined on the basis of the material placed before him by the complainant. Whatever the defence the accused may have can only be inquired into at the trial. An inquiry under Section 202, Cr.P.C. can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence.

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COURTS HAVE NO POWER TO INTERFERE IN INVESTIGATION IF IT GOES IN RIGHT LINES

State of Haryana vs. Bhajan Lal AIR 1992 SC 604 The core of the Sections 156, 157 and 159 of the Code of Criminal Procedure is that if a police officer has reason to suspect the commission of a cognizable offence, he must either proceed with the investigation or cause an investigation to be proceeded with by his subordinate; that in a case where the police officer sees no sufficient ground for investigation, he can dispense with the investigation altogether; that the field of investigation of any cognizable offence is exclusively within the domain of the investigation agencies over which the Courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation and that it is only in a case wherein a police officer decides not to investigate an offence, the concerned Magistrate can intervene and either direct an investigation or in the alternative, if he thinks fit, he himself can, at once proceed or depute any Magistrate sub-ordinate to him to proceed to hold a preliminary inquiry into or otherwise to dispose of the case in the manner provided in the Code.

State of Haryana vs. Bhajan Lal AIR 1992 SC 604 The investigation of an offence is the field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code and the Courts are not justified in obliterating the track of investigation when the investigating agencies are well within their legal bounds. A noticeable feature of the scheme under Chapter XIV of the Code is that a Magistrate is kept in the picture at all stages of the police investigation but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted. But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the Court, on being approached by the person aggrieved for the redress of any grievance has to consider the

nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution. No one can demand absolute immunity even if he is wrong and claim unquestionable right and unlimited powers exercisable upto unfathomable cosmos. Any recognition of Power' which no authority on earth can enjoy.

REASON TO SUSPECT TO COMMENCE INVESTIGATION BY POLICE DEPEND ON FACTS STATED IN FIR AND ANNEXURES THEREIN.

State of Haryana vs. Bhajan Lal AIR 1992 SC 604 The expression "reason to suspect the commission of an offence" used in Section 154(1) Cr. P.C. would mean the sagacity of rationally inferring the commission of a cognizable offence based on the specific articulate facts mentioned in the First Information Report as well in the Annexures, if any, enclosed and any attending circumstances which may not amount to proof. In other words, the meaning of the expression "reason to suspect" has to be governed and dictated by the facts and circumstances of each case and at in the First Information Report does not arise. The commencement of investigation by a police officer is subject to two conditions, firstly, the police officer should have reason to suspect the commission of a cognizable offence as required by Section 157(1) and secondly, the police officer should subjectively satisfy himself as to whether there is sufficient ground for entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated under clause (b) of the proviso to Section 157(1) of the Code.

EVEN IF COMPLAINT IS MADE OUT OF ANIMOSITY IT IS NOT A GROUND TO DISCARD SERIOUS ALLEGATIONS

State of Haryana vs. Bhajan Lal AIR 1992 SC 604 The entire matter is only at a premature stage and the investigation has not proceeded with except some preliminary effort taken on the date of the registration of the case. The evidence has to be gathered after a thorough investigation and placed before the Court on the basis of which alone the Court can come to a conclusion one way or the other on the plea of mala fides. If the allegations are bereft of truth and made maliciously, the investigation will say so. At this stage, when there are only allegations and recriminations but no evidence, this Court cannot anticipate the result of the investigation and render a finding on the question of mala fides on the materials at present available. Therefore, it cannot be said that the complaint should be thrown overboard on the mere unsubstantiated plea of mala fides. Even assuming that the complainant has laid the complaint only on account of his personal animosity that, by itself, will not be a ground to discard the complaint containing serious allegations which have to be tested and weighed after the evidence is collected.

DO NOT CHARACTER ASSASINATE THE COMPLAINANT/ACCUSED YOUR DUTY IS TO ONLY INVESTIGATE AND COLLECT ONLY EVIDENCE IN SUPPORT OF ALLEGATIONS

State of Haryana vs. Bhajan Lal AIR 1992 SC 604 The dominant purpose of registration of the case and the intended follow up action are only to investigate the allegations and

present a case before the Court, if sufficient evidence in support of those allegations are collected but not to make a character assassination of the person complained against.

NATURAL JUSTICE PRINCIPLES AND ITS FLEXIBILITY

The Apex Court analysed the requirement of flexibility in the application of principles of natural justice in AIR 2003 SC 1659 :State of Maharashtra & Anr. vs. Jalgaon Municipal Council & Ors., and observed thus:- "32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the Courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are: (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation. There is also a situation, which Prof. Wade & Forsyth terms as "dubious doctrine" that right to a fair hearing may stand excluded where the Court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exceptional into play."

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In the pronouncement of the Apex Court reported at (1980) 4 SCC 379 S.L. Kapoor vs. Jagmohan, the court held that the notice must be given in the context of the proposed action and merely furnishing the information casually or for some other purpose would not amount to proper notice. It was held that the requirement of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose.

The well settled principle that where law mandates something to be done in a particular way, then it has to be done in that way or not at all is so well settled that it needs no elaboration. (Ref : Tailor v. Tailor ; (1936) 63 IA 372 : AIR 1936 PC 253 Nazir Ahmed vs. King Emperor ; AIR 1954 SC 322 Rao Shiv Bahadur Singh & Anr. vs. State of U.P. ; AIR 1961 SC 1527 Deep Chand vs. State of Rajasthan AIR 1964 SC 358 State of U.P. vs. Singhara Singh & Ors. ; (1999) 3 SCC 422 Babu Verghese & Ors. vs. Bar Council of Kerala & Ors.).

In the case of CBI v. Rajesh Gandhi, 1997 Cri LJ 63 : (AIR 1997 SC 93) the Supreme Court has held that the decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with.

CRIMINAL ACTION CANNOT BE QUASHED BASING IT AS CIVIL NATURE

Hon'ble Supreme Court reported in *M.KRISHNAN vs. VIJAY SINGH* AIR 2001 SCC 3014 the case substantiates the contention that it is not desirable to quash the complaint merely on grounds that nature of dispute was primarily of civil nature, in as much as in all cases of cheating and fraud, in the whole transaction, there would generally be some element of civil nature. It is held in the said decision as under: "The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to other and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

KAMALADEVI AGARWAL v. STATE OF WEST BENGAL (2001 AIR SCW 4292) wherein the Honourable Supreme Court has held in para 17 that "... Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the code of Criminal Procedure and the pendency of a civil action in a different Court even though higher in status and authority, cannot be made a basis for quashing of the proceedings." In the above case, the Honourable Apex Court has held that quashing of proceedings at initial stage merely on the grounds that the very foundation of the criminal case is the subject matter of a civil case is unsustainable.

Hon'ble Supreme Court in the case of *Lalmuni Devi v. State Bank of Bihar and Ors.* reported in 2001 AIR SCW 2504 , wherein the Court held that in exercise of inherent jurisdiction under Section 482 Cr.P.C., if the complaint does not make out an offence it can be quashed. However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable, it does not mean that the criminal complaint cannot be maintained. The Court further held that it cannot be stated, at the prima facie stage, that it is a frivolous complaint. If that be so, then merely on the ground that it was a civil wrong, the criminal prosecution could not have been quashed.

OFFENCE OF CHEATING SHOULD HAVE CRIMINAL INTENTION AT THE STARTING OF TRANSACTION

In *Hridaya Rajan Prasad Verma v. State of Bihar* (2000 SCC (Cri) 786), the Apex Court has ruled: "In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the

beginning, that is, when he made the promise cannot be presumed. Judged on the touchstone of the principles noted above, the present case, in our considered view warrants interference inasmuch as the ingredients of the offence of cheating punishable under Section 420 I. P.C. and its allied offences under Sections 418 and 423 has not been made out."

In the case of *Mobarik Ali Ahmad v. The State of Bombay* AIR 1957 SC 857 : 1957 Cri LJ 1346 it was held by the Apex Court that the question whether the evidence discloses only a breach of civil liability or a criminal offence under Section 420, Penal Code, depends upon whether the complainant in parting with his money acted on the representations of the accused and in belief of the truth thereof and whether those representations when made were in fact false to the knowledge of the accused and whether he had a dishonest intention from the outset. The allegations in the present complaint fully borne out that the complainant parted with the huge money while acting on the representations and assurance of the accused persons in belief of the truth that the accused company had considerable experience in erection, installation and commission of Gas Fired Boiler also and further that the accused persons had prepared designs for the Gas Fired Boiler in collaboration with the reputed companies of international fame and that the 'Gas Burning Train' would be approved by either of the two companies referred to above, though such representations were wholly false and accused persons had full knowledge of the same and they had dishonest intention from the very beginning to defraud the complainant company.

In case of *Hari Prasad Chamaria v. Bishun Kumar Surekha* AIR 1974 SC 301 : 1974 Cri LJ 352. The facts of that case are, The complainant intended to start business and gave in full faith a large amount for the same. The respondents started business in their own name but refused to render account or return the money. It was only on these material facts that the Apex Court held : "Even assuming prima facie all the allegations in the complaint to be true, they merely amount to a breach of contract and could not give rise to criminal prosecution. There was nothing in the complaint to show that the accused persons had dishonest or fraudulent intention at the time the complainant parted with the money nor did the complaint indicate that the accused had induced the complainant to pay them the amount parted with. The complainant also did not allege the accused making any representation to him for parting with the money and mere fact that they did not abide by their commitment as to starting of the business in complainant's name as agreed to would not fasten them with criminal liability".

COURT COMPLAINT IS NECESSARY TO LAUNCH PROSECUTION AGAINST PRODUCTION OF FORGED RECORDS

In *GOPALAKRISHNA MENON v. D.RAJA REDDY* (AIR 1983 SC 1053), the money receipt alleged to have been forged was produced before the civil court, but, the same court has not chosen to give a complaint as contemplated under sec.195(1)(b)(ii) of Cr.P.C., but, the private complaint has been initiated by the other side. The Honourable Apex Court has held that the same is unsustainable in law since no complaint has been preferred by the court.

CRIMINAL CONTEMPT IF FALSE AFFIDAVIT IS FILED BEFORE COURT

Supreme Court in *Dhananjay Sharma v. State of Haryana*, AIR 1995 SCC 1795, any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt. The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but also has the tendency to impede, obstruct and interfere with the administration of justice. The filing of false affidavits in judicial proceedings in any Court of law exposes the intention of the concerned party in perverting the course of justice. The due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Any one who makes an attempt to impede or undermine or obstruct the free flow of unsoiled stream of justice by resorting to the filing of false evidence, commits criminal contempt of the Court and renders himself to be liable in accordance with the Act. Filing of false affidavits or making false statement on oath in Courts aims at striking a blow at the Rule of Law and no Court can ignore such conduct which has a tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by any one resorting to filing of false affidavit of giving of false statement and fabricating false evidence in a Court of law.

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IF COMPLAINT FACTS AND DOCUMENTS DISCLOSES OFFENCE IT CANNOT BE QUASHED

Mushtaq Ahmad vs Mohd. Habibur Rehman Faizi & Ors on 31 January, 1996 1996 SCC (7) 440, In this case the appellant, in his complaint, stated that he was a teacher and at the material time the respondents were the Manager, Principal, Teacher and Member of the Managing Committee of the school. The appellant went on leave for higher education to Saudi Arabia. When he came back he found that his salary and dearness allowance, for the period of his absence, had been drawn by the respondents, from government funds, forging his signature. According to the complaint the respondents had committed breach of trust of government money. In support of these allegations made in the complaint, copies of the salary statements of the relevant periods were produced. On the Magistrate taking cognizance of the offence, the respondents filed proceedings under Section 482 Cr.P.C. and the Allahabad High Court quashed the complaint on the ground that it was false, frivolous and vexatious. On a special leave petition being filed, the Supreme Court held:- ".....In spite of the fact that the complaint and the documents annexed thereto clearly made out a prima facie case for cheating, breach of trust and forgery, the High Court proceeded to consider the version of the respondents given out in their petition filed under Section 482 CrPC vis--vis that of the appellant and entered into the debatable area of deciding which of the versions was true, - a course wholly impermissible, in view of observations in *Bhajan Lal's* case.

MALIFIDES AGAINST INFORMANT IS IMMATERIAL

In **State Of Karnataka vs M. Devendrappa & Anr** (2002) 3 S.C.C. 89. held at page 97 that when an information is lodged at the Police Station and an offence is registered, the mala fides of the informant would be of secondary importance and that it is the material collected during the investigation and the evidence led in Court which decides the fate of the accused person and that allegations of mala fides against the informant are of no consequence and cannot by themselves be basis for quashing the proceedings.

The Supreme Court has held in the case of **Manohar M. Galani v. Ashok N. Advani**, 2000 SCC (Cri) 70 : (AIR 2000 SC 202) that the High Court is not justified in quashing the F. I. R. by an elaborate discussion on merits of the matter.

In the case of **State of Maharashtra v. Ishwar Piraji Kalpatri**, 1996 SCC (Cri) 150 : (AIR 1996 SC 722) the Supreme Court has held that mala fide so animus of a complainant or prosecution is not relevant at the initial stage for quashing criminal proceedings. If on the basis of the allegations in the complaint a prima facie case is made out, the High Court has no jurisdiction to quash the proceedings. It is not justified in judging the probability, reliability or genuineness of the allegations made. If the complaint which is made is correct and the offence had been committed, which will have to be established in a court of law, it is of no consequence that the complaint was by a person who was inimical or that: he was guilty of mala fides. If the ingredients which establish the commission of the offence exist, then the prosecution cannot fail merely because there was an animus of the complainant or prosecution against the accused. The allegations of mala fides may be relevant while judging the correctness of the allegations or while examining the evidence. But the mere fact that the complainant is guilty of mala fides would be no ground for quashing the prosecution.

In **Sheonandan Paswan v. State of Bihar**, AIR 1987 SC 877, the Hon'ble Apex Court while dealing with the issue of mala fides in criminal law observed: "It is well established proposition of law that a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant."

State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 329, the Apex Court has held as under:- "It must, however, be pointed out that if an information is lodged at the police station and an offence is registered, the mala fide of the informant would be of secondary importance if the investigation produced unimpeachable evidence disclosing the offence."

In **Zandu Pharmaceutical Works Ltd. and Ors. v. Mohd. Sharaful Haque and Anr.**, (2005) 1 SCC 122, the Hon'ble Supreme Court held that when an information is lodged and the offence is registered, the mala fides of the informant would be of secondary importance as it is a material collected during the investigation and evidence led in Court which decides the fate of the accused persons. The allegations of mala fide against informant are of no consequence and cannot, by themselves, be the basis for quashing the proceedings. While deciding the said case, reliance had been placed on the earlier judgment in **State of Bihar v. P.P. Sharma**, AIR 1991 SC 1960.

In *Sarjudas and Anr. v. State of Gujarat*, (1999) 8 SCC 508 the Hon'ble Supreme Court held that there must be cogent evidence of mala fides or malicious intention of the informant or the complainant for taking note of the allegations of mala fide. The bald statement in this respect is not sufficient.

REPORT OF POLICE OFFICER

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In *Jogendra Mahak and Ors. v. State of Orissa and Ors.*, AIR 1999 SC 2565, the Hon'ble Supreme Court again explained the scope of the provisions of Section 173 observing as under:- "Section 173 says that on completion of investigation, the officer-in-charge of police-station shall forward a report to the Magistrate, stating, inter-alia, the names of the persons who appear to be acquainted with the circumstances of the case. Sub-section (5) of Section 173 requires that the police officer shall forward to the Magistrate along with the said report (a) all documents or relevant extract thereof on which the prosecution proposes to rely and (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. Even when a further investigation, as required under sub-section (8) is conducted by the police, they have to comply with all the requirements contained in the preceding subsections."

QUASHING OF CHARGE

In *Ram Kumar Laharia v. State of Madhya Pradesh and Anr.*, AIR 2001 SC 556, the Supreme Court considered the scope of exercise of revisional powers and held that at this state, the Court is not permitted to weight the evidence. Whatever is permissible in law is that the court can assess the improbability or absurdity of the statement of witnesses. In case the evidence so collected prima facie suggests direct contact with the accused, the court cannot interfere with the order of framing the charge.

In *Sanju alias Sanjay Singh Sengar v. State of Madhya Pradesh and Ors.*, AIR 2002 SC 1998, the Hon'ble Apex Court quashed the charges for the reason that the appellant therein had been charged of the offence of abetment and after considering the evidence, the Apex Court recorded the finding that the ingredients of abetment were totally absent in the facts and circumstances of the case.

In *Ram Ekbak Missir v. Ram Niwash Pandey and Ors.*, (2002) 8 SCC 161, the Hon'ble Supreme Court quashed the criminal proceedings wherein the cognizance of the offence was taken after twenty-one years of lodging the first information report and the case had been dragged for more than two decades without any fault on the part of the accused. Moreso, the Apex Court also came to the conclusion that the cognizance had been taken in a mechanical manner. It has further been observed that neither the victim nor the accused should suffer by the mischief of the investigating agency or the staff of the court and such a delay was found to be a ground for quashing the charges.

CASE AND COUNTER CASE

The Division Bench of this Court in *State of Karnataka v. Balappa Bhau Vadagaue and Ors.* 1984 (2) KLJ 1 in para. 74, has referred to catena of decisions on the point and has

held that in the case of complaint and counter complaint, it is be registered separately but the same IO should conduct the investigation in respect of complaint and counter complaint. It is directed that necessary circular instructions to be issued to the police agency to adhere to the guidelines given in the judgment while conducting the investigation in the case of complaint and counter complaint.

INVESTIGATION SOUGHT IN WRIT WITH POLITICAL MOTIVE REGARDING ASSETS DISPROPORTIONATE TO KNOWN SOURCE OF INCOME

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KUNGA NIMA LEPCHA & ORS. VS STATE OF SIKKIM & ORS. BENCH : K.G. BALAKRISHNAN, P. SATHASIVAM, J.M. PANCHAL MAR 2010 Public Interest Litigation - Against Chief Minister - By persons belonging to political parties Alleging possession of assets disproportionate to known source of income and criminal misconduct - Seeking initiation of investigation by CBI:- The writ court can only play a corrective role to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is upto the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation. It must also be borne in mind that there are provisions in Cr.P.C. which empower the courts of first instance to exercise a certain degree of control over ongoing investigations. The scope for intervention by the trial court is hence controlled by statutory provisions and it is not advisable for writ courts to interfere with criminal investigations in the absence of specific standards for the same. Supreme Court cannot sit in judgment over a question whether investigations should be launched against politicians for alleged acts of corruption. The Supreme Court of India functions as a Constitutional Court as well as the highest appellate court in the country. If the Supreme Court gives direction for prosecution, it would cause serious prejudice to the accused, as the direction of this Court may have far reaching persuasive effect on the Court which may ultimately try the accused. It is always open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action.

MAGISTRATE'S POWERS TO ORDER INVESTIGATION

INVESTIGATION PRECOGNIZANCE AND POST COGNIZANCE STAGE Coram: ALTAMAS KABIR, CYRIAC JOSEPH Rameshbhai Pandurao Hedau Vs. State of Gujarat MAR 2010 SC CASE REPORTABLE : CODE OF CRIMINAL PROCEDURE, 1973: The power to direct an investigation to the police authorities is available to the Magistrate both u/s 156(3) Cr.P.C. and u/s 202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. The Courts are ad idem on the question that the powers u/s156(3) can be invoked by a Magistrate at a pre-cognizance stage, whereas powers u/s 202 are to be invoked after cognizance is taken on a complaint but before issuance of process. Once the Magistrate takes cognizance of the offence, he is thereafter precluded from ordering an investigation u/s156 (3) of the Code..... In the instant case, the Magistrate has treated the protest petition filed by the appellant as a complaint u/s 200 of the Code and has thereafter proceeded u/s 202 Cr.P.C. and kept the matter with himself for an inquiry. There is nothing irregular in the manner in which the Magistrate has proceeded and if at the stage of Sub-section (2) of s. 202 the Magistrate deems it fit,

he may either dismiss the complaint u/s 203 or proceed in terms of s.193 and commit the case to the Court of Session.

**WHEN NEW ACCUSED ADDED TRIAL & ALL PROCEEDINGS SHALL START AFRESH
MERE PRODUCTION OF WITNESS FOR CROSS EXAMINATION IS NOT SUFFICIENT**

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WHEN NEW ACCUSED ADDED TRIAL START FROM BEGINNING HARINARAYAN G BAJAJ Vs. STATE OF MAHARASHTRA & ORS. Coram: V.S. SIRPURKAR, MUKUNDAKAM SHARMA 06/01/2010 Code of Criminal Procedure, 1973 - s. 319(4)(a) and (b); 244 – Criminal proceedings - New accused joined to the proceedings after charges framed against the original accused - Right of newly added accused for initiation of proceedings qua him from the stage of s. 244 and right to cross-examine the witnesses before framing of charges - Held: The whole inquiry in respect of the newly added accused should commence afresh from the stage of s. 244 - Such accused had the right to cross-examine the witnesses.The Court would also give a meaningful interpretation to the word 'proceedings' which has been deliberately used by the Legislature. The Legislature does not use the word 'trial' which essentially begins after framing of the charge. If the legislature had intended that the newly joined accused should not get the right of cross-examining the witnesses examined before framing of the charge, it might have used the word 'trial'. The deliberate use of the word 'proceedings' would then include not only the trial but also the inquiry which commences with Section 244 Cr.P.C. and ends with the framing of the charge under Section 246 Cr.P.C..... If the interpretation that Section 319(4) does not require de novo inquiry, is to be accepted then a complainant, wherein it is a case of multiple accused, may mischievously join only few of them and after getting the charge framed, make an application under Section 319 Cr.P.C. to join some other accused persons who would then have no right of cross- examination of the witnesses and who would be required to be the mute spectators to the charge being framed against which they could have successfully resisted by cross-examining the witnesses..... Right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross- examination that the accused can show to the court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him..... Under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr. P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence.

ANTICIPATORY BAIL

RAVINDRA SAXENA VS STATE OF RAJASTHAN DEC 2009 Dispute between property dealer and buyer regarding sale of flats - Criminal complaint against property dealer and his family members for offences punishable u/ss. 420 and 120-B IPC – Suit for specific performance also filed by complainant - Third application for anticipatory bail rejected by High Court observing that "challan has now been presented" – HELD: It has been clearly held by Supreme Court in Gurbaksh Singh Sibbia and Ors. Vs. State of Punjab (1980) 2 SCC 565 that anticipatory bail can be granted at any time so long as the applicant has not been arrested - When the application is made to High Court or Court of Session, it must apply its own mind on the question and decide when the case is made out for granting such relief – There is also no reason to deny anticipatory bail merely because the allegation in the case pertains to cheating or forgery of a valuable security – The merits of the issues shall have to be assessed at the time of trial and denial of anticipatory bail only on the ground that challan has been presented would not satisfy the requirements of ss.437 and 438. Salutory provision contained in s.438 was introduced to enable the court to prevent deprivation of personal liberty - It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented, anticipatory bail cannot be granted"

DUTY OF EVERY ONE TO ASSIST CRIMINAL JUSTICE SYSTEM

Smt. Selvi And Ors. vs State By Koramangala Police Station 2004 (7) KarLJ 501 JUSTICE S Majage, It cannot be forgotten that Section 39 of the Criminal Procedure Code casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the cooperation of the people. Rather, it is the duty of every person to assist the State in the detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to the right to privacy, which itself is not an absolute right. In this regard, reference can be had to a recent decision of the Supreme Court in the case of State v. Dharmapal, 2003 AIR SCW 1960 : AIR 2003 SC 3450 and observed by the Supreme Court in the case of State of Gujarat v. Anirudha Singh,, that it is the statutory duty of every witness, who has the knowledge of the commission of the crime, to assist the State in giving evidence.

MISCELENIUS CASE LAWS

(i) AIR 1990 SC 2140 in the case of Kishore Chand v. State of Himachal Pradesh wherein the Apex Court has held that, all circumstances from which conclusion of the guilt is to be drawn must be fully established, the facts so established must be consistent with hypothesis of guilt of accused, any circumstance consistent with innocence of accused then necessarily the benefit of doubt has to be extended.

(ii) 1996(4) Crimes 74 in the case of Jaspal Singh @ Pall v. State of Punjab to contend that identification of the accused in the Court cannot be accepted as a reliable one in the absence of test identification parade.

(iii) 1996 Crl.L.J. 317 in the case of M. Abbas v. The State of Karnataka to contend that alleged voluntary statement of accused cannot be taken as substantial evidence and also one more decision in the one of Mohammad Abdul Hafeez v. State of A.P. to the similar effect.

(iv) in the case of State of Punjab v. Bhajan Singh and Ors. to contend that mere suspicion against the accused, however strong it may be, is not sufficient to take place of proof and warrant a finding of guilt of the accused.

(v) 1977 CrL. L.J. 711 (SC) in the case of Magan Biharilal v. State of Punjab to contend that expert opinion must always be received with great caution.

(vi) Judgment reported in 2003 CrL.L.J. 2548 in the case of Visveswaran v. State Rep. by S.D.M. wherein the Apex Court has held that the commission of crime can be proved by circumstantial evidence and the identification of the accused in a Court or in a test identification parade is not sine qua non for conviction and Court not to get swayed by minor contradictions or discrepancies and defective investigation.

TRANSFER PETITION OF CRIMINAL CASE

Supreme Court in Abdul Nazar Madani vs State of Tamil Nadu, [(2000) 6 SCC 204] has held :- "7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

GRANT OF BAIL PRINCIPLES

BABU SINGH & OTHERS VS STATE OF UP: AIR 1978 SC 527: 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.

The vital considerations are:

(a) The nature of charge, the nature of the evidence and, the punishment to which the party may be liable, if convicted, or conviction is confirmed. When the crime charged 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

- (b) whether the course of justices would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being
- (c) Antecedents of the man and socio-geographical circumstance, and whether or the petitioner's record shows him to be 'a habitual offender,
- (d) When, a person charged with a grave offence has been acquitted at a stage, the intermediate acquittal has pertinence to a bail plea when the appeal before this Court pends. The grounds for denial of provisional releases becomes weaker when a fair finding of innocence has been recorded by one court,
- (e) Whether the accused's safety may be more in, prison, than in the, vengeful village where feuds have provoked the violent offence and
- (f) The period in prison already spent and the prospect of delay in the appeal being heard, and disposed of.

To answer the test of reasonableness subject to- the need for securing the presence of the bail applicant, the Court must also weigh the contrary factors like-

- (i) the better chances which a man on bail has to prepare or present his case than one remanded in custody, (ii) promotion of public justice,
- (iii) the considerable public expenses in keeping in custody where no danger of disappearance or disturbance can arise and
- (iv) the deplorable condition verging on the inhuman of our sub-jails.

STATE THROUGH CBI VS AMARAMANI TRIPATHI: AIR 2005 SC 3490: AFTER DISCUSSING SERIES OF DECISIONS OF SUPREME COURT QUOTED FOLLOWING GUIDELINES: 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 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
- (viii) While a vague allegation that 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.
- (ix) The conduct of accused from the day of the murder in trying to interfere, detract and mislead the investigation and to threaten and coerce witnesses is very relevant.
- (x) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
- (xi) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant. (xii) Prima facie satisfaction of the court in support of the charge.
- (xiii) While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no pre-judging and no prejudice, a brief

examination to be satisfied about the existence or otherwise of a prima facie case is necessary.

In Prahlad Singh Bhati Vs. NCT, Delhi, 2001 (4) SCC 280, Supreme Court reiterated that if a person was suspected of the crime of an offence punishable with death or imprisonment for life then there must exist grounds which specifically negate the existence of reasonable ground for believing that such an accused is guilty of an offence punishable with the sentence of death or imprisonment for life. The jurisdiction to grant bail must be exercised on the basis of well settled principles having regard to the circumstances of each case. While granting bail, the Court has to keep in mind the nature of accusations, the nature of 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 and reasonable apprehension of witnesses being tempered with..... Chapter XXXIII relates to the provisions as to bails and bonds. Section 436 provides that when any person accused of a bailable offence is arrested or detained without warrant by an officer in charge of the police station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail. Under Section 437 of the Code when a person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail by a court other than the High Court and Sessions subject to the conditions that he does not reasonably appear to have been guilty of an offence punishable with death or imprisonment for life. The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed. It does not, however, mean that persons specified in the first proviso to sub-section (1) of Section 437 should necessarily be released on bail. The proviso is an enabling provision which confers jurisdiction upon a court, other than the High Court and the court of Sessions, to release a person on bail despite the fact that there appears reasonable ground for believing that such person has been guilty of an offence punishable with death or imprisonment for life. There is no gainsaying that the discretion conferred by the Code has to be exercised judicially. Section 438 of the Code empowers the High Court and the Court of Sessions to grant anticipatory bail to a person who apprehends his arrest, subject to the conditions specified under sub-section (2) thereof..... 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 Sessions yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is, suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.

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 Sessions, Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to Section 437 of the Code.

Kalyan Chandra Sarkar vs. Rajesh Ranjan 2004 (7) SCC 528. Court reiterated that while granting bail discretion must be exercised in a judicious manner and not as a matter of course. It may not be necessary to do detailed examination of evidence and documentation of the merit of the case but there is a need to indicate reasons for prima facie conclusion why bail was being granted particularly where the accused is charged of having committed serious offence.

The Supreme Court in the famous case of Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh, AIR 1978 SC 429 , has ruled as under

1. The issue of "Bail or Jail"-at the pretrial or post-conviction stage-although largely hinging on judicial discretion, 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.
2. 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 Art. 21 are the life of that human right.
3. The significance and sweep of Art. 21 make the deprivation of liberty, ,ephemeral or enduring, 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 Art. 19. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected.
4. All deprivation of liberty is validated by social defense and individual correction along an anti criminal direction. Public justice is central to the whole of bail law fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditating drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned "free enterprise" should be provided against. No seeker of justice shall play confidence tricks on the court or community. Conditions may be hung around bail orders not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our constitution.
5. 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.
6. The vital considerations are :-(a) The nature of charge, the nature of the evidence and, the punishment to which the party may be liable, if convicted, or conviction is

confirmed. When the crime charged 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; (b) whether the cause of justice would be thwarted by him who seeks the benignant jurisdiction of the court to be freed for the time being (c) Antecedents of the man and socio-geographical circumstances; and whether the petitioner's record shows him to be a habitual offender; (d) when a person, charged with a grave offence has been acquitted at a stage, the intermediate acquittal has pertinence to a bail plea when the appeal before this court pends. The ground for denial of provisional release, becomes weaker when a fair finding of innocence has been recorded by one court; (e) Whether the accused's safety may be more in prison than in the vengeful village where feuds have provoked the violent offence and (f) the period in prison already spent and the prospect of delay in the appeal being heard and disposed of.

7. Courts should soberly size up Police exaggerations of prospective misconduct of the accused, if enlarged, 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.

8. To answer the test of reasonableness, subject to the need for securing the presence of the bail applicant the court must also weigh the contrary factors viz. (i) the better chances which a man on bail has to prepare or present his case that are remanded in custody, (ii) promotion of public justice, (iii) the considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise and (iv) the deplorable condition, verging on the inhuman of our sub-jails.

APPRECIATION OF EVIDENCE

STATE OF U.P. Vs. KRISHNA GOPAL & ANR. AIR 1988 SC 2154, BENCH: VENKATACHALLIAH, M.N. (J) BENCH: VENKATACHALLIAH, M.N. (J) SEN, A.P. (J)

(1) It was, no doubt, true that as a self-made rule of practice, this Court did not interfere with the findings of fact reached by the High Court, but judicial pronouncements themselves qualify this rule and justify interference where serious errors of assumption vitiated the findings.

(2) There was no immunity to an erroneous order from a strict appellate scrutiny. But the appellate court wherever it found justification to reverse an acquittal must record reasons why it found lower court wrong.

(3) Eye witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical-evidence, as the sole touchstone for the test of such credibility.

(4) What degree of probability amounted to 'proof' was an exercise particular to each case. The concepts of probability, and the degrees of it, could not obviously be

expressed in terms of units to be mathematically enumerated as to how many of such units constituted proof beyond reasonable doubt.

(5) There was an unmistakable subjective- element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common-sense and, ultimately, on the trained intuitions of the judge.

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(6) Doubts would be called reasonable if they were free from a zest for abstract speculation. A reasonable doubt was not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.

GANGADHAR BEHERA AND ORS. VS STATE OF ORISSA, 2002(8)SCC 381, BENCH: ARIJIT PASAYAT & S.B. SINHA. JUDGMENT: J U D G M E N T ARIJIT PASAYAT, J.

1. In **Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364)** it has been laid down as under:- "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

2. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

3. Again in **Masalti and Ors. v. State of U.P. (AIR 1965 SC 202)** this Court observed: (p, 209-210 para 14): "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

4. To the same effect is the decision in **State of Punjab v. Jagir Singh (AIR 1973 SC 2407)** and **Lehna v. State of Haryana (2002 (3) SCC 76)**. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.

5. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab (AIR 1956 SC 460).

6. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh 1972 3 SCC 751) and Ugar Ahir and Ors. v. The State of Bihar (AIR 1965 SC 277).

7. An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962).

8. As **observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390)**, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

9. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See: Gurbachan Singh v. Satpal Singh and Others [AIR 1990 SC 209].

10. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava [AIR 1992 SC 840].

11. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admn.) (AIR 1978 SC 1091)].

12. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." quoted in State of U.P. v. Anil Singh (AIR 1988 SC 1998).

13. Law cannot afford any favourite other than truth. In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahebrao Bobade v. State of Maharashtra [1974 (1) SCR 489 (492-493)] : ".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of exalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt....."

14. ".....The evil of acquitting a guilty person light- heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the

guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltiness....."

15. ".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....." The position was again illuminatingly highlighted in *State of U.P. v. Krishna Gopal* (AIR 1988 SC 2154). At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

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16. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particularly to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II" : Glanville Williams: *Criminal Law Review*, 1979 by Sweet and Maxwell, p. 340 (342). "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

UNLAWFUL ASSEMBLY- COMMON OBJECT- COMMON INTENTION

17. Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141.

18. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage.

19. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

20. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

21. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section.

22. A 4-Judge Bench of this Court in Masalti's case (supra) observed as follows:

"Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

23. To similar effect is the observation in **Lalji v. State of U.P. (1989 (1) SCC 437)**. It was observed that : "Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

24. In **State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747)** it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

IMPORTANCE OF EYE WITNESS

STATE OF MADHYA PRADESH VS DHARKOLE @ GOVIND SINGH & ORS. AIR 2005 SC 44 BENCH: ARIJIT PASAYAT & C.K.THAKKER

Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a

mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P. v. Krishna Gopal and Anr.* (AIR 1988 SC 2154). On that score also the High Court's conclusion that the medical evidence varied with the ocular evidence suffers from vulnerability. It is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the respondents as the perpetrators of the crime.

DYING DECLARATION

The principle on which dying declaration is admitted in evidence is indicated in legal maxim "nemo moriturus proesumitur mentiri" a man will not meet his maker with a lie in his mouth.

Supreme Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in **Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817)**:

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja & Anr. v. The State of Madhya Pradesh* (1976) 2 SCR 764]]
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* (AIR 1985 SC 416) and *Ramavati Devi v. State of Bihar* (AIR 1983 SC 164)]
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and Anr. v. The Public Prosecutor* (AIR 1976 SC 1994)]
- (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of Madhya Pradesh* (1974 (4) SCC 264)]
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kaka Singh v State of M.P.* (AIR 1982 SC 1021)]
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath and Ors. v. State of U.P.* (1981 (2) SCC 654)]
- (vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v. Krishnamurthi Laxmipati Naidu* (AIR 1981 SC 617)]
- (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Oza and Ors. v. State of Bihar* (AIR 1979 SC 1505).]
- (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying

declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839)]."

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ASSETS DISPROPORTIONATE TO KNOWN SOURCE OF INCOME

DSP CHENNAI VS K.INBASAGARAN AIR 2006 SC 552, when the accused has come forward with the plea that all the money which has been recovered from his house and purchase of real estate or the recovery of the gold and other deposits in the Bank, all have been owned by his wife, then in that situation how can all these recoveries of unaccounted money could be laid in his hands. The question is when the accused has provided satisfactorily explanation that all the money belonged to his wife and she has owned it and the Income-tax Department has assessed in her hand, then in that case, whether he could be charged under the Prevention of Corruption Act. It is true that when there is joint possession between the wife and husband, or father and son and if some of the members of the family are involved in amassing illegal wealth, then unless there is categorical evidence to believe, that this can be read in the hands of the husband or as the case may be, it cannot be fastened on the husband or head of family. It is true that the prosecution in the present case has tried its best to lead the evidence to show that all these moneys belonged to the accused but when the wife has fully owned the entire money and the other wealth earned by her by not showing in the Income-tax return and she has accepted the whole responsibilities, in that case, it is very difficult to hold the accused guilty of the charge. It is very difficult to segregate that how much of wealth belonged to the husband and how much belonged to the wife. The prosecution has not been able to lead evidence to establish that some of the money could be held in the hands of the accused. In case of joint possession it is very difficult when one of the persons accepted the entire responsibility. The wife of the accused has not been prosecuted and it is only the husband who has been charged being the public servant. In view of the explanation given by the husband and when it has been substantiated by the evidence of the wife, the other witnesses who have been produced on behalf of the accused coupled with the fact that the entire money has been treated in the hands of the wife and she has owned it and she has been assessed by the Income-tax Department, it will not be proper to hold the accused guilty under the prevention of Corruption Act as his explanation appears to be plausible and justifiable.

There is no two opinion in the matter that the initial burden lies on the prosecution. In the case of C.S.D.Swami v. The State reported in AIR 1960 SC 7, this Court has taken the view that in Section 5(3) of the Prevention of Corruption Act, 1947 a complete departure has made from the criminal jurisprudence still initial burden lies on the prosecution and in that context it has been observed as follows : " Section 5 (3) does not create a new offence but only lays down a rule of evidence, enabling the court to raise a

presumption of guilt in certain circumstances- a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. Therefore, the initial burden was on the prosecution to establish whether the accused has acquired the property disproportionate to his known source of income or not. But at the same time it has been held in a case of *State of M.P. Vs. Awadh Kishore Gupta and Others* reported in (2004) 1 SCC 691 that accused has to account satisfactorily the money received in his hand and satisfy the court that his explanation was worthy of acceptance.

SEARCH AND ITS COMPLIANCE PROCEDURE

In *Radha Krishan vs. State of U.P.* AIR 1963 SC 822, speaking for a three Judge Bench, Justice Mudholkar held : "So far as the alleged illegality of the search is concerned, it is sufficient to say that even assuming that the search was illegal and the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are being searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences, no further consequence ensues."

In a subsequent decision reported in *Pooran Mal vs. Director of Inspection* (1974) 1 SCC 354, Supreme Court held : "So far as India is concerned its law of evidence is modeled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to shut out."

This decision was later followed in *Dr. Pratap Singh vs. Director of Enforcement* (1985) 3 SCC 72. The provisions contained in the Criminal Procedure Code relating to search and seizure are safeguards to prevent the clandestine use of powers conferred on the law enforcing authorities. They are powers incidental to the conduct of investigation and the legislature has imposed certain conditions for carrying out search and seizure in the Code. The courts have interpreted these provisions in different ways. One view is that disregard to the provisions of the Code of Criminal Procedure relating to the powers of search and seizures amounts to a default in doing what is enjoined by law and in order to prevent default in compliance with the provisions of the Code, the courts should take strict view of the matter and reject the evidence adduced on the basis of such illegal search. But often this creates a serious difficulty in the matter of proof. Though different High Courts have taken different views, the decisions of this Court quoted above have settled the position and we have followed the English decisions in this regard.

In the Privy Council decision in *Kuruma v. The Queen* (1955) A.C. 197, Lord Goddard, C.J. was of the firm view that in a criminal case the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused. The trend of judicial pronouncements is to the effect that evidence

illegally or improperly obtained is not per se inadmissible. If the violation committed by the investigating authority is of serious nature and causes serious prejudice to the accused, such evidence may be excluded.

HUMAN RIGHTS CASE LAW

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In respect of violations of human rights during investigation, in **D.K. Basu v. State of West Bengal [(1997) 1 SCC 416]**, grave concern was expressed by Supreme Court in respect of persons who were supposed to be the protectors of the citizens and committed violence under the shield of uniform and authority in the four walls of a Police Station or lockup, the victims being totally helpless. It will be useful to note what was said in para 18 which reads : "However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportion that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder."

In **Makinnon Mackenzie and Co. Ltd. v. Audrey D'Costa [(1987) SCC 469]**, Supreme Court considered the case of a "confidential lady stenographer" who complained that she and other women stenographers who are in the service of a company were being paid lower emoluments than their male counterparts. Taking note of the fact that India is a party to the international convention concerning equal remuneration for men and women for work of equal value (the Equal Remuneration Convention, 1951), the Court adopted a principle embodied in the Convention to construe a law enacted by the Parliament, the Equal Remuneration Act, 1976 to grant relief to the petitioner therein by holding the action of the employer to be an unconstitutional violation of the principles of equal pay for equal work.

In **Sheela Barse v. Secretary, Children's Aid Society [(1987) 3 SCC 50 at 54]**, the petitioner complained about the state of affairs in an observation home for children. While issuing directions to the State of Maharashtra, it was held by this Court that the international instruments which had been ratified by India and which elucidated norms for the protection of children cast an obligation on the State to implement their principles. The Court said: "Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realized. In 1959 the Declaration of all the rights of the child was adopted by the General Assembly of the United Nations in Article 24 of the International Covenant on Civil and

Political Rights, 1996, the importance of the child has been appropriately recognized. India as a part to these International Charters having ratified the Declaration, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way."

CONFESSION PROCEDURE AND ITS RELEVANCY:

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In Devendra Prasad Tiwari v. State of U.P. [AIR 1978 SC 1544], Supreme Court opined: "It is also true that before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into "account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on Sept. 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock up even if he did not confess his guilt"

In Subramania Goundan v. The State of Madras [1958 SCR 428], Supreme Court held: "The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially..."

In Aher Raja Khima vs. State of Saurashtra [AIR 1956 SC 217], Supreme Court held: "Now the law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. It is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he says may be used against him; and any attempt by a person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it if the fear was still operating on his mind at the time he makes the confession and if it would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him: Section 24 of the Indian Evidence Act. That is why the recording of a confession is hedged around with so many safeguards and is the reason why Magistrates ordinarily allow a period for reflection and why an accused person is remanded to jail custody and is put out of the reach of the investigating police before he is asked to make his confession. But the force of these precautions is destroyed when, instead of isolating the accused from the investigating police, he is for all practical purposes sent back to them for a period of ten

days. It can be accepted that this was done in good faith and we also think that the police acted properly in sending the appellant up for the recording of his confession on the 21st; they could not have anticipated this long remand to so-called jail custody. But that is hardly the point. The fact remains that the remand was made and that that opened up the very kind of opportunities which the rules and prudence say should be guarded against; and, as the police are as human as others, a reasonable apprehension can be entertained that they would be less than human if they did not avail themselves of such a chance."

In **State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru [(2005) 11 SCC 600]**, Supreme Court observed: "Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer. Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police."

In **Devendra Prasad Tiwari v. State of U.P. [AIR 1978 SC 1544]**, Supreme Court opined: "It is also true that before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into "account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on Sept. 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock up even if he did not confess his guilt"

In **Parmananda Pegu v. State of Assam [AIR 2004 SC 4197]**, Supreme Court opined: "The foremost amongst the factors that are sought to be relied upon by the prosecution is the retracted confession of the appellant recorded under Section 164 Cr.P.C. The confession has been extracted supra in verbatim. Before acting on a confession made before a Judicial Magistrate in terms of Section 164, the Court must be satisfied first that

the procedural requirements laid down in Sub- sections (2) to (4) are complied with. These are salutary safeguards to ensure that the confession is made voluntarily by the accused after being apprised of the implications of making such confession.Thus the first requirement for acting on a confession is satisfied but that is not the end of the matter. The Court, called upon to consider the evidence against the accused, should still see whether there are any circumstances appearing from the record which may cast a doubt on the voluntary nature of the confession. The endeavor of the Court should be to apply its mind to the question whether the accused was free from threat, duress or inducement at the time of making the confession. In doing so, the Court should bear in mind, the principle enunciated in *Pyare Lal v. State of Rajasthan* [(1963) Suppl.1 SCR 689] that under Section 24 of the Evidence Act, a stringent rule of proof as to the existence of threat, duress or inducement should not be applied and a prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, "on the evidence and the circumstances in a particular case it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved."

B.U.PARMAR VS STATE OF GUJARAT AIR 2007 SC 420. Rape and murder of the minor girl is not in dispute before this Court. It is also not disputed that apart from the purported judicial confession there is no other material which can be said to be sufficient to establish the guilt of the accused. The Chief Judicial Magistrate recorded the confession on the basis of an application made by the Investigating Officer. An application was also filed to record the confession of the accused in another case..... The Magistrate examined himself as PW-2. In his deposition he reproduced the statements of the accused. In his cross-examination, he accepted that the confession started at about 11.15 a.m. and was completed at about 11.30 a.m. He did not remember that on the same day he recorded another confession of the accused in relation to another Session Case. He, however, accepted that he had done so when it was brought to his notice. Recording of that confession was completed at 11.45 a.m. Till then no legal aid was provided to him. He did not examine the body of the accused. He asked only the routine question as to whether he was ill-treated by the police. He accepted that the accused was produced before him under police protection and was also taken back under the police protection..... The evidence of the brother of the deceased categorically shows that the offence was committed in between 2 a.m. and 4 a.m. The purported confession shows that the offence was committed around 12 O' Clock in the night. The prosecution case proved that not only the complainant but also other family members were sleeping in the same shed. The purport of the confessions goes to show that the deceased was sleeping alone in the shed..... It is not appreciated as to why oath had to be administered to the accused while recording confession. Recording of statement of an accused on oath is prohibited. It may or may not be of much significance. But, it may assume significance when it is examined that a purported deposition of accused was taken wherein also his evidence on oath was recorded..... A judicial confession undoubtedly is admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary and if clearly proved. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged on the basis of the entire prosecution case..... The court must give sufficient time to an accused to ponder over as to whether he would make confession or not..... The first confession was recorded in 15 minutes time which included the

questions which were required to be put to the accused by the Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording the confession of the accused in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The Magistrate, therefore, should have allowed some more time to the accused to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the accused..... There was no direction to provide free legal aid to the accused. He had no opportunity to have independent advice. Each case against the accused must be judged on the basis of the legal evidence brought on records.

CONFESSION OF CO-ACCUSED

AIR 2006 SC 1106, R. Janakiraman VS State of Tamil Nadu, through CBI, It is no doubt well settled that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused and it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of such evidence, it is permissible to turn to the confession in order to lend support or assurance to the conclusion of guilt which the court is about to reach on the other evidence.

ARREST AND INVESTIGATION

M.C. MEHTA (TAJ CORRIDOR SCAM) V. UNION OF INDIA & ORS. (2007) 1 SCC 110 was a public interest litigation in which Supreme Court, after noticing the precedents, held that when a cognizable offence is reported to the police, they may after investigation take action under Section 169 or Section 170 of the Code. If the officer-in-charge of the police station forms an opinion that there is no sufficient evidence against the accused, the officer-in-charge may, under Section 169 of the Code, release the accused from custody or, if the officer forms an opinion that there is sufficient evidence, he may, under Section 170 of the Code, forward the accused to a competent Magistrate. After analyzing the earlier judgments, this Court observed:...that there is a clear-cut and well-demarcated sphere of activities in the field of crime detection and crime punishment. Investigation of an offence is the field reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive is charged with a duty to keep vigilance over law and order situation. It is obliged to prevent crime. If an offence is committed allegedly, it is the State's duty to investigate into the offence and bring the offender to book. Once it investigates through the police department and finds an offence having been committed, it is its duty to collect evidence for the purposes of proving the offence. Once that is completed, the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 Cr.P.C and his duty comes to an end."

IN M.C. ABRAHAM & ANR. V. STATE OF MAHARASHTRA & ORS. (2003) 2 SCC 649, Supreme Court observed: "Section 41 of the Code of Criminal Procedure provides for

arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection."

D.VENKATASUBRAMANIAM & ORS. Vs. M.K.MOHAN KRISHNAMACHARI & ORS. 14-09-2009 Supreme Court observed: "The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation."

CASE DAIRY AND ITS RELEVANCY

AIR 2005 SC 4352,- The entire case diary maintained by the police was made available to the accused. Under Section 172 of the Code of Criminal Procedure, 1973, every police officer making an investigation has to record his proceedings in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. It is specifically provided in Section 172(3) that neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 of the Cr.P.C. or the provisions of Section 145 of the Evidence Act shall be complied with. The court is empowered to call for such diaries not to use it as evidence but to use it as an aid to find out anything that happened during the investigation of the crime. These provisions have been incorporated in the Code of Criminal Procedure to achieve certain

specific objectives. The police officer who is conducting the investigation may come across a series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of the Cr.P.C.

SECTION 27 OF EVIDENCE ACT : DISCOVERY AND STATEMENT

Privy Council in Pulukuri Kottaya and others v. Emperor [AIR 1947 PC 67], "The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused..... Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are not admissible since they do not relate to the discovery of the knife in the house of the informant." The said decision has been cited with approval in a large number of cases by Supreme Court.

Supreme Court in State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600] wherein this Court opined: "The history of case law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with

the offence charged, was admissible under Section 27. The decision of the Privy Council in Kotayya's case, which has been described as a locus classicus, had set at rest much of the controversy that centered round the interpretation of Section 27. To a great extent the legal position has got crystallized with the rendering of this decision. The authority of Privy Council's decision has not been questioned in any of the decisions of the highest Court either in the pre or post independence era.

In Hanumant v. The State of Madhya Pradesh [1952 SCR 1091], Supreme Court in the fact situation obtaining therein opined : "It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. If the statement of the accused is used as whole, it completely demolishes the prosecution case and, if it is not used at all, then there remains no material on the record from which any inference could be drawn that the letter was not written on the date it bears."

In Palvinder Kaur vs. The State of Punjab, [1953 SCR 94], Supreme Court held: "Not only was the High Court in error in treating the alleged confession of Palvinder as evidence in the case but it was further in error in accepting a part of it after finding that the rest of it was false. It said that the statement that the deceased took poison by mistake should be ruled out of consideration for the simple reason that if the deceased had taken poison by mistake the conduct of the parties would have been completely different, and that she would have then run to his side and raised a hue and cry and would have sent immediately for medical aid, that it was incredible that if the deceased had taken poison by mistake, his wife would have stood idly by and allowed him to die. The court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so it contravened the well accepted rule regarding the use of confession and admission that these must either be accepted as a whole or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible"

GEEJAGANDA SOMAIAH VS STATE OF KARNATAKA AIR 2007 SC 1355, Supreme Court HELD On the basis of the voluntary disclosure made by the accused, the article belonging to the deceased were recovered from his possession, an inference, therefore, can safely be drawn that that not only the accused was in possession of those articles belonging to the deceased but also committed murder of the deceased..... A fact deposed to as discovered in consequence of information received from a person accused of an offence , in the custody of the police officer, so much of the such information whether it amounts to a confession or not , as relates distinctly to the fact thereby discovered , may be proved, however , the court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act.

Some of the circumstances, recovery of the gold ornaments of the deceased as well as the weapon used in the crime. The bloodstained clothes of the accused were also seized. As held by this Court in **J.P. Anand v. D.G. Baffna, AIR (2002) SC 141, and Ezhil and Ors. v. State of Tamil Nadu, AIR (2002) SC 2017**, in the absence of explanation of the accused as to legitimate or origin of their possession of articles belonging to the deceased, keeping in view of the time within which the murder was supposed to have been committed and the body found and the articles recovered from the possession of

the accused an inference can be safely drawn that not only the accused was in possession of those articles belonging to the deceased but also committed murder of the deceased. The articles belonging to the deceased were in possession of the accused who had voluntarily disclosed and as such presumption under Section 114 of the Evidence Act was clearly applicable.

In State of Uttar Pradesh v. Deoman Upadhyaya, AIR (1960) SC 1125, Supreme Court held that Sections 25 and 26 were manifestly intended to hit an evil, viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. These sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing of offences as it is concerned with protecting persons who may be compelled to give confessional statements. Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of truth of the statement made by him and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable.

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In Mohmed Inayatullah v. The State of Maharashtra, AIR (1976) SC 483 it was held that expression 'fact discovered' includes not only the physical object produced but also place from which it is produced and the knowledge of the accused as to that. Interpreting the words of Section "so much of the information" as relates distinctly to the fact thereby discovered, the Court held that the word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of proveable information. The phrase "distinctly" relates "to the fact thereby discovered". The phrase refers to that part of information supplied by the accused which is the direct cause of discovery of a fact. The rest of the information has to be excluded.

In Earabhadrapa alias Krishnappa v. State of Karnataka, [1983] 2 SCR 552, it was held that for the applicability of section 27 of the Evidence Act two conditions are pre-requisite, viz.,

- (i) information must be such as has caused discovery of the fact, and
- (ii) the information must 'relate distinctly' to the fact discovered.

Under Section 27 only so much of the information as distinctly relates to the fact really thereby discovered, is admissible. While deciding the applicability of Section 27 of the Evidence Act, the Court has also to keep in mind the nature of presumption under Illustration (a) to (s) of Section 114 of the Evidence Act. The Court can, therefore, presume the existence of a fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relations to the facts of the particular case. In that case one of the circumstance relied upon by the prosecution against the accused was that on being arrested after a year of the incident, the accused made a statement before the police leading to the recovery of some of the gold ornaments of the deceased and her six silk sarees, from different places which were identified by the witness as belonging to the deceased. In that context the court observed: "There is no controversy that the statement made by the appellant Ex.P-35 is admissible under S.27 of the Evidence Act.

Under S.27 only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The word 'fact means some concrete or material fact to which the information directly relates."

State of Maharashtra v. Damu, S/o Gopinath Shinde & Ors., JT (2000) 5 SC 575 has held that the Section 27 the Evidence Act was based on the doctrine of confirmation by subsequent events and giving the section actual and expanding meanings, held: "The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in section.

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In Gulab Chand v. State of M.P. AIR (1995) SC 1598, where ornaments of the deceased were recovered from the possession of the accused immediately after the occurrence, this Court held: "It is true that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced.

It has been indicated by **Supreme Court in Sanwat Khan v. State of Rajasthan AIR (1956) SC 54**, that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by Supreme Court by indicating that suspicion should not take the place of proof. In the said decision, Supreme court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case.

It may be indicated here that in a latter decision of Supreme Court in **Earabhadrapa v. State of Karnataka, [1993] 2 SCC 330**, the Court has held that the nature of the presumption and Illustration (a) under Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession in the recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. In our view, it has been rightly held by the High Court that the accused was not affluent enough

to possess the said ornaments and from the nature of the evidence adduced in this case and from the recovery of the said articles from his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery a reasonable inference of the commission of the said offence can be drawn against the appellant. Excepting an assertion that the ornaments belonged to the family of the accused which claim has been rightly discarded, no plausible explanation for lawful possession of the said ornaments immediately after the murder has been given by the accused. In the facts of this case, it appears to us that murder and robbery have been proved to have been integral parts of the same transaction and therefore the presumption arising under Illustration (a) of Section 114 Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her ornaments."

LAW RELATING TO CIRCUMSTANTIAL EVIDENCE

GEEJAGANDA SOMAIAH VS STATE OF KARNATAKA AIR 2007 SC 1355, Supreme Court HELD Conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by Supreme Court, viz.

- (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (iii) The circumstances should be of a conclusive nature and tendency;
- (iv) They should exclude every possible hypothesis except the one to be proved; and
- (v) There must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
- (vi) It has been consistently laid down by Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.
- (vii) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.
- (viii) Where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt. (**Bhagat Ram v. State of Punjab AIR (1954)SC 621**)
- (ix) "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."(**C. Chenga Reddy v. State of A.P., (1996) 10 SCC 193**)

(x) Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. (**State of U.P. v. Ashok Kumar Srivastava (1992) CrL LJ 1104**)

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(xi) There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by Supreme Court as far back as in 1952. In **Hanumant Govind Nargundkar v. State of M.P. AIR (1952) SC 343**, it was observed thus: "(1) It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and (2) all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, (3) the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, (4) there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and (5) it must be such as to show that within all human probability the act must have been done by the accused."

(xii) **Sharad Birdhichand Sarda v. State of Maharashtra, AIR (1984) SC 1622**, Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea.

PRECEDENT IN CRIMINAL LAW

While deciding the cases on facts, more so in criminal cases the court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case (See: **Pandurang and Anr. vs. State of Hyderabad (1955 1 SCR 1083)**).

It is also a well established principle that while considering the ratio laid down in one case, the court will have to bear in mind that every judgement must be read as applicable to the particular facts proved or assumed to be true.

Since the generality of expressions which may be found therein are not intended to be expositions of the whole of the law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides, and not what logically follows from it. (1) **Quinn vs. Leathem (1901) AC 495** (2) **State of Orissa vs. Sudhansu Sekhar Misra (AIR 1968 SC 647)** (3) **Ambica Quarry Works Vs. State of Gujarat (AIR 1987 SC 1073)**

In **Megh Singh Vs. State of Punjab - (2003) 8 SCC 666**, this Court held that in criminal law one additional or different fact may make a world of difference between the conclusions in two cases or between two accused in the same case.

BAIL PROVISIONS

Jayendra Saraswathi Swamigal VS State of Tamil Nadu AIR 2005 SC 716

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Prosecution case was that petitioner-appellant entered into a conspiracy to kill the deceased with the help of co-accused. The co-accused entered the office of the deceased in the evening and caused multiple injuries to him resulting in his death. It is alleged that motive for crime was various complaints alleged to have been made by the deceased levelling serious allegations, both against personal character of petitioner and also his style of functioning as Shankaracharya of the Mutt. A month before crime, deceased had sent letter as last warning levelling various allegations. Petitioner was arrested for the offence. He moved bail petition before High Court, which was rejected. His second bail petition was also rejected. Hence present appeal. Petitioner-appellant contended that the specific case of the prosecution at the time of the hearing of the two bail applications before the High Court was that a huge sum of money amounting to Rs.50 lakhs was withdrawn from an account of the Mutt maintained in ICICI Bank, for making payment to the hirelings. In this court, State was directed to give particulars of the bank account for such transactions and also to produce the copy of the account and the passbook. However State took a different stand that an agreement had been entered into for sale of 50 acres of land belonging to Kanchi Janakalyan Trust for Rs.5 crores, wherein an advance of Rs. 50 lakhs in cash was received. It was this money which was retained in cash by the petitioner all along from which payment was made to the hirelings after the conspiracy was hatched; that in view of Section 30 of the Evidence Act confession of a co-accused is a very weak type of evidence which can only be taken into consideration to lend assurance to the prosecution case; that confession of A-4 came to be retracted subsequently and also that of A-2 have very little evidentiary value in order to sustain the charge against him. Prosecution relied upon copies of 39 letters, which were allegedly recovered from the house of the deceased himself and confessional statement of A-2 and A-4 stating that petitioner offered Rs.50 lakhs for getting rid of the deceased. Prosecution contended that in view of Section 10 of the Evidence Act, anything said, done or written by any one of the accused is a relevant fact as against each of the persons conspiring to commit a crime; that there is also evidence of dying-declaration in order to fasten the liability upon the petitioner and for this reliance is placed upon the statement of SV, who stated that he knew deceased and used to talk to him and on the fateful day, he had contacted him over phone and told him that his petition presented to HR&CE Department was numbered and if any danger came to him, petitioner alone would be responsible for the same; that there are two other witnesses who have heard the petitioner telling some of the co-accused to eliminate the deceased; that the prohibition contained in Section 437(1)(i) Cr.P.C. would be applicable to the Courts entertaining a bail petition under Section 439 Cr.P.C.

Allowing the appeal, the court HELD:

1. The considerations which normally weigh with the Court in granting bail in non-bailable offences are-the 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 interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.

2. In the instant case, prima facie a strong case has been made out for grant of bail.

3. The recovery of 39 letters from the house of the deceased is not a proof of the fact that they were actually received by petitioner or were brought to his notice.

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4. The deceased was not an employee of the Mutt but was working as In-charge Administrative Manager of another Dharamsthanam which has nothing to do with Kanchi Mutt. Though according to the prosecution, the deceased had started making complaints against the petitioner for last 3 years prior to incident, there is absolutely no evidence collected in investigation that the petitioner made any kind of protest or took any kind of action against the deceased. Even otherwise, many letters or complaints etc. are addressed to people holding high office or position and it is not necessary that they read every such letter or complaint or take them seriously. There is absolutely no evidence or material collected in investigation to indicate that the petitioner had ever shown any resentment against the deceased for having made allegations against either his personal character or the discharge of his duties as Shankaracharya of the Mutt. The petitioner having kept absolutely quiet for over three years, it does not appeal to reason that he suddenly decided to enter into a conspiracy for eliminating the deceased.

5. No documents of the account in ICICI Bank have been produced in support of the plea taken twice by the prosecution before the High Court while opposing the prayer for bail. A-23 who is Manager of the Mutt had stated that he had received Rs.50 lakhs in cash. The statement of account clearly shows that after deposit of the aforesaid amount the entire overdraft was cleared. This belies the prosecution case, which was developed subsequently after the order had been passed by this Court directing the State to produce copy of the ICICI Bank account, that the cash money was retained by the Petitioner from which substantial amount was paid to the hirelings.

6. The opening words in Section 10 are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence". If prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all. There is no prima facie evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators. Here, the confessions of A-2 and A-4 were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act cannot be pressed into service. However, no concluded opinion is expressed on this question in the present case as the matter relates to grant of bail only and the question may be examined more deeply at the appropriate stage.

7. The names and identity of witnesses who had heard the petitioner telling some co-accused to eliminate the deceased have not been disclosed on the ground that the interrogation is still in progress. However, these persons are not employees of the Mutt and are strangers. It looks highly improbable that the petitioner would talk about the commission of murder at such a time and place where his talks could be heard by total strangers.

8. Since the telephonic conversation which the deceased had with SV, did not relate to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, the same does not come within the purview of Section 32(1) of the Evidence Act and is thus not admissible in evidence.

WHEN BAIL CAN BE CANCELLED

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However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused

- (1) misuses his liberty by indulging in similar criminal activity,
- (2) interferes with the course of investigation,
- (3) attempts to tamper with evidence of witnesses,
- (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation,
- (5) attempts to flee to another country,
- (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,
- (7) attempts to place himself beyond the reach of his surety, etc.

These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

In Dolat Ram And Ors. vs. State of Haryana, (1995) 1 SCC 349, Supreme Court held: "Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted."

In Nazir Ahmad Vs. King Emperor, AIR 1936 PC 253 it has been held: "that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."and further "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves."

In Ranjit Singh v. State of Punjab [(1998) 7 SCC 149], Supreme Court opined: "Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers.

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But then one more question may survive. In a situation where the Sessions Judge notices from the materials produced but before any evidence is taken, that any other person should also have necessarily been made an accused (without which the framing of the charge would be defective or that it might lead to a miscarriage of justice), Kishun Singh Supreme Court stated as follows: All the materials produced by the investigating agency would clearly show the positive involvement of a person who was not shown in the array of the accused due to some inadvertence or omission.

Should the court wait until evidence is collected to get that person arraigned in the case? Though such situations may arise only in extremely rare cases, the Sessions Court is not altogether powerless to deal with such situations to prevent a miscarriage of justice. It is then open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left-out accused. But we hasten to add that the said procedure need be resorted to only for rectifying or correcting such grave mistakes.

Supreme Court in Lok Pal v. Nihal Singh [(2006) 10 SCC 192] observed: "...The court, while examining an application under Section 319 of the Code, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, for exercise of discretion under Section 319 of the Code all relevant factors, including those noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused. It was furthermore observed: "In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken..."

In Mohd. Shafi v. Mohd. Rafiq & Anr. [2007 (5) SCALE 611], Supreme Court held: "Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appears to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in this behalf must be judicially exercised. It is incumbent that the court must arrive at its satisfaction in this behalf.

In R.P. Kapur v. State of Punjab [AIR 1960 sc 866] Supreme Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

- (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
- (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
- (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

COMPLAINANT CAN QUESTION THE GRANTING OF BAIL

Brij Nandan Jaiswal v. Munna @ Munna Jaiswal & Anr. Criminal Appeal No. 2087/2008.
Date of Judgment 19-12-08

1. Complainant can question the order granting bail if the said order is not validly passed.
2. Bail may be cancelled not only for its misuse but may be tested on merits.
3. The complainant could question the merits of the order granting bail.
4. While granting bail, particularly in serious cases like murder some reasons justifying the grant are necessary.

SURETY AND BAIL

MOTI RAM & ORS. Vs. STATE OF M.P. AIR 1978 SC 1594 Criteria to guide in quantifying the amount of bail and acceptance of surety whose estate is situate in a different district or State, explained. Pursuant to the directions of the Supreme Court for releasing the petitioner-appellant "on bail to the satisfaction of the Chief Judicial Magistrate," the Magistrate ordered that a surety in a sum of Rs. 10,000/- be produced. When the petitioner produced one, the magistrate made an odd order refusing to accept the suretyship of the petitioner's brother because he and his asset were in another district. Frustrated by magisterial intransigence the prisoner moved, Supreme Court again to modify the original order

HELD: (1) Social Justice is the signature tune of our Constitution and the littleman in peril of losing his liberty is the consumer of social justice. And 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 and necessitates the Supreme Court to interdict judicial

arbitrariness deprivatory of liberty and ensure "fair procedure" which has a creative connotation after Maneka Gandhi [1978] 2 SCR 621.

(2) Bail covers release on one's own bond with or without sureties, as the legal literature, Indian and Anglo-American on bail jurisprudence lends countenance and the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights justifies. When sureties should be demanded and what sum should be insisted on are dependent on variables.

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(3) A semantic smog overlays the provisions of bail in the Code and prisoners' rights, when cast in ambiguous language become precarious.

(a). 'Bail' in s. 436 of the Criminal Procedure Code suggests 'with or without sureties. And, 'bail bond' in s. 436(2) covers own bond.

(b) 'Bail' in s. 437 (2) suggests release, the accent being on undertaking to appear. when directed, not on the production of sureties. But s. 137(2) distinguishes between bail and bond, without sureties.

(c) Section 445 suggests, especially read with the marginal note that deposit of money will do duty for bond 'with or without sureties'.

(d) Superficially viewed, s. 441 (1) uses the words 'bail' and 'own bond' as antithetical, if the reading is liberal. 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 s 441(1) compels a contrary meaning. S. 441(2) and (3) use the word 'bail' generically because the expression is intended to cover bond with or without sureties;

(e) When the Court of appeal as per the import of s. 389(1) may release a convict on his own bond without sureties, surely, it cannot be that an undertrial 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 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.

(4) The Supreme Court's powers to enlarge a prisoner, as the wide words of order 21 Rule 27 (Supreme Court Rules 1966) show, contain no limitation based on sureties, 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 be. Such a strange anomaly could not be, even though it is true that the Supreme Court exercises wider powers with greater circumspection.

(5) If sureties are obligatory even for juveniles, females and sickly accused while they can be dispensed with. after being found guilty, if during the trial when the presence to District lawyers is more necessary, an accused must buy release only with sureties while at the appellate level, suretyship 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 the Court reads 'bail' to mean that it popularly does. and lexically and in American Jurisprudence is stated to mean, viz. a generic expression used to describe under release from custodia juris.

(6) Art. 14 protects all Indians qua Indians, within the territory of India. Art. 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 and State language according to the law in that State must be accepted everywhere in the territory of India, same where a valid legislation to the contrary exists. Otherwise, an Adivasi will be unfree in Free India, and likewise many other minorities. The process of making Indians aliens in their own homeland should be inhibited. Swaraj is made out of united stuff. The best guarantee of presence in Court is the reach of law, not the money tag.

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(7) The Court left open to the Parliament to consider- whether in our socialist republic with social justice as its hallmark, monetary superstition, not other relevant consideration like family ties, roots in the community, membership of stable organisations should prevail or bail bonds to ensure that the 'bailee' does not flee justice.

PRINCIPLES TO BE FOLLOWED WHILE GRANTING BAIL

VAMAN NARAIN GHIYA. VS STATE OF RAJASTHAN 2008(16) SCALE 324 ,

Code of Criminal Procedure, 1973 - s.439 - Bail - Held: While considering bail application, detailed discussion of evidence and elaborate documentation of merits to be avoided - An accused is not detained in custody on assumption of his guilt, but it is a mechanism whereby the State devotes upon the community the function of securing the presence of the prisoner - Balance is to be maintained between personal liberty of the accused and the investigational right of the police and between the requirement of society being shielded from the hazards of misadventures of accused and the fundamental cannon of criminal jurisprudence of innocence in favour of accused.

SUPREME COURT IN THE CASE OF GURBAKSH SINGH, DECIDED BY A CONSTITUTION BENCH AIR 1980 SC 1632, Bail-Anticipatory Bail-Section 438 of the Code of Criminal Procedure Code, 1973 (Act 2 of 1974), Scope of- Judicial balancing of personal liberty and the investigational powers of the Police, explained.

The appellant herein, Sri 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 of the Criminal Procedure Code, praying that the appellants be directed to be released on bail, in the event of their arrest on the aforesaid charges. Considering the importance of the matter, a learned single Judge referred the applications to a **Full Bench**, which by its judgment dismissed them, after summarising, what according to it is the true legal position, of s. 438 of the Code of Criminal Procedure, :

Allowing the appeals in part, Supreme Court, HELD:

1. The society has a vital stake in both of these interests namely, **personal liberty and the investigational power of the police**, though their relative importance at any given time depends upon the complexion and restraints of political conditions. The Court's task is how best to balance these interests while determining the scope of section 438 of the Code of Criminal Procedure, 1973.

2. The High Court and the Court of Session should be left 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.

3. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. **The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence.** The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. **Mere 'fear' is not 'belief'**, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non- bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested.

Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large, as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusation, likely or unlikely.

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.

Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

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

Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

4. However, a "blanket order" of anticipatory bail should not generally be passed. This flows from the very language of the section which requires the appellant 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 which ever 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 bad.

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.

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 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.

5. An order of bail can be passed under section 438(1) of the Code without notice to the Public Prosecutor. 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.

6. Equally the operation of an order passed under section 438(1) need not necessarily be limited in point of time. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

7. Bail is basically release from restraint, more particularly release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognizance suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself as 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 the custody by word or action". A direction under section 438 is intended to confer conditional immunity from this 'touch' or confinement.

8. No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sangfroid, in so far as the ordinary rut of criminal investigation is concerned. It is the normal day-to-day business of the police to investigate into charges brought before them and, broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminal to needless harassment.

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But the crimes, the criminals and even the complaints can occasionally possess extraordinary features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in hand-cuffs, 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. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our Criminal Jurisprudence as the presumption of innocence.

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 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 sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses.

Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.

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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 offences 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.

10. The amplitude of judicial discretion which is given to the High Court and the Court of Sessions, to impose such conditions as they may think fit while granting anticipatory bail, should not be cut down, by a process of construction, by reading into the statute conditions which are not to be found therein like those evolved by the High Court. 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.

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 order 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.

11. 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, this Court cuts 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 this Court 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.

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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 the Courts generally is to preserve their discretion without meaning to abuse it. It will be strange if the Court exhibits concern to stultify the discretion conferred upon the Courts by law. 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.

12. It is true that the functions of judiciary and the police are in a sense complementary and not overlapping. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under section 438(1) are those recommended in Sub-section (2)(i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2), so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail.

13. 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 s. 437(1) are implicitly contained in Section 438 of the Code. The power conferred by section 438 is of an "extra ordinary" character only in the sense that it is not ordinarily resorted to like the power conferred by sections 437 and 439.

14. Since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions.

15. 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.

ANTICIPATORY BAIL REASONS TO BE RECORDED

State of Maharashtra & Anr vs Mohd. Sajid Husain & others BENCH: S.B. Sinha J & Harjit Singh Bedi J, AIR 2008 SC 155 , Code of Criminal Procedure, 1973: , s.439-Grant of anticipatory bail-Determining factors-Discussed.

s.439-Anticipatory bail-Accused persons police officers and politicians-Charged with offence of raping minor girl-Remaining underground-Sessions judge rejected their regular bail and anticipatory bail-High Court allowed anticipatory bail-Correctness of- Held: Not correct as victim needed protection-Moreover accused persons unscrupulously not complied with the conditions imposed on them and also not present before the court number of times

The prosecution case was that the prosecutrix was staying with her maternal aunt 'M' after her mother remarried on death of her father. She was assaulted and abused by 'M' and as a result she left the home and started working in the house of accused 'T' as a maid servant. In the house of 'T' some girls used to come. After few days when one girl did not come, 'T' took prosecutrix to a place where she was offered a soft drink and then against her will, was subjected to rape. Thereafter she was regularly been sent out with various persons. Respondents who are politicians, police officers and businessmen

allegedly had been taking her to hotel, government guest house and even to their own apartment. On one day, the accused persons, named in the First Information Report took her to a hotel to take liquor. However, the accused persons started behaving indecently with her. The police came and took all of them to the police station.

She was medically examined on same day. Her Radiological (Bone) Assessment suggested her age to be between 14-16 years. Respondents were not named in the First Information Report. However, prosecutrix made several statements thereafter implicating the respondents.

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When respondents came to know that they have been named by the said girl, they absconded. They filed an application for anticipatory bail before the Sessions Judge which was dismissed. Thereafter, they filed application for anticipatory bail before the High Court which was allowed on the ground that the prosecutrix being major and having willingly consented for sex for consideration, prima facie, a case under s.376 IPC is not made out and that since prosecutrix was stationed in the Remand Home she was fully protected.

In appeal to this Court, State contended that the High Court committed a serious error in passing the impugned judgment inasmuch as from various public documents, it is evident that, at all material times, namely, she was minor and in that view of the matter, the purported consent given by her would not be of much significance; that in the First Information Report, the names of the respondents had not been taken, but in a case of this nature, the court should have considered the fact that she had been arrested by the police and as such it is just possible that she was not in a position to recollect all the details.

Allowing the appeal, the Court

HELD:

1. The four factors, which are relevant for considering the application for grant of anticipatory bail, are :

"(i) the nature and gravity or seriousness of accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and

(iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice."

2.1. If the prosecutrix was a minor, consent on her part will pale into insignificance. She had been medically examined and her approximate age on the basis of radiological test was determined to be between 14 to 16 years. Her date of birth was recorded on 04.07.1996 by the Parbhani Municipal Council as '28.06.1991'. The said certificate was issued on 29.05.2007, but evidently the date of registration of the said certificate was 04.07.1996 i.e. much before any controversy arose. Three school leaving certificates had

been placed wherein her date of birth was shown as 28.06.1991. She had been, as per the said certificates, studying in 9th standard. She dropped out from the school.

2.2. The date of issuance of the certificates had not been stated, but evidently such certificates had been obtained by the prosecution. It may be true that in the First Information Report as also in her first supplementary examination, her age was recorded as 18 years, but she had been examined medically. The possibility of her trying to shield her from prosecution at the time of her arrest and for that purpose disclosing her age to be 18 years cannot be ruled out.

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2.3. A mistake in regard to her age as recorded in the First Information Report or the first medical document or even in her supplementary affidavit should yield to the public documents which have been produced by the prosecution at this stage. Even before the Chief Judicial Magistrate, she disclosed her date of birth to be 22.06.1991. Therefore, even according to that she was below 16 years of age.

3. Out of the eight respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. The respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

4. The High Court has in regard to the first factor envisaged under the Maharashtra Amendment of s.438 of the Code of Criminal Procedure proceeded on the basis that the prosecutrix was a girl of easy virtue. This may be so but the same by itself may not be a relevant consideration. A case of this nature should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of s.154 Cr. PC, it may not always be held to be imperative that all the accused persons must be named in the First Information Report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed of towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, at least at this stage her evidence should not be rejected outrightly. Parameters for grant of anticipatory bail in such a serious offence, being under ss. 376, 376(2)(g) IPC are required to be satisfied.

5.1. Immoral trafficking is now widespread. Victims, who are lured, coerced or threatened for the purpose of bringing them to the trade should be given all protection. At this stage, this court need not enter into the details in regard to the merit of the matter so as to prejudice the case of one party or the other at the trial, but **it is now well-settled principle of law that while granting anticipatory bail, the court must record the reasons therefor.**

5.2. Immoral conduct on the part of police officers should not be encouraged. It is not understandable as to how the police officers could go underground. They had been changing their residence very frequently. Although most of them were police officers,

their whereabouts were not known. During the aforementioned period attempts had been made even by 'M' to obtain the custody of the girl at whose instance, is not known. On the one hand, 'M' had been praying for the custody of the girl and the mother of the girl had affirmed an affidavit in relation to her date of birth. These may not be acts of voluntariness on their part. It, therefore is a case where no anticipatory bail should have been granted.

6. The High Court itself has refused to grant regular bail to the accused against whom charge-sheet has been submitted. The Session Judge also did not grant bail to some of the accused persons. If on the same materials, prayer for regular bail has been rejected, there is no reason to enlarge respondents on anticipatory bail. In the peculiar fact and circumstances of the case, the High Court ought not to have granted anticipatory bail to the respondents.

WHAT CONDITIONS CAN BE IMPOSED

Munish Bhasin & Ors. Vs State (Govt. of N.C.T. of Delhi) & Anr. JUSTICE R.V. Raveendran & JUSTICE J.M. Panchal HELD ON FEB 2009: Regarding Aticipatory Bail that: While exercising discretion to release an accused under Section 438 of the Code of Criminal Procedure, 1973 neither the High Court nor the Session Court would be justified in imposing freakish conditions. The Court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all. The conditions which can be imposed by the Court while granting anticipatory bail are enumerated in sub-section (2) of Section 438 and sub-section (3) of Section 437 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer or before the Court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or Court or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on Court under section 438 of the Code. While imposing conditions on an accused who approaches the Court under section 438 of the Code, the Court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. The conditions to be imposed under section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under section 438 of the Code.In the instant case, when the High Court had found that a case for grant of bail under section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000/- for past maintenance and a sum of Rs.12,500/- per month as future maintenance to his wife and child. In a proceeding under section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child. The case of the appellant is that his wife is employed and receiving a handsome salary and therefore is not entitled to maintenance. Normally, the question of grant of maintenance should be left to be decided by the competent Court in an appropriate proceedings where the parties can adduce evidence in support of their respective case, after which liability of husband to pay maintenance could be determined and appropriate order would be passed directing the husband to pay

amount of maintenance to his wife. The record of the instant case indicates that the wife of the appellant has already approached appropriate Court for grant of maintenance and therefore the High Court should have refrained from granting maintenance to the wife and child of the appellant while exercising powers under section 438 of the Code. The condition imposed by the High Court directing the appellant to pay a sum of Rs.12,500/- per month as maintenance (both past and future) to his wife and child is onerous, unwarranted and is set aside. Rest of the directions contained in the said order are maintained.

REJECTION AND CANCELLATION OF BAIL

In State (Delhi Admn.) v. Sanjay Gandhi Supreme Court observed rejection of bail when bail is applied for is one thing; cancellation of a bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail once granted. That is because cancellation of bail interferes with the liberty already secured by the accused either on the exercise of discretion by the court or by the thrust of law. This Court, therefore, observed that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. That does not mean that the power though extraordinary in character must not be exercised even if the ends of justice so demand.

As stated in Raghbir Singh's case the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Sections 437(1) or (2) or 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

ANTICIPATORY BAIL

PARVINDERJIT SINGH AND ANR. VS STATE (U.T. CHANDIGARH) AND ANR. 2008 (13) SCALE 711 ,

Code of Criminal Procedure, 1973: s.438 - Exercise of power under - Scope - Disposing of the appeals with certain directions, the Supreme Court HELD:

1. The facility which s.438 Cr.P.C. gives is generally referred to as 'anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression 'anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in anticipation of

arrest. Any order of bail can be effective only from the time of arrest of the accused. The bail is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order under s.438 Cr.P.C. is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under s.438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under s.438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by s.438 Cr.P.C. is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

2. S.438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under s.438 Cr.P.C. convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the applicant may be 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 vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out for granting the relief sought. The provisions cannot be invoked after arrest of the accused.

3. Normally a direction should not be issued to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under s.438 is a device to secure the individual's liberty' it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

4. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons,

arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under s.438 Cr.P.C.. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under s.438 Cr.P.C. will amount to interference in the investigation, which cannot, at any rate, be done under s.438 Cr.P.C.

5. In the instant case this Court had in fact by order dated 30.5.2008 directed that the appellants shall not be arrested subject to the condition that they will join investigation. The order is in operation and it is not appropriate in the present case to make any variation.

SCOPE OF SECTION 482 TO QUASH FIR

The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335]. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of the rare cases. The illustrative categories indicated by this Court are as follows:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

WORDS OF CAUTION TO HIGH COURTS IN QUASHING PROCEEDINGS

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. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceedings. **These aspects were also highlighted in State of Karnataka v. M. Devendrappa [2002(3) SCC 89].**

Supreme Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the

accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

Supreme Court again in Janata Dal v. H. S. Chowdhary & Others (1992) 4 SCC 305 observed that in what circumstances the inherent powers should be exercised:- "The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plentitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles."

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The decision in Central Bureau of Investigation, SPE, SIU(X), New Delhi v. Duncans Agro Industries Ltd., Calcutta (1996) 5 SCC 591 The court observed that for the purpose of quashing the complaint, it is necessary to consider whether the allegations in the complaint prima facie make out an offence or not. It is not necessary to scrutinize the allegations for the purpose of deciding whether such allegations are likely to be upheld in the trial. Any action by way of quashing the complaint is an action to be taken at the threshold before evidences are led in support of the complaint. For quashing the complaint by way of action at the threshold, it is, therefore, necessary to consider whether on the face of the allegations incorporated in a complaint or F.I.R., a criminal offence is constituted or not.

In B.S. Joshi & Others v. State of Haryana & Another (2003) 4 SCC 675 the court reiterated the legal position that the court's inherent powers have no limit but should be exercised with utmost care and caution. Inherent powers must be utilized with the sole purpose to prevent the abuse of the process of the court or to otherwise secure the ends of justice. In exercise of inherent powers, proper scrutiny of facts and circumstances of concerned case are absolutely imperative.

In Jagdish Chanana & Others v. State of Haryana & Another 2008 (4) Scale 411 Supreme court observed as under:- "The fact that a compromise has indeed been recorded is admitted by all sides and in terms of the compromise the disputes which are purely personal in nature and arise out of commercial transactions, have been settled in terms of the compromise with one of the terms of the compromise being that proceedings pending in court may be withdrawn or compromised or quashed, as the case may be. In the light of the compromise, it is unlikely that the prosecution will succeed in the matter. We also see that the dispute is a purely personal one and no public policy is involved in the transaction that had been entered into between the parties. To continue with the proceedings, therefore, would be a futile exercise."

In Madan Mohan Abbot v. State of Punjab (2008) 4 SCC 582 in which one of us (Bedi, J.) was the author of the judgment observed as under:- "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 utilized 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."

Raghubir Saran (Dr) v. State of Bihar [AIR 1964 SC 1]. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings."

Recently in R. Kalyani vs. Janak C. Mehta & Ors. [(2009) 1 SCC 516], this Court opined: "Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

In Hira Lal Hari Lal Bhagwati v. CBI [(2003) 5 SCC 257], this Court held : "It is settled law, by a catena of decisions, that for establishing the offence of cheating, the

complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption."

In Vir Prakash Sharma v. Anil Kumar Agarwal [(2007) 7 SCC 373], noticing, inter alia, the aforementioned decision, this Court held: "The dispute between the parties herein is essentially a civil dispute. Non-payment or underpayment of the price of the goods by itself does not amount to commission of an offence of cheating or criminal breach of trust. No offence, having regard to the definition of criminal breach of trust contained in Section 405 of the Penal Code can be said to have been made out in the instant case."

Supreme Court in the case of Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736, at page 747 has observed as under : "The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few--*Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre*, *State of Haryana v. Bhajan Lal*, *Rupan Deol Bajaj v. Kanwar Pal Singh Gill*, *Central Bureau of Investigation v. Duncans Agro Industries Ltd.*, *State of Bihar v. Rajendra Agrawalla*, *Rajesh Bajaj v. State NCT of Delhi*, *Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.*, *Hridaya Ranjan Prasad Verma v. State of Bihar*, *M. Krishnan v. Vijay Singh and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque.* The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on

the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

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Supreme Court has recently in R. Kalyani v. Janak C. Mehta and Others, (2009) 1 SCC 516, observed as follows: "15. Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

In Chandrapal Singh & Others v. Maharaj Singh & Another (1982) 1 SCC 466, in a landlord and tenant matter where criminal proceedings had been initiated, this Court observed in para 1 at page 467 as under:- "A frustrated landlord after having met his Waterloo in the hierarchy of civil courts, has further enmeshed the tenant in a frivolous criminal prosecution which prima facie appears to be an abuse of the process of law. The facts when stated are so telling that the further discussion may appear to be superfluous."

In G. Sagar Suri & Another v. State of UP & Others (2000) 2 SCC 636, this court observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process particularly when matters are essentially of civil nature.

This court in Roy V.D. v. State of Kerala (2000) 8 SCC 590 observed thus:- "It is well settled that the power under section 482 Cr.P.C has to be exercised by the High

Court, inter alia, to prevent abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under section 482 CrPC to quash proceedings in a case like the one on hand, would indeed secure the ends of justice."

Supreme court in Zandu Pharmaceutical Works Ltd. & Others v. Mohd. Sharaful Haque & Another (2005) 1 SCC 122 observed thus:- "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. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

CRIMINAL BREACH OF TRUST

Further, this Court observed in S. W. Palanikar v. State of Bihar [2002 (1) SCC 241] that every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. It observed as follows: "8. Before examining respective contentions on their relative merits, we think it is appropriate to notice the legal position. Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.

The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.

The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii)

in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168 on facts of that case, has expressed thus: (SCC p. 177, para 15) In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

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CHARGE AND DISCHARGE

In K. Prema S. Rao and Another v. Yadla Srinivasa Rao and Others [(2003) 1 SCC 217], this Court observed: "Mere omission or defect in framing 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 Code of Criminal procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed under Section 304B and in the Alternative Section 498A, IPC (as quoted above) it is clear that all facts and ingredients for framing charge for offence under Section 306, IPC existed in the case. The mere omission on the part of the trial Judge to mention of Section 306, IPC with 498A, IPC does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed under Section 498A of IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of Section 221 of Cr.P.C. take care of such a situation and safeguard 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 for such offence."

In Kammari Brahmaiah and Others v. Public Prosecutor, High Court of A.P. [(1999) 2 SCC 522], this Court observed: "3. At the time of hearing of this appeal, learned Counsel appearing on behalf of the appellant submitted that the Order passed by the High Court convicting the appellants for the offence punishable under Section 325 read with 149 is on the face of it illegal as no charge under Section 149 was framed against the accused. He contended that all accused were charged only for the offence punishable under Section 302 of IPC for causing injuries to the deceased Itikala Mogulaiah. As against this, learned Counsel for the State vehemently submitted that even though it is an error on the part of the Additional Sessions Judge of not framing the charge under Section 302 read with 149 of IPC no prejudice is caused to the accused as

relevant facts were placed before the Court and the attention of the accused also was drawn. Further, they are punished for lesser offence, therefore, the order passed by the High Court is justified and legal."

In Dalbir Singh v. State of U.P. [(2004) 5 SCC 334], this Court observed: "11. The High Court was further of the opinion that the evidence on record clearly established the charge against the accused under Section 306 IPC and he could be convicted and sentenced for the said offence. However, in view of the fact that no charge under Section 306 IPC had been framed and there was conflict of opinion in the two decisions of this Court rendered by Benches of equal strength and as in such a situation a later decision was to be followed, the High Court came to a conclusion that the accused cannot be convicted under Section 306 IPC. On this basis the conviction and sentence of accused under Section 498-A IPC alone were maintained.

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The main question which requires consideration is whether in a given case it is possible to convict the accused under Section 306 IPC if a charge for the said offence has not been framed against him. In *Lekhjit Singh and Anr. v. State of Punjab* (supra) the accused were charged under Section 302 IPC and were convicted and sentenced for the said offence both by the trial Court and also by the High Court. This Court in appeal came to the conclusion that the charge under Section 302 IPC was not established. The Court then examined the question whether the accused could be convicted under Section 306 IPC and in that connection considered the effect of non-framing of charge for the said offence. It was held that having regard to the evidence adduced by the prosecution, the cross-examination of the witnesses as well as the answers given under Section 313 Cr.P.C. it was established that the accused had enough notice of the allegations which could form the basis for conviction under Section 306 IPC"

In Kamalanantha and Others v. State of T.N. [(2005) 5 SCC 194], this Court held: "It is clear from the aforesaid decisions that misjoinder of charges is not an illegality but an irregularity curable under Section 464 or Section 465 Cr.P.C. provided no failure of justice had occasioned thereby. Whether or not the failure of justice had occasioned thereby, it is the duty of the Court to see, whether an accused had a fair trial whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

The question came up for consideration in *Harjit Singh v. State of Punjab* [2006(1) SCC 463] wherein, however, it was held : "23. Faced with this situation, the learned counsel appearing on behalf of the State relies upon a judgment of this Court in *K. Prema S. Rao v. Yadla Srinivasa Rao* wherein an observation was made in the peculiar facts and circumstances of that case that even if the accused is not found guilty for commission of an offence under Sections 304 and 304-B of the Penal Code, he can still be convicted under Section 306 IPC thereof.

Omission to frame charges under Section 306 in terms of Section 215 of the Code of Criminal Procedure may or may not result in failure of justice, or prejudice the accused. It cannot, therefore, be said that in all cases, an accused may be held guilty of commission of an offence under Section 306 of the Penal Code wherever the prosecution fails to establish the charge against him under Section 304-B thereof.

Moreover, ordinarily such a plea should not be allowed to be raised for the first time before the court unless the materials on record are such which would establish the said charge against the accused."

The propositions of law which can be culled out from the aforementioned judgments are:

- (i) The appellant should not suffer any prejudice by reason of misjoinder of charges.**
- (ii) A conviction for lesser offence is permissible.**
- (iii) It should not result in failure of justice.**
- (iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges. , Anil @ Raju Namdev Patil VS Administration of Daman & Diu,& Anr. 2006(13)SCC36 ,**

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BHARAT PARIKH VS. C.B.I. & ANR. 2008(10)SCC109 , Code of Criminal Procedure, 1973: ss. 207, 227 and 482 - Prayer of accused for discharge after charges were framed - HELD: At the stage of framing the charge roving and fishing inquiry is impermissible and submissions of accused have to be confined to the material produced by investigating agency - Documents subsequently filed cannot be relied upon to re-open the proceedings once charge has been framed or for invocation of power of High Court u/s 482. In the instant appeal arising out of rejection of accused's application seeking to reopen the proceedings and his discharge after the charges had been framed, the questions for consideration before the Court were: (i) whether having framed charges against an accused, a Magistrate has the jurisdiction in law to recall such order on the ground that the prosecution had failed to comply with the provisions of Section 207 of the Code of Criminal Procedure" and (ii) whether in exercise of its inherent powers, the High Court could quash the charges framed and acquit the accused on account of such non-compliance with the provisions of Sections 207 and 238 of the Code

While framing charges, the trial court can only look into the materials produced by the prosecution while giving an opportunity to the accused to show that the said materials were insufficient for the purpose of framing charge.

The question of discharge by the Magistrate after framing of charge does not, therefore, arise, notwithstanding the submissions advanced with regard to denial of natural justice and a fair and speedy trial as contemplated under Article 21 of the Constitution, which have no application whatsoever to the facts of the instant case.

With regard to the High Court's powers to look into materials produced on behalf of or at the instance of the accused for the purpose of invoking its powers under Section 482 of the Code for quashing the charges framed, it has to be kept in mind that after the stage of framing charge, evidence has to be led on behalf of the prosecution to prove the charge if an accused pleads not guilty to the charge and claims to be tried. It is only in the exceptional circumstances that criminal proceedings may be quashed to secure the ends of justice, but such a stage will come only after evidence is led, particularly, when the prosecution has produced sufficient material for charges to be framed.

At the stage of framing charge roving and fishing inquiry is impermissible and a mini trial cannot be conducted at such stage; and submissions on behalf of the accused have to be confined to the material produced by the investigating agency. The accused will get an opportunity to prove the documents subsequently produced by the prosecution on the order of the Court, but the same cannot be relied upon to re-open the proceedings once charge has been framed or for invocation of the High Court's powers under Section 482 of the Code.

CHARGE AND DISCHARGE AND APPRECIATION OF EVIDENCE

In State of Bihar v. Ramesh Singh [(1977) 4 SCC 39] considering the scope of Sections 227 and 228 of the Code, it was held that at the stage of framing of charge it is not obligatory for the Judge to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At that stage, the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at the initial stage of framing of charge, is sufficient to frame the charge and in that event it is not open to say that there is no sufficient ground for proceeding against the accused.

In Superintendent and Remembrancer of legal Affairs, West Bengal v. Anil Kumar Bhunja and Others [(1980) 1 SCR 323] a three- judge Bench held that the Magistrate at the stage of framing charges had to see whether the facts alleged and sought to be proved by the prosecution prima facie disclose the commission of offence on general consideration of the materials placed before him by the investigating police officer.

In State of Delhi v. Gyan Devi and Others [(2000) 8 SCC 239] this Court reiterated that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons.

In State of Madhya Pradesh v. S.B.Johari and Others [(2000) 2 SCC 57] it was held that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted, cannot show that the accused committed the particular offence. In that case, there would be no sufficient ground for proceeding with the trial.

In State of Maharashtra v. Priya Sharan Maharaj and Others [(1997) 4 SCC 393] it was held that at Sections 227 and 228 stage the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

In State Anti-Corruption Bureau, Hyderabad and Another v. P. Suryaprakasam [1999 SCC (Cr.) 373] where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage is of being heard and nothing beyond that.

Decision in the case of Nirmal Singh Vs. State of Bihar reported in 2005(9) SCC 725 and Sanganagouda A. Vs. Veeranagouda Vs. State of Karnataka reported in 2005(12) SCC 468 also give out the position that merely because doubts are raised about the FIR and the nature of prosecution case, that by itself, would be fatal to the prosecution case.

SOMA CHAKRAVARTY VS STATE THROUGH CBI AIR 2007 SC 2149 Criminal Trial - Framing of Charges - Allegation of misappropriation of huge amount of Government money - Revision Petition challenging the framing of charges - Dismissed by High Court - Allegations were that six bogus firms claiming to have published advertisements, submitted 76 bogus bills worth Rs.30,30,057/- for payment by signing under fictitious names. The bills had not been entered in bill register and no file had been opened in respect of these firms. The file numbers written on the fictitious bills were also fake. Out of the 76 bills, 14 (pertaining to ad-hoc advertisement) were dishonestly processed by the appellant-accused and co-accused. All the bills were filled by another co-accused who was neither posted in the publicity division nor was he authorized to do so. Appellant-accused was also not the incharge of ad hoc advertisements. None of the bills bore initials or signatures of the incharge of the ad hoc advertisements. The bills were also not sanctioned / approved by the competent authority. The Revision Petition challenging the order of trial court, was dismissed by High Court. Hence the present appeals. Dismissing the appeals, the Court HELD: Per Markandey Katju, J.

1. If on the basis of material on record the court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.
2. It cannot be said that no charge could be framed against the appellant as there was no material to show that she was prima facie guilty or had any mens rea.
3. It cannot be said that the appellant had signed the bills in the normal course of her duty and it was the Accounts section which was negligent in not verifying these bills. Once a person signs on a document he or she is expected to make some enquiry before signing it.

4. There are serious allegations of misappropriation of a huge amount of money belonging to the Government, and it cannot be said at this stage that there is no material at all for framing the charge against her.

POWERS OF APPELLATE COURTS

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GHUREY LAL VERSUS STATE OF U.P. 2008(10)SCC450 , The appellate court undoubtedly has wide and extensive powers of re-appreciating and re-evaluating the entire evidence, but the same must be used with great care and caution. Appellate court would be justified in interfering with judgment of acquittal only when the same is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse..... On marshalling the entire evidence and the documents on record, the view taken by the trial court is certainly a possible and plausible view. The settled legal position is that if the trial court's view is possible and plausible, the High Court should not substitute the same by its own possible views..... When the trial court finds serious infirmities in the prosecution version, then the trial court was virtually left with no choice but to give benefit of doubt to the accused according to the settled principles of criminal jurisprudence. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence; therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.....

The High Courts and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the order of acquittal passed by the trial court.

(a) The appellate court may reverse or otherwise disturb the order of acquittal passed by trial court only if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when: i) the trial court's conclusion with regard to the facts is palpably wrong; ii) the trial court's decision was based on an erroneous view of law; iii) the trial court's judgment is likely to result in "grave miscarriage of justice"; iv) the entire approach of the trial court in dealing with the evidence was patently illegal; v) the trial court's judgment was manifestly unjust and unreasonable; vi) the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic Expert, etc. This list is intended to be illustrative, not exhaustive.

(b) The appellate court must always give proper weight and consideration to the findings of the trial court.

(c) If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

Chandrappa and Ors. v. State of Karnataka (2007 (4) SCC 415), the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

SHRI D.K. BASU, ASHOK K. JOHRI Vs. STATE OF WEST BENGAL, STATE OF U.P. (1997

(1) SCC 416) To check the abuse of police power, transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigation so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation.

It is, therefore, appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(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 be either 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 concerned State or Union Territory. 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 inter-rogation, 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.

NDPS ACT BAIL AND PROCEDURE

UNION OF INDIA -- APPELLANT VERSUS RATTAN MALLIK @ HABUL 23-01-2009 . It is clear from a bare reading of the non-obstante clause in Section 37 of the Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the Act is not only subject to the limitations imposed u/s. 439 Cr.P.C., it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the

Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative..... While considering an application for bail with reference to Section 37 of the Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

SINGLE WITNESS

MUNNA @ POORAN YADAV .VS STATE OF MADHYA PRADESH 2009(1) SCC 202 ,

Penal Code, 1860 - s. 302 - Murder - The evidence of the eye- witness is reliable and has been appreciated by courts blow with caution - Hence cannot be discarded his being sole eye-witness and related witness - Evidence of the eye-witness also cannot be discarded on the principle of Falsus in uno falsus in omnibus. Court can and may convict relying on the testimony of a single witness provided he is wholly reliable and that there was no legal impediment in convicting a person on the sole testimony of a single witness..... It is one thing to disbelieve the witness and to give benefit of doubt to the accused on the basis of that evidence and it is quite another to hold that the witness had deliberately and falsely implicated the two other accused. The theory of falsus in uno, falsus omnibus has long back ceased to apply in criminal jurisprudence of India.

FAILURE OF PROSECUTION TO EXPLAIN INJURY ON ACCUSED

SHRIRAM VS STATE OF MP AIR 2004 SC 491 : "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

- (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;
- (3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries.

SOLITARY WITNESS AND INTERESTED WITNESS

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In Vadivelu Thevar v. State of Madras, 1957 SCR 981 : AIR 1957 SC 614, referring to Mahomed Sugul, this Court stated; On a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions may be safely stated as firmly established :

- (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
- (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
- (3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

Quoting Section 134 of the Evidence Act, their Lordships stated that "we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated." The Court proceeded to state; It is not seldom that a crime had been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution.

In the leading case of Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, this Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."

In Anil Phukan v. State of Assam, (1993) 3 SCC 282 : JT 1993 (2) SC 290, the Court observed; "Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect."

In Kartik Malhar v. State of Bihar, (1996) 1 SCC 614 : JT 1995 (8) SC 425, referring to several cases, this Court stated; "On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar case and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence."

In Chittar Lal v. State of Rajasthan, (2003) 6 SCC 397 : JT 2003 (7) SC 270, this Court had an occasion to consider a similar question. In that case, the sole testimony of a young boy of 15 years was relied upon for recording an order of conviction. Following Mohamed Sugal and reiterating the law laid down therein, this Court stated: "The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). Administration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent cases where the testimony of a single witness only could be available, in number of crimes offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability. If the testimony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact."

Recently, in Bhimappa Chandappa v. State of Karnataka, (2006) 11 SCC 323, this Court held that testimony of a solitary witness can be made the basis of conviction. The credibility of the witness requires to be tested with reference to the quality of his evidence which must be free from blemish or suspicion and must impress the Court as natural, wholly truthful and so convincing that the Court has no hesitation in recording

a conviction solely on his uncorroborated testimony. From the aforesaid discussion, it is clear that Indian legal system does not insist on plurality of witnesses. Neither the Legislature (Section 134, Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eye witness, therefore, has no force and must be negated. It was then contended that the only eye witness PW6-Sopan was none other than the son of the deceased. He was, therefore, 'highly interested' witness and his deposition should, therefore, be discarded as it has not been corroborated in material particulars by other witnesses. We are unable to uphold the contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive.

In Darya Singh & Ors. v. State of Punjab, (1964) 3 SCR 397 : AIR 1965 SC 328, this Court held that evidence of an eye witness who is a near relative of the victim, should be closely scrutinized but no corroboration is necessary for acceptance of his evidence. Speaking for the Court, Gajendragadkar, J. (as His Lordship then was) stated: "There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal Court to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. If the offence has taken place as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eye-witnesses cannot be properly characterised as unlikely. If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In doing so, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness

may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

In Dalbir Kaur (Mst.) v. State of Punjab, (1976) 4 SCC 158 : AIR 1977 SC 472, the accused killed his own father and real brother over a property dispute. Eye-witnesses to the 'gruesome, brutal and unprovoked' double-murder were near relatives of the deceased. It was, therefore, contended that they were 'interested' witnesses and their evidence should not be accepted for holding the appellants guilty. Negating the contention, upholding the order of conviction, and referring to Dalip Singh, this Court stated; "There can be no doubt that having regard to the fact that the incident took place at midnight inside the house of Ajaib Singh, the only natural witnesses who could be present to see the assault would be Jaswant Kaur and her mother Shiv Kaur. No outsider can be expected to have come at that time because the attack by the appellants was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here. In the instant case there is absolutely no evidence to indicate that either Jaswant Kaur or Shiv Kaur bore any animus against the accused."

Harbans Kaur v. State of Haryana, (2005) 9 SCC 195, the conviction of the accused was challenged in this Court, inter alia, on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire confidence. Negating the contention this Court said: "There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

Supreme court in Namdeo vs State Of Maharashtra 2007 Cr.L.J. 1819 From the above case-law, it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

PRESUMPTION OF LAW AND FACT

IN A RECENT CASE OF 2010:- The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision,

thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof" "In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean: - "Proved : A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Disproved : A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist." Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

A Division Bench of this Court in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35] albeit in a civil case laid down the law in the following terms: "Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non- existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt"

In Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16], a 3- Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a 3-Judge Bench, however, opined: "Presumptions are rules of evidence and do not conflict with the presumption of

innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

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In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316], Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating: "Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

In Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808], Khanna, J., speaking for the 3-Judge Bench, held: "One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

In The State through the Delhi Administration v. Sanjay Gandhi [AIR 1978 SC 961], it was stated: "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"

Trimukh Maroti Kirkan vs. State of Maharashtra [(2006) 10 SCC 681] wherein it was held: "18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of West Bengal v. Mir Mohammad Omar and Ors.* [(2000) 8 SCC 382]. In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial Court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports:

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody.' "

Ponnusamy vs. State of Tamil Nadu [(2008) 5 SCC 587], this Court held: "We have to consider the factual background of the present case in the light of the relationship between the parties. If his wife was found missing, ordinarily, the husband would search for he. If she has died in an unnatural situation when she was in his company, he is expected to offer an explanation therefor. Lack of such explanation on the part of the appellant itself would be a circumstantial evidence against him."

"A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in *Stirland v. Director of Public Prosecution* (1944 AC (PC) 315) quoted in *State of U.P. v. Anil Singh* (AIR 1988 SC 1998).

PRESUMPTION AND DOWRY DEATH

In State of Rajasthan v. Jaggu Ram [2008 (12) SCC 51], this Court has considered the circumstance about the non-information to the parents and the hurried cremation. This was also a case where accused persons were tried for offence under Section 304B, IPC, where the accused, after the death of the unfortunate lady did not bother to inform her parents. Supreme Court took a serious note of the manner in which the body was disposed of. The Court observed "the disposal of the dead body in a hush-hush manner clearly establishes that the accused had done so with the sole object of concealing the real cause of death of Shanti @ Gokul."

In Kamesh Panjiyar VS STATE OF BIHAR AIR 2005 SC 785: Presumption under Section 113B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials :

- (1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B IPC).
- (2) The woman was subjected to cruelty or harassment by her husband or his relatives.
- (3) Such cruelty or harassment was for, or in connection with any demand for dowry.
- (4) Such cruelty or harassment was soon before her death.

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 Pratap Singh VS STATE OF JHARKAND AIR 2005 SC 273:-

The definition of 'Juvenile' under the 1986 Act, of course refers to a person who has been found to have committed offence but the same has been clarified in the 2000 Act. The provisions of 1986 Act, sought to protect not only those juveniles who have been found to have committed an offence but also those who had been charged therefor. In terms of Section 3 of the 1986 Act as well as 2000 Act when an enquiry has been initiated even if the juvenile has ceased to be so as he has crossed the age of 16 and 18 as the case may be, the same must be continued in respect of such person as if he had continued to be a juvenile. Section 3 of the 1986 Act therefore cannot be given effect to if it is held that the same only applied to post delinquency of the juvenile.

In this context, the proposed legislation aims at achieving the following objectives:-

(i) to lay down a uniform legal framework for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts;

(ii) to provide for a specialized approach towards the prevention and treatment of juvenile delinquency in its full range in keeping with the developmental needs of the child found in any situation of social maladjustment;

(iii) to spell out the machinery and infrastructure required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system. This is proposed to be achieved by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles;

(iv) to establish norms and standards for the administration of juvenile justice in terms of investigation and prosecution, adjudication and disposition, and care, treatment and rehabilitation;

(v) to develop appropriate linkages and co-ordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or socially maladjusted children and to specifically define the areas of their responsibilities and roles;

(vi) to constitute special offences in relation to juveniles and provide for punishments therefor;

(vii) to bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rule for the Administration of Juvenile Justice.

(i) In terms of the 1986 Act, the age of the offender must be reckoned from the date when the alleged offence was committed;

- (ii) The 2002 Act will have a limited application in the cases pending under the 1986 Act;
- (iii) The model rules framed by the Central Government having no legal force cannot be given effect to.
- (iv) The court, thus, would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of Section 35 of the Indian Evidence Act.

RIGHT OF PRIVATE DEFENCE

Satya Narain Yadav VS Gajanand and Anr. AIR 2008 SC 3284: Section 96 IPC does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case..... Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. The right of private defence commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially a finding of fact. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much

which is required in the thinking of a man in ordinary times or under normal circumstances. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

2006(9) SCC 678

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. Merely because there was a quarrel and some of the accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary.

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SELF DEFENCE

As noted in *Butta Singh v. The State of Punjab* (AIR 1991 SC 1316), a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negated. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact."

In *Bhanwar Singh & Ors. vs. State of M.P.* [2008 (7) scale 633], this Court held: "To put it pithily, the right of private defence is a defence right. It is neither a right of aggression or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. Necessity must be present, real or apparent.

The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen

defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence."

RAPE CASES AND VIEWS OF SUPREME COURT

In the case of State of Punjab vs. Gurmit Singh, (1996) 2 SCC 384, it has been held that a conviction can be founded on the testimony of prosecutrix alone unless there are compelling reasons for seeking corroboration. It is further held that her evidence is more reliable than that of an injured witness. It was pointed out in paragraph 8 at scc pp.395-396 as under: - "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of

another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable".

In the case of Sheikh Zakir vs. State of Bihar, (1983) 4 SCC 10, in paragraph 8 at scc p.18 it has been held:-

"Insofar as non-production of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable. It is, however, nobody's case that there was such a report and it had been withheld."

In the case of Ranjit Hazarika vs. State of Assam (1998) 8 SCC 635, it was pointed out in paragraph 5 at scc.p 637 as under:- "The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

In the case of State of Rajasthan vs. N.K, the accused (2000) 5 SCC 30, it was pointed out in paragraph 9 at scc p.38 as under:- "Having heard the learned counsel for the parties we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as

administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and given benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women.

In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (1983) 3 SCC 217, this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion."

NORMAL DISCREPANCIES AND MATERIAL DISCREPANCIES OF WITNESS STATEMENTS:-

As observed by this Court in *State of Rajasthan v. Smt. Kalki and Anr.* (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

CURATIVE PUNSHMENTS

MOHAMMAD GIASUDDIN Vs. STATE OF ANDHRA PRADESH AIR 1977 SC 1926

Since the whole territory of punishment in its modern setting is virtually virgin so far as our country is concerned, the court went into the subject in some incisive depth for the guidance of the subordinate judiciary.

Progressive criminologists in the world agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals-mental and moral-is the key to the pathology of delinquency and the therapeutic role of punishment. The whole man is a healthy man and every man is born good. Criminality is a curable deviance. If every saint has a past every sinner has a future and it is the role of law to remind both of this.

Man is subject to more stresses and strains in this age than ever before and a new class of crimes arising from restlessness of the spirit and frustration of ambitions has erupted. White collar crime, as in the present case, belongs to this disease of man's inside. Barbarity and injury recoils as injury so that if healing the mentally or morally maimed or malformed man is the goal, awakening the inner being more than torturing through exterior compulsions, holds out better curative hopes. The infliction of harsh and savage punishment is thus a relic of past and regressive times. Today sentencing should be a process of re-shaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence. Therefore, a therapeutic, rather than a terrors outlook should prevail in our criminal courts.

There is a great discretion vested in the judge while imposing sentence. The Judge must exercise this discretionary power, draw his inspiration from the humanitarian spirit of the law living down the traditional precedents which have winked at the personality of the crime doer and been swept away by the features of the crime. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz., imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards.

Humanitarian winds must blow into the prison barricades. Jail reforms from abolition of convict's costume and conscript labour to restoration and fraternal touch, are on the urgent agenda of the nation. Our prisons should be correctional houses, and not cruel iron aching the soul.

India, like every other country, has its own crime complex and dilemma of punishment. Solutions to tangled social issues do not come like the crack of dawn but are the product of research and study, oriented on the founding faiths of society and driving towards that transformation which is the goal of free India. Man is subject to more stresses and strains in this age than ever before, and a new class of crimes arising from restlessness of the spirit and frustration of ambitions has erupted. White-collar crime, with which we are concerned here, belongs to this disease of man's inside.

If the psychic perspective and the spiritual insight we have tried to project is valid, the police billy and the prison drill cannot 'minister to a mind diseased nor tone down the tension, release the repression, unbend the perversion, each of which shows up as debased deviance, violent vice and behavioral turpitude. It is a truism, often forgotten in the hidden vendetta in human bosoms, that barbarity breeds barbarity, and injury recoils as injury, so that if healing the mentally or morally maimed or malformed man (found guilty) is the goal, awakening the inner being, more than torturing through exterior compulsions, holds out better curative hopes.

A holistic view of sentencing and a finer perception of the effect of imprisonment give, short shrift to draconian severity as self-defeating and fillips meditational relaxation, psychic medication and like exercises as apt to be more rewarding. Therefore, the

emphasis has to be as much on man as on the system, on the inner imbalance as on the outer tensions. Perhaps the time has come for Indian criminologists to rely more on Patanjali sutra as a scientific curative for crimogenic factors than on the blind jail term set out in the Penal Code and that may be why western researchers are now seeking Indian yogic ways of normalising the individual and the group. Western jurisdiction and 'sociologists, from their own angle have struck a like note.

QUOTED the words of The Law Commission of India (in 47th Report) has summed up the components of a proper sentence :

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"A proper sentence is a composite of many factors, including the nature of the offence, the circumstances extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education. home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any for such a deterrent in respect to the particular type of offence involved."

The new Criminal Procedure Code, 1973 incorporates some of these ideas and gives an opportunity in s. 248(2) to both parties to bring to the notice of the court facts and circumstances which will help personalize the sentence from a reformative angle. This Court, in Santa Singh (1976) 4 SCC 190, has emphasized how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in s. 235(2) "This new provision in s. 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code,. It 'was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be consigned to a Subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court.

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 other side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.

DEATH PENALTY

The following propositions emerge from Bachan Singh's case AIR 1982 SC 1325 :

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

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

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

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

The position was again reiterated in Devender Pal Singh v. State of NCT of Delhi [2002 (5)SCC 234]

The community may entertain such sentiment in the following circumstances: (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland. (3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

In Mahesh v. State of M.P. (1987) 2 SCR 710), this Court while refusing to reduce the death sentence observed thus: "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformatory jargon."

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in **Sevaka Perumal etc. v. State of Tamil Nadu (AIR 1991 SC 1463).**

In Jashubha Bharatsinh Gohil v. State of Gujarat (1994 (4) SCC 353), it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

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Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

In Dhananjoy Chatterjee v. State of W.B. (1994 (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

Ravji v. State of Rajasthan, (1996 (2) SCC 175). It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

APPRECIATION OF EVIDENCE

GANGADHAR BEHERA AND ORS. VS STATE OF ORISSA, 2002(8)SCC 381, BENCH: ARIJIT PASAYAT & S.B. SINHA. JUDGMENT: J U D G M E N T ARIJIT PASAYAT, J.

1. In **Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364)** it has been laid down as under:- "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

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2. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in **Dalip Singh's** case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

3. Again in **Masalti and Ors. v. State of U.P. (AIR 1965 SC 202)** this Court observed: (p, 209-210 para 14): "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

4. To the same effect is the decision in **State of Punjab v. Jagir Singh (AIR 1973 SC 2407)** and **Lehna v. State of Haryana (2002 (3) SCC 76)**. Stress was laid by the accused-appellants on the non- acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in

India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.

5. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab (AIR 1956 SC 460).

6. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh 1972 3 SCC 751) and Ugar Ahir and Ors. v. The State of Bihar (AIR 1965 SC 277).

7. An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962).

8. As **observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390)**, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

9. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting

guilty escape is not doing justice according to law. [See: Gurbachan Singh v. Satpal Singh and Others [AIR 1990 SC 209].

10. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava [AIR 1992 SC 840].

11. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admn.) (AIR 1978 SC 1091)].

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12. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." quoted in State of U.P. v. Anil Singh (AIR 1988 SC 1998).

13. Law cannot afford any favourite other than truth. In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahebrao Bobade v. State of Maharashtra [1974 (1) SCR 489 (492-493)] : ".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt....."

14. ".....The evil of acquitting a guilty person light- heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless....."

15. ".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....." The position was again illuminatingly highlighted in State of U.P. v. Krishna Gopal (AIR 1988 SC 2154). At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

16. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particularly to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II" : Glanville Williams: Criminal Law Review, 1979 by Sweet and Maxwell, p. 340 (342). "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

17. Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141.

18. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage.

19. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution

of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

20. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

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21. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot *co instanti*. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section.

22. A 4-Judge Bench of this Court in Masalti's case (supra) observed as follows: "Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

23. To similar effect is the observation in **Lalji v. State of U.P. (1989 (1) SCC 437)**. It was observed that : "Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

24. In **State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747)** it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

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STATE OF MADHYA PRADESH VS DHARKOLE @ GOVIND SINGH & ORS. AIR 2005 SC 44 BENCH: ARIJIT PASAYAT & C.K.THAKKER

Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P. v. Krishna Gopal and Anr.* (AIR 1988 SC 2154). On that score also the High Court's conclusion that the medical evidence varied with the ocular evidence suffers from vulnerability. It is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the respondents as the perpetrators of the crime.

COMPETENCE OF ATROCITY COURT TO TAKE COGNIZANCE AND PROCEDURAL LAPSE

Supreme Court in *State of M.P. Vs. Bhooraji and others*, reported at (2001) 7 SCC 679, where the Court held that a trial held before a competent Court would not be vitiated by a procedural lapse. The High Court of Madhya Pradesh in *Meerabai Vs. Bhujbal Singh*, reported at 1995 Cri LJ 2376 (MP), had held that cases under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act needed to be committed to the Special Court of Session. This was overruled by a Full Bench of the same Court, which held that

the Special Court could directly take cognizance without commitment. This in turn was overruled by the Apex Court in *Gangula Ashok Vs. State of A.P.*, reported in (2000) 2 SCC 504, making commitment necessary. Bhooraji's case was tried by appropriate Court, but without its having been committed. The High Court ordered a fresh trial. On appeal, the Supreme Court set aside the judgment, observing " The expression "a court of competent jurisdiction" envisaged in Section 465 is to denote a validly constituted court conferred with jurisdiction to try the offence or offences. Such a court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The inability to take cognizance of an offence without a committal order does not mean that a duly constituted court became an incompetent court for all purposes. If an objection was raised in that court at the earliest occasion on the ground that the case should have been committed by a Magistrate, the same specified court has to exercise a jurisdiction either for sending the records to a Magistrate for adopting committal proceedings or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. Even this could be done only because the court has competence to deal with the case. Sometimes that court may have to hear arguments to decide that preliminary issue. Hence the argument advanced by the learned counsel on the strength of the aforesaid decisions is of no avail."

MAGISTRATE POWER TO PARDON

Sections 306 and 307 of the Code of Criminal Procedure, 1973, which are relevant provisions governing magistrate's power to pardon , read as under:

"306. Tender of pardon to accomplice :-

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this Section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into, or trying the offence, at any stage of the inquiry or trial, may tender pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This Section applies to-- (a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952); (b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record- (a) his reasons for so doing (b) whether the tender was or was not accepted by the person to whom it was made; and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)- (a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any; (b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case- (a) commit it for trial- (i)

to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate ; (ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952, (46 of 1952), if the offence is triable exclusively by that Court ; (b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon :- At any time after commitment of a case but before judgement is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

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In *Narayan Chetanram Chaudhary and Another v. State of Maharashtra* [(2000) 8 SCC 457], a Division Bench of this Court, in an almost similar situation, viz., where the confessional statement was kept in a sealed cover and wherein also the learned Sessions Judge granted pardon, declined to hold that only because some delay had occurred in granting pardon, no reliance could be placed thereupon. It was furthermore opined that what was mandatory was the examination of the accomplice. Non-examination of the approver at the committal stage by the committing Magistrate, if rectified later, would not lead to any prejudice to the accused, stating: "27. There is no legal obligation on the Trial Court or a right in favour of the accused to insist for the compliance with the requirement of Section 306(4) of the Cr.PC. Section 307 provides a complete procedure for recording the statement of an accomplice subject only to compliance of conditions specified in Sub-section (1) of Section 306. The law mandates the satisfaction of the Court granting pardon, that the accused would make a full and true disclosure of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. It is not necessary to comply with the requirement of Section 306(4) when the pardon is tendered by the Trial Court. The Trial Court, in this case has taken all precautions in complying with the provisions of the Section 306(1) before tendering pardon to accused Raju, who later appeared as PW. 2. We do not find any violation of law or illegality in the procedure for tendering the pardon and recording the statement of PW.2." If it is to be held that in each and every case pardon can only be granted at the initial stage, the power conferred upon the Sessions Judge to grant under Section 307 of the Code of Criminal Procedure for all intent and purport shall become otiose.

For an effective compliance of sentencing procedure under section 354(3) and section 235(2) Cr.P.C, sufficient discretion is a pre-condition. Strict channeling of discretion would also go against the founding principles of sentencing as it will prevent the sentencing court to identify and weigh various factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime etc. Pre-sentence Hearing and "Special Reasons" Under section 235(2) and 354 (3) of the Criminal Procedure Code, there is a mandate as to a full fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance to both the provisions. A scrupulous compliance

of both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage.

SENTENCING OF CRIMINALS

In *Dhananjay Chatterjee v. State of W.B.* [(1994) 4 SCC 220], Supreme Court has taken notice of the fact that shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility.

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In *Panchhi v. State of U.P.*, [(1998) 7 SCC 177], Supreme Court elucidates on "when the alternative option is foreclosed" benchmark in the following terms: 16. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in *Bachan Singh v. State of Punjab* this Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the rarest of rare cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate.

In *Machhi Singh v. State of Punjab* a three-Judge Bench of Supreme Court while following the ratio in *Bachan Singh* case laid down certain guidelines among which the following is relevant in the present case: (SCC p. 489, para 38) "(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

In *Bachan Singh* (supra), it was stated: "206. Dr Chitale has suggested these mitigating factors: "Mitigating circumstances.--In the exercise of its discretion in the above cases, the court shall take into account the following circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall nby evidence prove that the accused does not satisfy the conditions (3) and (4) above. (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence. (6) That the accused acted under the duress or domination of another person. (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

PIL CASES AND DIRECTIONS TO HIGH COURTS

IN THE SUPREME COURT OF INDIA a recent case of 2010 *State of Uttaranchal Vs Balwant Singh Chaufal & Others*, In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:- (1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb

the PIL filed for extraneous considerations. (2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter. (3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L. (4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL. (5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition. (6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions. (7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation. (8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

GUIDELINES ISSUED REGARDING WOMEN PRISONER AND RIGHTS OF CHILD BORN TO HER

AIR 2006 SC 1946, R.D. Upadhyay VS State of A.P. & Ors.

GUIDELINES :

1. A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.
2. Pregnancy: a. Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child. b. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on. c. Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.

3. Child birth in prison: a. As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility. b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned. c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children: a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years. b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance. c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood. d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons. e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

5. Food, clothing, medical care and shelter: a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales. b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms. c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis. d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child. e. Clean drinking water must be provided to the children. This water must be periodically checked. f. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer. g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff. h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic. i. Children of prisoners shall have the right of visitation. j. The Prison Superintendent shall be empowered in

special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

6. Education and recreation for children of female prisoners: a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crhches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff. b. There shall be a crhche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crhche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crhche and nursery outside the prison premises.

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7. In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

9. Diet : Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that "dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally." It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

11. Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.

13. The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously.

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14. Copy of the judgment shall be sent to Union of India, all State Governments/Union Territories, High Courts.

15. Compliance report stating steps taken by Union of India, State Governments, Union territories and State Legal Services Authorities shall be filed in four months whereafter matter shall be listed for directions.

The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. The salient features of the study brought to the notice of all Governments in February 2002, are : (i) The general impression gathered was the most of these children were living in really difficult conditions and suffering from diverse deprivations relating to food, healthcare, accommodation, education, recreation, etc. (ii) No appropriate programmes were found to be in place in any jail, for their proper bio-psycho-social development. Their looking after was mostly left to their mothers. No trained staff was found in any jail to take care of these children. (iii) It was observed that in many jails, women inmates with children were not given any special or extra meals. In some cases, occasionally, some extra food, mostly in the form of a glass of milk, was available to children. In some jails, separate food was being provided only to grown up children, over the age of five years. But the quality of food would be same as supplied to adult prisoners. (iv) No special consideration was reported to be given to child bearing women inmates, in matters of good or other facilities. The same food and the same facilities were given to all women inmates, irrespective of the fact whether their children were also living with them or not. (v) No separate or specialised medical facilities for children were available in jails. (vi) Barring a few, most mother prisoners considered that their stay in jails would have a negative impact on the physical as well as mental development of their children. (vii) Crowded environment, lack of appropriate food, shelter and above all, deprivation of affection of other members of the family, particularly the father was generally perceived by the mothers as big stumbling blocks for the proper development of their children in the formative years of life. (viii) Mother prisoners identified six areas where urgent improvement was necessary for proper upkeep of their children. They related to food, medical facilities, accommodation, education, recreation and separation of their children from habitual offenders. (ix) No prison office was deployed on the exclusive duty of looking after these children or their mothers. They had to perform this duty alongside many other duties including administrative work, discipline maintenance, security-related jobs etc. None of them was reported to have undergone any special training in looking after the children in jails.

BAD INVESTIGATION

Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others [(2004) 4 SCC 158] opined: "18. According to the appellant Zahira there was no fair trial and the entire effort during trial and at all relevant times before also was to see that the accused persons got acquitted. When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim. 54. Though justice is depicted to be blindfolded, 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 lie 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 the faith inbuilt in the 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. 55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself."

2006 (12) SCC 421 Sasi Thomas VS State & Ors. Proper and fair investigation on the part of the investigating officer is the backbone of rule of law. A proper and effective investigation into a serious offence and particularly in a case where there is no direct evidence assumes great significance as collection of adequate materials to prove the circumstantial evidence becomes essential. Unfortunately, the appellant has not been treated fairly. When a death has occurred in a suspicious circumstance and in particular when an attempt had been made to bury the dead body hurriedly and upon obtaining apparently an incorrect medical certificate, it was expected that upon exhumation of the body, the investigating authorities of the State shall carry out their statutory duties fairly. The appellant alleges that no fair investigation has been conducted. It is clearly a matter of great concern that the authorities did not become alive to the situation. Although the dead body was buried on the premise that she died of heart attack, a final report was submitted stating that she might have committed a suicide. We do not know on what material, such an opinion was arrived at by the investigating officer.

The procedure for submitting an investigation report has been considered by this Court in the case of M.C. Abraham and Anr. Vs. State of Maharashtra [2003] 2 SCC 649. While considering the law on the question as to when the report of the investigating agency shall be submitted before the Magistrate where the case is pending, an observation made in the case of Abhinandan Jha Vs. Dinesh Mishra [AIR 1968 SC117] was quoted with approval by B.P.Singh, J. in M.C. Abraham's case (supra) with which we

are also in full agreement and which is as follows: " Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under Section 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give directions to the police, under Section 156(3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation under Section 156(3). The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, under Section 190(1)(b), notwithstanding the contrary opinion of the police, expressed in the final report. The function of the Magistracy and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot certainly infringe (sic impinge) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view. Therefore, to conclude, there is no power, expressly or impliedly conferred under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial."

This court in M.C. Abraham's case (supra) observed in para 17 as under: "The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation."

In Union of India vs. Prakash P.Hinduja & Anr. [(2003) 6 SCC 195], this Court in para 20 observed as follows : "Thus the legal position is absolutely clear and also settled by judicial authorities that the court would not interfere with the investigation or during the course of investigation which would mean from the time of the lodging of the First Information Report till the submission of the report by the officer-in-charge of the police station in court under Section 173 (2) Code, this field being exclusively reserved for the investigating agency."

When there was doubt as to who inflicted the fatal blow, safe course is to convict the accused under Sections 326 or 304 Part-II, IPC. State of Haryana v. Prabhu & Ors AIR 1979 SC 1019; Sarwan Singh & Ors.etc. v. State of Punjab AIR 1978 SC 1525; Ram Anjore and Others. v. State of U.P. AIR 1975 SC 185; Gokul & Others v. State of Rajasthan AIR 1972 SC 209; Md. Isak Md. & Others v. State of Maharashtra AIR 1979 SC 1434; Ninaji Raoji Baudha & Another v. State of Maharashtra AIR 1976 SC 1537; Nattan v. State of Tamil Nadu AIR 1976 SC 2197; Mariadasan & Others v. State of Tamil Nadu AIR 1980 SC 573; Bharwad Bhikha Natha & Others v. State of Gujarat AIR 1977 SC 1768; Harshadsingh Pahelvansingh Thakore v. State of Gujarat AIR 1977 SC 710; Bhajan Singh and Others v. State of Punjab AIR 1978 SC 1759; Bansropan Singh and Others v. State of Bihar AIR 1983 SC 166; Sarman & Others v. State of M.P. AIR 1993 SC 400

The unexplained delay in dispatch of FIR would create suspicion about the contents of the FIR and the evidence of the eye-witnesses. In this regard, reliance has been placed on : Ishwar Singh v. State of U.P AIR 1976 SC 2423; Radhakrishnan Nair v. State of Kerala 1995 Suppl (1) SCC 217; Chotu v. State of Haryana 1996 SCC (Crl.) 1161; Palia v. State of Punjab 1997 SCC (Crl.) 383; Bathula Nagamalleswara Rao And Ors. v. State rep. by Public Prosecutor (2008) 11 SCC 722; Mahmood and Anr. v. State of U.P. (2008) Crl. Law Journal 696; State of Punjab v. Avtar Singh (2008) 14 SCALE 368; State of Punjab v. Gurdip Kaur (2009) 1 SCC 120 and Ramesh Baburao Devaskar And Others v. State of Maharashtra 2007 (13) SCC 501.

If the trial court recorded the finding to the effect that there was violation of mandatory provisions contained in Section 157 of Cr.P.C. which is fatal for prosecution case. In this regard, reliance may placed on Chandu v. State of Maharashtra 2002 (9) SCC 408; Kashiram & Ors. v. State of M.P. 2002 (1) SCC 71 and Harijana Thirupala & Ors. v. Public Prosecutor A.P., Hyderabad 2002 (6) SCC 470.

In Meharaj Singh, this court explained the consequences that may ensue due to delay in dispatching FIR to the Magistrate in the following words : ".....One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course 26 2002 (9) SCC 408 27 2002 (1) SCC 71 28 2002 (6) SCC 470 29 1962 (3) SCR 590; 19 the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf....."

In the case of T.T. Antony, it has been held by this Court that there can be no second FIR. While dealing with Section 154 and other relevant provisions, this Court said: "18. An information given under sub-section (1) of Section 154 Cr.P.C is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 Cr.P.C, as the case may be, and forwarding of a police report under Section 173 Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one

or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report -- FIR postulated by Section 154 Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 Cr.P.C. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of Cr.P.C..... 20 19. The scheme of Cr.P.C is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 Cr.P.C on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 Cr.P.C, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) Cr.P.C. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C. 20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 Cr.P.C only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 Cr.P.C."

In the case of Ramesh Baburao Devaskar, this Court observed : "18. A First Information Report cannot be lodged in a murder case after the inquest has been held. The first information report has been lodged on the basis of the statements made by PW 11 to the informant himself at the spot. If the said prosecution witness who claimed himself to be the 21 eyewitness was the person who could lodge a first information report, there was absolutely no reason as to why he himself did not become the first informant. The first information report was recorded on the basis of his information given to the first informant at the spot. All information given by him to PW 13 was made before the investigating officer himself. What prevented him from lodging the First Information Report is beyond our comprehension. PW 11, we may place on record, categorically stated that he had disclosed the details of information to all concerned. Therefore, it is expected that the first informant was informed thereof. We have noticed hereinbefore that the information given by PW 13 had at least been recorded by

the police in the crime register and he categorically stated a few facts viz. the main accused Accused 9 committed murder of his brother Shivaji Patil and one Baburao Patil. Even the place where the murder took place was known to him. If we are to believe the investigating officer, he recorded the statement after holding inquest. The detailed report in regard to the nature of injuries as also the place where the injuries were inflicted was known to him as inquest report had already been prepared. Such an attempt on the part of the investigating officer has been deprecated by this Court in a large number of decisions. All other witnesses including the panch witnesses must have been present there. If despite the same, according to panch witnesses, at least in respect of Baburao, unknown persons are said to be his assailants, it is evident that PW 11 did not disclose the names of the assailants; at least all of them before PW 9 as also the investigating officer."

In Dharma Rama Bhagare v. State of Maharashtra , (1973) 1 SCC 537 this Court held that FIR is never treated as a substantive piece of evidence; it can only be used for corroborating or contradicting its maker when he appears in Court as a witness.

WITNESS FROM RIVAL FACTION

In Muthu Naicker and Others vs. State of Tamil Nadu , (1978) 4 SCC 385 this Court held that where an occurrence takes place involving rival factions, it is but inevitable that the evidence would be of a partisan nature and rejection of such evidence on that ground may not be proper. This Court put a word of caution that such evidence needs to be examined with utmost care and caution. This is what this Court said : "Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence, the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and, therefore, the evidence has to be examined with utmost care and caution. It is in such a situation that this Court in Masalti v. State of U.P.(AIR 1965 SC 202) adopted the course of adopting a workable test for being assured about the role attributed to every accused. To some extent it is inevitable that we should adopt that course."

In the case of State of U.P. v. Ballabh Das and Others (1985) 3 SCC 703, this Court held that evidence of interested witnesses may be relied upon if such evidence is otherwise trustworthy. This Court said : "What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. We might also mention that the evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as

any other evidence. It may also be mentioned that in a faction-ridden village, as in the instant case as mentioned by us earlier, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses.

This Court in Badri v. State of U.P.(AIR 1975 SC 1985) made the following observations: [AIR Headnote] (SCC p. 616, para 6) In case where a murder takes place in a village where there are two factions bitterly opposed to each other, it would be idle to expect independent persons to come forward to give evidence and only partisan witnesses would be natural and probable witnesses to the incident. In such a case, it would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. Their evidence has to be assessed on its own merits. The dominant question to be considered in the instant case is whether the witnesses, despite being interested, have spoken the truth and are creditworthy. Once it is found by the court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot persuade the court to reject the prosecution case on that ground alone."

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A similar view has been echoed by this Court in State of U.P. v. Ram Swarup and Others 1988 (Supp) SCC 262 wherein this Court held : ".....There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the faction opposed to that of the accused by itself does not render their evidence false. Partisanship by itself is no ground for discarding sworn testimony. Interested evidence is not necessarily false evidence. In a small village like the one under consideration where people are divided on caste basis, the prosecution may not be able to get any neutral witness. Even if there is any such neutral witness, he will be reluctant to come forward to give testimony to support one or the other side. Therefore, merely because the eyewitnesses are associated with one faction or the other, their evidence should not be discarded. It should, no doubt, be subjected to careful scrutiny and accepted with caution."

AIR 2008 SC 1614, DIVINE RETREAT CENTRE VS STATE OF KERALA & ORS.

The High Court in exercise of its inherent jurisdiction cannot change the Investigating Officer in the midstream and appoint any agency of its own choice to investigate into a crime on whatsoever basis and more particularly on the basis of complaints or anonymous petitions addressed to a named Judge. Such communications cannot be converted into suo motu proceedings for setting the law in motion. Neither the accused nor the complainant or informant are entitled to choose their own investigating agency to investigate a crime in which they may be interested.

High Court cannot set the law in motion against the named and unnamed individuals based on the information received by it without recording the reasons that the information received by it prima facie disclosed the commission of a cognizable offence. Setting criminal law in motion is fraught with serious consequences, which cannot lightly be undertaken by the High Court even in exercise of its jurisdiction under Article 226 of the Constitution of India. The High Court in exercise of its whatsoever jurisdiction cannot direct investigation by constituting a Special Investigation Team on

the strength of anonymous petitions. The High Courts cannot be converted into Station Houses.

High Court initiated suo motu proceedings without even examining as to whether the contents of the anonymous letter and material sent along with it disclosed any prima facie case for ordering an investigation. High Court has merely quoted certain allegations made against the appellant and others and proceeded on the basis of those allegations made in the anonymous petition without forming any prima facie opinion with regard to those allegations.

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It is evident from Sections 154, 156 and 157 Cr.P.C. that even a police officer can not act on the basis of information received or otherwise and proceed to investigate provided he has reason to suspect the commission of a cognizable offence which he is empowered to investigate under Section 156 Cr.P.C.

The investigation of an offence is the field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions under Chapter XII Cr.P.C. However, unfettered discretion does not mean any unaccountable or unlimited discretion and act according to one's own choice. The power to investigate must be exercised strictly on the condition of which that power is granted by Cr.P.C. itself.

There is nothing like unlimited arbitrary jurisdiction conferred on the High Court under Section 482 Cr.P.C.. The power has to be exercised sparingly, carefully and with caution only where such exercise is justified by the tests laid down in the Section itself. Section 482 does not confer any new power on the High Court but only saves the inherent power which the court possessed before the enactment of Cr.P.C.. There are three circumstances under which the inherent jurisdiction may be exercised, namely (i) to give effect to an order under Cr.P.C., (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice.

The High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an Investigating Officer mala fide. That power is to be exercised in rarest of the rare cases where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII Cr.P.C. is clearly made out requiring the interference of the High Court. But even in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code.

Even in cases where no action is taken by the police on the information given to them, the informant's remedy lies under Sections 190, 200 Cr. P.C., but a Writ Petition in such a case is not to be entertained.

The whole of public law remedies available under Article 226 of the Constitution of India and the constituent power to issue writs in the nature of mandamus, certiorari, prohibition and quo-warranto are neither echoed nor transplanted into Section 482.

May be both the powers to issue writs and pass appropriate orders under Section 482 are conferred upon the High Court but they undoubtedly operate in different fields.

The contents of the petition submitted by the victim and as well as the allegations made in the anonymous complaint do not reveal any cause for issuing directions relieving the Investigating Officer of his statutory power and duty to investigate Crime No. 381 of 2005 under Section 376(g) IPC. Neither the anonymous petition nor the complaint made by the victim has been directed against the Investigating Officer, complaining of any bias or any attempt on his part to destroy the available evidence.

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It is difficult to discern the basis for arriving at the conclusion that the entire attempt of the Investigating Officer was to exonerate the accused and make the complainant as accused.

The impugned order of the High Court directing enquiry and investigation into allegations in respect of which not even any complaint/information has been lodged with the police is violative of principles of natural justice. The case on hand is a case where the criminal law is directed to be set in motion on the basis of the allegations made in anonymous petition filed in the High Court. No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting one's own reputation.

The order directing the investigation on the basis of such vague and indefinite allegations undoubtedly is in the teeth of principles of natural justice. It is correct that accused gets a right of hearing only after submission of the charge-sheet, before a charge is framed or the accused is discharged vide Sections 227, 228, 239 and 240 Cr.P.C. The appellant is not an accused and, therefore, it was not entitled for any notice from the High Court before passing of the impugned order.

The appellant undoubtedly is aggrieved by the impugned order and, therefore, entitled to invoke the jurisdiction of this Court under Article 136 of the Constitution of India. The Director of the appellant-institution has been impleaded as a party respondent in the criminal petition and the whole of the allegations in the anonymous petition are leveled against the appellant and in such a situation it was imperative for the High Court to put the appellant on notice before passing the impugned order.

The suo motu action initiated cannot be treated as the one in Public Interest Litigation. The Public Interest Litigant must disclose his identity so as to enable the court to decide that the informant is not a wayfarer or officious intervener without any interest or concern. A Public Interest Litigation can be entertained by the Constitutional Courts only at the instance of a bona fide litigant. The author of the letter in this case is anonymous, there is no way to verify his bonafides and in fact no effort was made by the court to verify about the authenticity, truth or otherwise of the contents of the petition.

It is clear from the record that the Judge of the High Court was not dealing with any Public Interest Litigation cases as on the date of entertaining anonymous petition. It is beyond pale of any doubt and controversy that the administrative control of the High Court vests in the Chief Justice of the High Court alone and it is his prerogative to

distribute business of the High Court both judicial and administrative; that the Chief justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted; and the puisne judges can only do that work as is allotted to them by the Chief Justice or under his directions; that the puisne judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.

The Judge ought not to have entertained the anonymous petition, contents of which remain unverified and made it basis for setting the law in motion as against the appellant as he was not entrusted with the judicial duty of disposing of PIL matters.

Independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility to resolve the issues which are otherwise not entrusted to it by adopting procedures which are otherwise not known. There is heavy duty cast upon the constitutional courts to protect themselves from the onslaught unleashed by unscrupulous litigants masquerading as Public Interest Litigants. The individual judges ought not to entertain communications and letters personally addressed to them and initiate action on the judicial side based on such communication so as to avoid embarrassment; that all communications and petitions invoking the jurisdiction of the court must be addressed to the entire Court, that is to say, the Chief Justice and his companion Judges. The individual letters, if any, addressed to a particular judge are required to be placed before the Chief Justice for consideration as to the proposed action on such petitions. Each Judge cannot decide for himself as to what communication should be entertained for setting the law in motion be it in PIL or in any jurisdiction.

The third respondent having completed the investigation arrived at certain conclusions, but unnecessarily kept the matter pending. In the circumstances of the case, third respondent is directed to make available the material gathered during the course of investigation in Crime No. 381 of 2005 to the Investigating Officer. Thereafter, the Investigating Officer shall submit appropriate report in accordance with the provisions of Cr.P.C..

The well defined and demarcated functions in the field of crime detection by the police and its subsequent adjudication by the Courts is so well known and had been recognized way back in **Emperor Vs. Khwaja Nazir Ahmad** . The Privy Council observed that 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 upon them the duty of enquiry. It is held: In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own

function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491, Criminal P.C., to give directions in the nature of habeas corpus. In such a case as the present, however, the Courts functions begin when a charge is preferred before it and not until then. It has sometimes been thought that S. 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest 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 that Act.

In S.N. Sharma Vs. Bipen Kumar Tiwari & ors. , this Court took the view that there is no mention of any power to stop an investigation by the police. The power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case, the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate. It is further held: though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers.

This position has been made further clear by this Court in its authoritative pronouncement in **State of Bihar & anr. Vs. J.A.C. Saldanha & ors.** thus: There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This has been recognised way back in King Emperor v. Khwaja Nazir Ahmad This view of the Judicial Committee clearly demarcates the functions of the executive and the judiciary in the field of detection of crime and its subsequent trial and it would appear that the power of

the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary.

The observations of this Court in M.C. Abraham & Anr. Vs. State of Maharashtra & Ors. in this regard deserve to be noticed. In the said case it was held: The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The Investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

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In State of West Bengal Vs. S.N. Basak , this Court reiterated the principle that the police has statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and that power of the police to investigate cannot be interfered with by the exercise of power under the inherent power of the High Court.

In Hazari Lal Gupta Vs. Rameshwar Prasad & Anr. Etc. , this Court while explaining the nature and purport of the inherent jurisdiction of the High Court observed that in exercising jurisdiction under Section 561-A of the Criminal Procedure Code, 1898, the High Court can quash proceedings if there is no legal evidence or if there is any impediment to the institution or continuance of proceedings but the High Court does not ordinarily enquire as to whether the evidence is reliable or not. Where again, investigation into the circumstances of an alleged cognizable offence is carried on under the provisions of the Criminal Procedure Code the High Court does not interfere with such investigation because it would then be the impeding investigation and jurisdiction of statutory authorities to exercise power in accordance with the provisions of the Code of Criminal Procedure.

In Nirmaljit Singh Hoon Vs. The State of West Bengal & Anr. this Court held that: The police authorities have under Sections 154 and 156 of the Code a statutory right to investigate into a cognizable offence without requiring any sanction from a judicial authority and even the High Court has no inherent power under Section 561-A of the Code to interfere with the exercise of that statutory power.

In State of W.B. & Ors. Vs. Sujit Kumar Rana [2004] 4 SCC 129], this Court while dealing with the nature of inherent powers of the High Court held that the inherent power of the High Court is saved only where an order has been passed by the Criminal Court which is required to be set aside to secure the ends of justice or where the proceedings pending before a court amounts to abuse of the process of Court. The power under Section 482 of the Code can be exercised by the High Court in relation to a

matter pending before a criminal court or where a power is exercised by the Court under the Code of Criminal Procedure.

WHETHER THE ANONYMOUS PETITION IS TO BE TREATED AS PUBLIC INTEREST LITIGATION

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The question that falls for our consideration is whether the anonymous letter sent in the name of a Judge can be entertained as Public Interest Litigation? It is well settled that a public interest litigation can be entertained by the Constitutional Courts only at the instance of a bona fide litigant. The author of the letter in this case is anonymous, there is no way to verify his bonafides and in fact no effort was made by the Court to verify about the authenticity, truth or otherwise of the contents of the petition. It is not the case of the appellant that no Writ Petition under Article 226 of the Constitution of India can be entertained on the strength of a letter addressed by a bona fide litigant to the High Court.

This Court in **Sunil Batra (II) Vs. Delhi Administration** has accepted a letter written to the Supreme Court by one Sunil Batra, a prisoner from Tihar Jail, Delhi complaining of inhuman torture in the jail.

In **Dr. Upendra Baxi (I) Vs. State of U.P.** , this Court entertained letter sent by the two Professors of Delhi University seeking enforcement of the constitutional right of the inmates in a Protective Home, at Agra who were living in inhuman and degrading conditions.

In **Miss Veena Sethi V. State of Bihar** , this Court treated letter addressed to a Judge of this Court by the Free Legal Aid Committee at Hazaribagh, Bihar as a writ petition.

In **Citizens for Democracy through its President Vs. State of Assam & ors.** upon which reliance has been placed by Shri P.P. Rao, this Court entertained a letter addressed by Shri Kuldip Nayar, an eminent journalist, in his capacity as President of Citizens for Democracy to one of the judges of this Court complaining of human rights violations of TADA detainees and the same was treated as a petition under Article 32 of the Constitution of the India. But in none of these cases, the Court entertained anonymous petition and converted the same into a Public Interest Litigation. We do not propose to burden this judgment with various authoritative pronouncements of this Court laying down the parameters of Public Interest Litigation. Suffice it to recapitulate that this Court uniformly and consistently held that the individual who moves the court for judicial redress in cases of Public Interest Litigation must be acting bone fide with a view to vindicating the cause of justice and not for any personal gain or private profit or of the political motivation or other oblique consideration. The Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular petition filed in Court.

In **S.P. Gupta & ors. Vs. President of India & ors.** , this Court in clear and unequivocal terms observed that it would be prudent for the constitutional courts to confine this

strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organization which can take care of such cases.

The law in this regard is summarized in **Janata Dal Vs. H.S. Chowdhary** thus: It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievance, deserves rejection at the threshold.

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In **Dattaraj Nathuji Thaware Vs. State of Maharashtra & ors.** this Court observed: The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well as to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

In **State of West Bengal & ors. Vs. Sampat Lal & Ors.**, this Court administered a caution stating when communications complaining of violation of rights of the deprived and vulnerable sections of the community are sent to the court, care and caution should be adopted to ensure that the process of the court is not abused or misused. The Court should be prima facie satisfied that the information laid before it is of such a nature that it calls for examination and this prima facie satisfaction may be derived from the credentials of the informant, namely, what is the character or standing of the informant or from the nature of the information given by him, namely, whether it is vague and indefinite or contains specific allegations as a result of survey or investigation or from the gravity or seriousness of the complaint set out in the information or from any other circumstance or circumstances appearing from the communication addressed to the court or to a Judge of the court on behalf of the court.

In **Bandhua Mukti Morcha Vs. Union of India & ors.** (supra), this Court visualized grave danger inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. It has been observed that the document petitioning the court for relief should be supported by satisfactory verification. This requirement is all the greater where petitions are received by the Court through the post. It is never beyond the bound of possibility that an

unverified communication received through the post by the Court may in fact have been employed mala fide, as an instrument of coercion or blackmail or other oblique motive against a person named therein who holds a position of honour and respect in society. The Court must be ever vigilant against the abuse of its process. It cannot do that better in the matter than insisting at the earliest stage, and before issuing notice to the respondent, that an appropriate verification of the allegations be supplied.

This Court in more than one case expressed its reservation about individual judges entertaining the communications and petitions addressed to them to pass orders on judicial side. In **Bandhua Mukti Morcha Vs. Union of India & ors.**, the Court in clear and unequivocal terms declared that communications and petitions addressed to a particular judge are improper and violate the institutional personality of the court. They also embarrass the Judge to whom they are personally addressed. The fundamental conception of the Court must be respected, that it is a single indivisible institution, of united purpose and existing solely for the high constitutional functions for which it has been created. The conception of the Court as a loose aggregate of individual Judges, to one or more of whom judicial access may be particularly had, undermines its very existence and endangers its proper and effective functioning.

2007(9)SCR1038, PRATIBHA VS RAMESHWARI DEVI & ORS

The power under Section 482 of the Code has to be exercised sparingly and in the rarest of rare cases. The present case did not warrant such exercise by the High Court.

While exercising power under Section 482 Cr.P.C., it is not open to the High Court to rely on the report of the investigating agency nor can it direct the report to be submitted before it as the law is very clear that the report of the investigating agency may be accepted by the Magistrate or the Magistrate may reject the same on consideration of the material on record. High Court has erred in quashing the FIR on consideration of the investigation report submitted before it even before the same could be submitted before the Magistrate. High Court in quashing the FIR in the exercise of its inherent powers under Section 482 of the Code by relying on the investigation report and the findings made therein has acted beyond its jurisdiction. For the purpose of finding out the commission of a cognizable offence, the High Court was only required to look into the allegations made in the complaint or the FIR and to conclude whether a prima facie offence had been made out by the complainant in the FIR or the complaint or not.

The Court is entitled to exercise its inherent jurisdiction for quashing a criminal proceeding or an FIR when the allegations made in the same do not disclose the commission of an offence and that it depends upon the facts and circumstances of each particular case.

High Court while exercising its powers under Section 482 Cr.P.C. has gone beyond the allegations made in the FIR and has acted in excess of its jurisdiction and, therefore, the High Court was not justified in quashing the FIR by going beyond the allegations made in the FIR or by relying on extraneous considerations. In the facts and circumstance of the case, the High Court was not justified in drawing an adverse inference against the appellant- wife for lodging the FIR belatedly i.e. six months after she had left the matrimonial home. It is pertinent to note that the complaint was filed only when all

efforts to return to the matrimonial home had failed and the respondent No.2 husband had filed a divorce petition under Section 13 of the Hindu Marriage Act, 1955. That apart, filing of a divorce petition in a Civil Court cannot be a ground to quash criminal proceedings under Section 482 Cr.P.C. Criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts.

High Court while exercising its powers under Section 482 Cr.P.C. was not justified in relying on the investigation report which was neither filed before the Magistrate nor a copy of the same supplied to the appellant. High Court has acted in excess of its jurisdiction by relying on the investigation report and the High Court was also wrong in directing the report to be submitted before it. It is for the investigating agency to submit the report to the Magistrate.

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In view of Section 173(2) Cr.P.C., it cannot be disputed that after completion of the investigation, the officer-in-charge of the police station shall forward the report not to the High Court where the proceedings under Section 482 is pending but to a Magistrate empowered to take cognizance of the offence on such police report. Therefore, the High Court had acted beyond its power to direct the investigating agency to file the said report before it in the exercise of power under Section 482 Cr. P.C. It was impermissible for the High Court to entertain the report of the investigating agency before the same could be forwarded and filed before the concerned Magistrate in compliance with Section 173(2) Cr.P.C.

In State of West Bengal Vs. Swapan Kumar Guha [1982 [1] SCC 561] Chandrachud, C.J. [as His Lordship then was] had observed that if the FIR did not disclose the commission of a cognizable offence, the court would be justified in quashing the investigation on the basis of the information as laid or received. In the same judgment, Justice A.N. Sen [as His Lordship then was] who has written the main judgment, has laid down the legal propositions as follows: "...the legal position is well-settled. The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted.... Once an offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of justice suffers. It is on

the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case.... If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence".

In Pratibha Rani Vs. Suraj Kumar and Anr. [1985] 2 SCC 370, this Court at page 395 observed as follows: " It is well settled by a long course of decisions of this Court that for the purpose of exercising its power under Section 482 Cr PC to quash a FIR or a complaint the High Court would have to proceed entirely on the basis of the allegations made in the complaint or the documents accompanying the same per se. It has no jurisdiction to examine the correctness or otherwise of the allegations".

In Madhavrao Jiwaji Rao Scindia and Ors. v. Sambhajirao Chandrojirao Angre and Ors. [1988 [1] SCC 692], this Court has reiterated the same principle and laid down that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence.

Again in the case of State of Bihar Vs. Murad Ali Khan & Ors. [1988 [4] SCC 655], Venkatachaliah, C.J. [as His Lordship then was] has laid down that the jurisdiction under Section 482 of the Code has to be exercised sparingly and with circumspection and has observed that in exercising that jurisdiction, the High Court should not embark upon an inquiry whether the allegations in the complaint are likely to be established by evidence or not.

Leading decision of Supreme court reported in State of Haryana Vs. Bhajan Lal [1992 Suppl. {1} SCC 335] in which the court pointed out certain category of cases by way of illustrations wherein the inherent power under Section 482 of the Code can be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. The same are as follows :-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

RAGGING IN COLLEGES TEN RECOMMENDATION OF SUPREME COURT

University of Kerala . Vs Council, Principals' Colleges, Kerala and Ors. . May 08, 2009 BENCH DR ARJIT PASAYAT J , ASOK KUMAR GANGULY J

(i) Recommendation: "We also recommend that every institution should engage or seek the assistance of professional counselors at the time of admissions to counsel 'freshers' in order to prepare them for the life ahead, particularly for adjusting to the life in hostels...";

(ii) Recommendation: "We recommend that on the arrival of senior students after the first week or after the second week as the case may be, further orientation programmes must be scheduled as follows

(i) joint sensitization programme and counseling of both 'freshers' and senior by a Professional counselor;

(ii) joint orientation programme of 'freshers' and seniors to be addressed by the principal/Head of the institution, and the anti -ragging committee ;

(iii) organization on a large scale of cultural, sports and other activities to provide a platform for the 'freshers' and seniors to interact in the presence of faculty members ;

(iv) in the hostel, the warden should address all students; may request two junior colleagues from the college faculty to assist the warden by becoming resident tutors for a temporary duration; and , the UGC and other funding bodies should provide financial grants for meeting the expenditure on resident tutors

(v) it is strongly recommended that as far as possible faculty members should dine with the hostel residents in their respective hostels to instill a feeling of confidence among the fresh residents.";

(iii) Recommendation: "We recommend that every institution must have an Anti-Ragging Committee and an Anti - Ragging Squad. It is essential to have a diverse mix of membership in terms of levels as well as gender in both the Anti - Ragging Squad as well as the Anti - Ragging Committee. The Anti - Ragging Committee at the level of the institution should consist of the representatives of civil and police administration, local media, Non Government Organizations involved in youth activities, representatives of

faculty members, representatives of parents, representatives of students belonging to the freshers' category as well as seniors, non - teaching staff and should be headed by the Head of the Institution. The Anti - Ragging Squad, in contrast, should be a body with vigil, oversight and patrolling functions and should appropriately be a smaller body which should be nominated by the Head of the Institution with such representation as considered necessary to keep it mobile, alert and active at all time. The Squad may be called upon to make surprise raids on hostels and other hot spots and should be empowered to inspect places of potential ragging. . The Squad should work under the overall guidance of Anti- Ragging Committee. The Squad should not have any outside representation and should only consist of members belonging to the various sections of the campus community."

(iv) Recommendation: "At the level of the District, we recommend a District level Anti - Ragging Committee, which should consist of the Heads of Higher Education Institutions as members. It should be headed by the District Collector / Deputy Commissioner / District Magistrate and should also have the Superintendent of Police / SSP of the District as member. The Additional District Magistrate should be a member - secretary of the Committee, which should also have representation of the local media and district level Non Government Organizations actively associated in youth development programmes, as well as representations of all student organizations. The District level Committee should hold preparatory meetings during the summer vacation meetings to take stock of the state of preparedness of each institution and their compliance with the policies and directions or guidelines of the appropriate bodies, the university/State/ Central authorities; and this Court's guidelines in regard to curbing the menace of ragging. We have already emphasized on the need for publicity campaigns, summer months may be appropriate to launch such campaigns. Some of the role expectations from the District level Committees have already been mentioned in the preceding paragraphs dealing with activities at the level of Schools as well as higher education institutions and therefore are not being repeated."

(v) Recommendation: "We have thought through the suggestion that the District level Committee, should function as some sort of an appellate forum to the action taken by the institution level Anti - Ragging Committee. We feel that this is neither necessary nor desirable. It is not necessary in the context of the recommendation that we propose to make in respect of, the scheme of penalty later in this Chapter. It is not desirable from the point of view that such a mechanism lends an extra - campus dimension to the tackling of intra-campus disciplinary matter. All matters of discipline within teaching institutions, in our opinion, must be resolved within the campus - except those impinging on law and order or breach of peace or public tranquility, all of which should be dealt with under the penal laws of the land; fortifying of which is being suggested by us later on."

(vi) Recommendation: "At the level of the University, we recommend that there should be a Monitoring Cell on Ragging, which should coordinate with the affiliated colleges and institutions under its domain. The Cell should call for reports from the Heads of institutions in regard to the activities of the Anti-Ragging Committee, Anti - Ragging Squads, Monitoring Cells at the level of the institution, the compliance with instructions on conducting orientation programmes, counseling sessions, the incidents of ragging, the problems faced by wardens or other officials. It should also keep itself abreast of the

decisions of the District level Anti - Ragging Committee. This Monitoring Cell should also review the efforts made by institutions to publicize anti - ragging measures, soliciting of undertaking from parents and students each year to abstain from ragging activities or willingness to be penalized for violations; and should function as the prime mover for initiating action on the part of the appropriate authorities of the university for amending the Statutes or Ordinances or Bye - laws to facilitate the implementation of anti-ragging measures at the level of the institution."

(vii) Recommendation: "At the State level, we recommend that there should be a Monitoring Cell at the level of the Chancellor of the State Universities, who may also coordinate with those of the Central Government institutions located in the State in which the Governor has a defined role under the relevant law. Governors, in their capacity as Chancellors of State Universities, can leverage the influence of their office to ensure that the State Government as well as the university authorities are suitably instructed to be alert in regard to ragging. The involvement of Governors would also ensure that the autonomy of institutions of higher learning is not compromised. In addition, Governors of States are associated with Central Universities in their role as Chief Rector /Chancellor etc. and can oversee the function of coordination where required vis-a- vis the office of the President of India in his capacity as the Visitor of the Central Universities and also the Central Government in the Ministry of Human Resource Development. The State level Monitoring Cell should receive periodically, and at such frequencies that it may lay down, status reports from the University level Monitoring Cells and Districts level Anti - Ragging Committees."

(viii) Recommendation: "We recommend that in the light of the increasing number of private commercially managed, lodges or hostels outside campuses, such hostels and management must be registered with the local police authorities and permission to start such hostels or register them must necessarily be recommended by the Heads of educational institutions. It should be mandatory for both local police, local administration as well as the institutional authorities to ensure vigil on incidents that may come within the definition of ragging. Managements of such private hostels should be responsible for non-reporting of cases of ragging in such premises. Local authorities as well as the institutional authorities should be responsible for action in the event of ragging in such premises, just as they would be for incidents within campuses. The Committee also recommends that besides registering private hostels as stated above, the towns or cities where educational institutions are located should be apportioned as sectors among faculty members, as is being done by some institutions, so that they could maintain vigil and report any incidents of ragging outside campuses and en route while 'freshers' commute."

(ix) Recommendation: "Wardens must be accessible at all hours and therefore it is important that they be available on telephone and other modes of communication - therefore, we recommend that wardens must be issued mobile phones by the institutions and the details of their telephone number must be widely publicized. Similarly, the telephone numbers of the other important functionaries - Heads of institutions, faculty members, members of the anti-ragging committees, district and sub-divisional authorities and state authorities where relevant, should also be widely disseminated for the needy to get in touch or seek help in emergencies. The Committee recommends that brochures or booklet/leaflet distributed to each student at the

beginning of each academic session for obtaining undertaking not to indulge or abet ragging, shall contain the blueprint of prevention and methods of redress." The educational institutions shall ensure that each hostel should have a full-time warden who resides within the hostel, or at the very least, in the close vicinity thereof. State of Himachal Pradesh has submitted that the creation of a separate cadre for warden would not be beneficial for this purpose. But it is desirable that institutions should provide necessary incentives for the post of full-time warden, so as to attract suitable 10 candidates. It has been pointed out that UGC, in its Draft Regulations on Curbing the Menace of Ragging; has also provided accordingly.

(x) Recommendation : "The committee recommends that at the national level, the UGC should fund, a toll - free Helpline which could be accessed by students in distress owing to ragging related incidents. The Ministry of Communication and Information Technology should facilitate the establishment, infrastructure and operation of the proposed Helpline. Any distress message should be simultaneously relayed to the Head of the Institution, warden or officer of the Hostels, District authorities including the Superintendent of Police, and should be web-linked so as to be in the public domain simultaneously for the media and citizens to access it. A genuine message of distress from the victim of ragging should make it obligatory for the Head of the institution and civil authorities to initiate action on the lines already suggested by us."

FURTHER DIRECTIONS IN THE NATURE OF PRECAUTIONS TO BE TAKEN

The Principal or Head of the Institution/Department shall obtain an undertaking from every employee of the institution including teaching and non-teaching members of staff, contract labour employed in the premises either for running canteen or as watch and ward staff or for cleaning or maintenance of the buildings/lawns etc. that he/she would report promptly any case of ragging which comes to his/her notice. A provision shall be made in the service rules for issuing certificates of appreciation to such members of the staff who report ragging which will form part of their service record;

It is seen, that college canteens and hostel messes are also places where ragging often takes place. The employers/employees of the canteens/mess shall be given necessary instructions to keep strict vigil and to report the incidents of ragging to the college authorities if any;

Each batch of freshers should be divided into small groups and each such group shall be assigned to a member of the staff. Such staff member should interact individually with, each member of the group on a daily basis for ascertaining the problems/difficulties if any faced by the fresher in the institution and extending necessary help. By building up rapport with each member of the group teachers or other members of the staff would be able to infuse confidence in the freshers and make them feel at home so as to enable them to report incidents of ragging or bullying. Each group in-charge shall maintain a diary of his/her interaction with the freshers under his/her charge;

In the case of freshers admitted to a hostel it shall be the responsibility of the teacher in charge of the group to coordinate with the warden of the hostel and to make surprise visits to the rooms in the hostel where the members of the group are lodged;

Freshers shall be lodged in a separate hostel block, wherever possible, and where such facilities are not available, the college/institution shall ensure that seniors' access to freshers' accommodation is strictly monitored by wardens, security guards and college staff;

A ragging takes place mostly in the hostels after the classes are over in the college. A round the clock vigil against ragging in the hostel premises shall be provided;

It is necessary that parents/guardians of freshers assume responsibility for promptly bringing to the notice of the Head of the Institution any instance of ragging;

HISTORY OF THE CASE AND INTERIM OBSERVATIONS MADE BY COURT

University of Kerala . Vs Council, Principals' Colleges, Kerala and Ors. (DR. ARIJIT PASAYAT) J (DR. MUKUNDAKAM SHARMA) J the court in its interim observations on , February 11, 2009 observed:-

Ragging is rationalised and justified as a way of "Introduction or getting familiar" with the freshers at the starting of an academic session of any educational institution.

In a very positive aspect, "Ragging" could not be considered as an abridgement between the seniors and the freshers, whereas "Introduction" could be considered as genesis of relationship between the two.

When any student is admitted in a particular institution he/she has to face certain problems and one of them which affects the most is staying away from home and especially away from the dear ones. Because of these problems, the freshers expect some one to look after them, with whom they can have homely environment as they were enjoying at their respective homes. But nowadays the seniors have crossed the barriers, by which they have changed the meaning of "Introduction" into "Ragging".

"Seniors" under the garb of "Introduction" have started ragging the freshers and due to which, in recent years, it has become the talk of the day that the freshers who have faced severe ragging are leaving the educational institutions and some have attempted to commit suicide and even some have committed it.

In modern era, "Ragging" has become to be known only as synonym of "teasing", "terror", "harassment", "cruelty", "fear" and "physical and mental torture".

By perusal of records and survey, it has come to be accepted that "Ragging" is a systematized form of Human Rights' abuse as embodied under the Constitution of India as well as other Constitutions of the World.

Over the years in all over the world and especially in South Asia, the practice of "Ragging" has come to be meant as an extreme "harassment", "terror" and even "physical and mental torture" of freshers.

Ragging is a set of undisciplined activities undertaken by the seniors to break the ice with the juniors, who have been suddenly thrown into a totally new environment. The

contention of seniors behind all such activities is simply to bring the freshers down to earth, because in their opinion the freshers do not respect the seniors and by doing all such inhuman activities under the garb of "Introduction", the seniors rag the freshers so that the freshers may respect them and be under their control. But this act cannot be reasonable and just. The act by the seniors is a "fist of steel against ice" and likewise by doing so, they shatter the ambition, aim and object of freshers and they become aloof in this practical world.

To prohibit "Ragging", this Court has given a series of guidelines to the educational institutions whether being Central, State or Private Institute. [**Vishva Jagriti Mission v. Central Government (AIR 2001 SC 2793)**].

Ragging in essence is a human rights' abuse. Ragging can be in various forms. It can be physical abuse or mental harassment. In present times shocking incidents of ragging have come to the notice. Sometimes violence is used. The student is physically tortured or psychologically terrorized. All human being should be free to claim, as a matter of right in the society in which they live, for life of dignity but when it is intentionally or recklessly damaged or departed then the person's human right is abused; in that sense ragging is the best example of human rights' abuse.

Everyman's Encyclopaedia (1938 Edition, Vol. II) and Random House Dictionary of the English Language (1967 Edition) have references about ragging. The synonyms of ragging as racking, ducking, teasing, etc. are mentioned in detail in these reference books. In England the credit/discredit goes to Duke of Exeter to introduce the practice of ragging. Racking was another form of ragging in which a special instrument called 'rack' was used to torture the victim. Gradually it mixed up with the term of ragging. Egyptian, Romans and Greeks were also not lagging behind. Some form or the other of ragging was found in their societies.

Ragging is not a new phenomenon. It existed even in older times. It was part of civilised societies. In ancient seats of learning, e.g., Berytus and Athens ragging was prevalent. In army schools of England ragging existed as a tradition. Later on this tradition took its root in medical and engineering colleges. In English society ragging took the form of freshers being paraded on street which caused much annoyance not only to freshers but even to general public especially girls.

Ragging is a form of systematic and sustained physical, mental and sexual abuse of fresh students at the college/university/any other educational institution at the hands of senior students of the same institution and sometimes even by outsiders. Although some form of ragging is present in every educational institution but serious abuses of human rights take place generally in medical and engineering colleges and Armed Forces. The form and effect of ragging differ from institution to institution. It creates a sense of fear in the minds of first year students and they become apprehensive of unforeseen incidents which later comes true and culminates in actual form of action.

Ragging is "display of noisy, disorderly conduct and great high spirits considered by perpetrators (raggers) as excellent fun and by many outsiders as a bloody nuisance".

Another meaning of ragging is "to question vigorously and jocularly, horseplay or assail roughly and noisily".

Yet another definition of ragging refers to popular Spanish game of "Bull-Fight", wherein Bull is shown red 'rag' and a person shouts which infuriates the Bull in fighting.

As noted above "Ragging" means display of noisy, disorderly conduct or doing any act which causes or is likely to cause physical or psychological harm or raise apprehension or fear or shame or embarrassment to a student in any educational institution and includes, (a) teasing, abusing of, playing practical jokes on, or causing hurt to, such students; or (b) asking the student to do any act or perform something which such student will not, in the ordinary course, willingly do.

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"Ragging" means doing an act which causes or is likely to cause insult or annoyance or fear or apprehension or threat or intimidation or outraging of modesty or injury to a student.

"Ragging" means causing, inducing, compelling or forcing a student, whether by way of a practical joke or otherwise, to do any act which detracts from human dignity or violates his person or exposes him to ridicule or to forbear from doing any lawful act, by intimidating, wrongfully restraining, wrongfully confining, or injuring him or by using criminal force to him or by holding out to him any threat of such intimidation, wrongful restraint, wrongful confinement, injury or the use of criminal force.

The word "ragging" colloquially means to tease or play practical jokes on someone, specially on students who are the fresh entrants in the schools, colleges, Universities or any other educational institutions. In the beginning, it was a way of introduction of the first year students in the institutions which gradually has become not only serious problem but also a social stigma. While in the age of a child in cradle, it was a harmless practice by senior students over their juniors.

Regarding the origin or initiative steps of the ragging, it can be traced back to the Seventh or Eighth Century A.D. 23. In 1828-1845, in United States' Colleges and Universities Campus, several student-organizations called 'fraternities' popped up. Freshers to these fraternities were known as pledges. In its rudimentary form, it as called 'hazing' which was merely ritual to test the courage of the pledge.

In ancient Greece, freshers to the sporting communities were subjected to humiliation and teasing to inculcate team spirit. After the passage of time this type of activities were adopted by Armed Forces in which new entrants have to pass out by obeying the seniors in off-duty time. As has been said above, in the age of child in cradle, the ragging was a harmless practice rather permissible in the society but it had taken shape of brutality, humiliation and harassment after the First World War. In fact the technique, style or forms which the soldiers participating in the War had learnt and faced in army atmosphere, were brought by them, when they re- entered in the colleges after returning from the War. Actually these forms were devised to highlight the importance of the team. Gradually these techniques and forms passed on those persons who did not know the real meaning of the technical word 'hazing' or 'ragging'. Now the ragging has acquired a new heinous meaning which indicates any disorderly conduct whether by

words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or undisciplined activities which causes or is likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student or asking the student to do any act or perform something which such student will not do in the ordinary course and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student.

A rare and strange case of ragging is as follows -Pyotr Ilyich Tchaikousky was a renowned composer of Russia. It was reported in 1893 that he died due to cholera and cholera was caused due to drinking of contaminated water. This was a blatant lie. However, this lie prevailed for about a century. The truth was revealed by, Alexandra Orlova, the biographer of the composer and that too when the composer died and the biographer migrated to America. The biographer revealed that the Russian composer was a homosexual during his education period and this fact became known to college authorities and they decided to punish the composer and was likely to be expelled. The news of proposed punishment leaked to his old classmates and they thought that if the composer is punished it will bring a bad name to the institution. Therefore, the composer was summoned before eight former classmates in the "Court of Honour" and was asked to end his own life to "preserve the good name of the school". The composer ended his life by consuming poison brought by one of the Judges and story of death by cholera was concocted.

After consideration of the reports, we direct that the Government in the States and the Union Territories and the University shall act in terms of the guidelines formulated by the Constituted Committee. The MCI, BCI in consultation with UGC shall frame the requisite regulations which shall be binding on the institutions. They shall be indicated to the students at the time of admission by appropriate provision in the prospectus issued for admission. The consequences which flow from not observing the guidelines shall also be indicated. Inquiries which are pending shall be completed and report shall be submitted before this Court.

A question raised was regarding giving opportunity to the offender before taking actions like expulsion etc. Delay in taking action in many cases would frustrate the need for taking urgent action. In such cases if the authorities are prima facie satisfied about the errant act of any student, they can in appropriate cases pending final decision, suspend the student from the institution and the hostel if any and give opportunity to him to have his say. Immediately, the police shall be informed and criminal law set into motion. If it comes to the notice of the university or controlling body that any educational institution is trying to shield the errant students, they shall be free to reduce the grants in aid and in serious cases deny grants in aids.

VISHVA JAGRITI MISSION V. CENTRAL GOVERNMENT (AIR 2001 SC 2793)

IN EXERCISE OF THE JURISDICTION CONFERRED BY ARTICLE 32 AND ARTICLE 142 OF THE CONSTITUTION COURT ISSUED THE FOLLOWING GUIDELINES:-

This Court views with concern the increase in the number of incidents of ragging in educational institutions. Some of the reported incidents have crossed the limits of decency, morality and humanity. Some of the States have acted by enacting legislations and making ragging as defined therein a cognizable and punishable offence. However, we feel ragging cannot be cured merely by making it a cognizable criminal offence. Moreover we feel that the acts of indiscipline and misbehavior on the part of the students must primarily be dealt with within the institution and by exercise of the disciplinary authority of the teachers over the students and of the management of the institutions over the teachers and students. Students ought not to ordinarily be subjected to police action unless it be unavoidable. The students going to educational institution for learning should not remain under constant fear of being dealt with by police and sent to jail and face the courts. The faith in the teachers for the purpose of maintaining discipline should be restored and the responsibility fixed by emphasising the same.

Broadly speaking Ragging is :

Any disorderly conduct whether by words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or indiscipline activities which causes or is likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student or asking the students to do any act or perform something which such student will not do in these ordinary course and which has the effect of causing or generating sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student.

The cause of indulging in ragging is deriving a sadistic pleasure or showing off power, authority or superiority by the seniors over their juniors or freshers.

Ragging can be stopped by creating awareness amongst the students, teachers and parents that ragging is a reprehensible act which does no good to any one and by simultaneously generating an atmosphere of discipline by sending a clear message that no act of ragging shall be tolerated and any act of ragging shall not go unnoticed and unpunished.

Anti-ragging movement should be initiated by the institutions right from the time of advertisement for admissions. The prospectus, the form for admission and/or any other literature issued to aspirants for admission must clearly mention that ragging is banned in the institution and any one indulging in ragging is likely to be punished appropriately which punishment may include expulsion from the institution, suspension from the institution or classes for a limited period or fine with a public apology. The punishment may also take the shape of (i) withholding scholarships or other benefits (ii) debarring from representation in events (iii) withholding results (iv) suspension or expulsion from hostel or mess, and the like. If there be any legislation governing ragging or any provision in the Statute/Ordinances they should be brought to the notice of the students/parents seeking admissions.

The application form for admission/enrolment shall have a printed undertaking to be filled up and signed by the candidate to the effect that he/she is aware of the institution's approach towards ragging and the punishments to which he or she shall be

liable if found guilty of ragging. A similar undertaking shall be obtained from the parent/guardian of the applicant.

Such of the institutions as are introducing such a system for the first time shall ensure undertakings being obtained from the students and their parents/guardians already studying in the institutions before the commencement of the next educational year/session.

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A printed leaflet detailing when and to whom one has to turn for information, help and guidance for various purposes, keeping in view the needs of new entrants the institution, along with the addresses and telephone numbers of such person, should be given to freshers at the time of admissions so that the freshers need not look up to the seniors for help in such matters and feel indebted to or obliged by them.

The management, the principal, the teaching staff should interact with freshers and take them in confidence by apprising them of their right as well as obligation to fight against ragging and to generate confidence in their mind that any instance of ragging to which they are subjected or which comes in their knowledge should forthwith be brought to their knowledge and shall be promptly dealt with while protecting the complainants from any harassment by perpetrators of ragging. It would be better if the head of the institution or a person high in authority addresses meetings of teachers, parents and students collectively or in groups in this behalf.

At the commencement of the academic session, the institution should constitute a proctorial committee consisting of senior faculty members and hostel authorities like wardens and a few responsible senior students:

i) to keep a continuous watch and vigil over ragging so as to prevent its occurrence and recurrence,

ii) to promptly deal with the incidents of ragging brought to its notice and summarily punish the guilty either by itself or by putting forth its finding/recommendation/suggestions before the authority competent to take decision.

All vulnerable locations shall be identified and specially watched.

The local community and the students in particular must be made aware of the dehumanising effect of ragging inherent in its perversity. Posters, notice boards and sign-boards wherever necessary, may be used for the purpose.

Failure to prevent ragging shall be construed as an act of negligence in maintaining discipline in the institution on the part of the management, the principal and the persons in authority of the institution. Similar responsibility shall be liable to be fixed on hostel wardens/superintendents.

The hostels/accommodations where freshers are accommodated shall be carefully guarded, if necessary by posting security personnel and placed in charge of a warden/superintendent who should himself/herself reside thereat, and wherein the entry of senior and outsiders shall be prohibited after specified hour of night and before

except under the permission of the person incharge. Entry at other times may also be regulated.

If the individual committing or abetting ragging are not identified collective punishment could be resorted to act as a deterrent punishment and to ensure collective pressure on the potential raggers.

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Migration certificate issued by the institution should have an entry apart from that of general conduct and behavior whether the student had participate in and in particular was punished for ragging.

If an institution fails to curb ragging, the UGC/Funding Agency may consider stoppage of financial assistance to such an institution till such time as it achieves the same. An University may consider disaffiliating a college or institution failing to curb ragging.

The Universities and the institutions shall at a reasonable time before the commencement of an academic year, and therefore at such frequent intervals as may be expedient deliberate over and devise such positive and constructive activities to be arranged by involving the students generally so that the seniors and juniors, and the existing students and the freshers, interact with each other in a healthy atmosphere and develop a friendly relationship so as to behave like members of a family in an institution. Seniors or juniors should be encouraged to exhibit their talents in such events so as to shed their complexes.

We make it clear that these guidelines are only illustrative and are not intended to come in the way of the unsteadiness and authorities devising ways and means to curb the ragging. If there are local laws governing ragging they shall be implemented and knowledge and information about such laws shall also be disseminated. Ragging if it becomes unmanageable or amounts to a cognizable offence the same may be reported to the police. However the police should be called in or allowed entry in the campus at the instance of the head of the institution or the person in charge. We expect the police also to deal with such incidents when brought to its notice for action by keeping in mind that they are dealing with students and not criminal. The action of the police should never be violent and be always guided by a correctional attitude.

In State of Himachal Pradesh versus A Parent of a student of Medical College, Simla and others [(1985) 3 SCC 169], the High Court of Himachal Pradesh required the State Government to initiate legislation against ragging in educational institutions and for this purpose time of six weeks was granted to the State Government. The decision was challenged before the court. SUPREME court was of the opinion that the direction given by the division bench was nothing short of an attempt to compel the State Government to initiate legislation with a view to curb the evil of ragging. It is held : "It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. That it is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the court can

certainly require the executive to carry out such duty and this is precisely what the court does when it entertains public interest litigation. Where the court find, or being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continued to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the court certainly can and must intervene and compel the executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realize their social and economic rights. When the court passes any orders in public interest litigation, the court does so not with a view to mocking at legislative or executive authority or in a spirit of confrontation but with a view to enforcing the constitution and the law, because it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with a feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large members of half-clad, half- hungry people of this country. That is a feeling which should never be allowed to grow. But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature."

In Asif Hameed and others versus State of Jammu and Kashmir and others [1989 Suppl. (2) SCC 364], the court had an occasion to have a fresh look on the inter-se functioning of the three organs of democracy under our Constitution. It is held : "Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the function assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strange and independents of each of its organ. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self- imposed discipline of judicial restraint.

RAPE VICTIM AND HER EVIDENCE VALUE

STATE OF PUNJAB v. GURMIT SINGH AND ORS., 1996 SC (Criminal) 316 which lays down a principle that the testimony of the victim of sexual assault is vital and unless there are compelling reasons, which necessitate looking for corroboration of her statement, the Court should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused when her testimony inspires confidence and is found to be reliable.

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STATE OF KARNATAKA v. DEVIDAS, 1994 (2) KLJ 46 wherein the observation is that evidence of a victim of alleged rape shall be assessed as evidence of any other witness and that such evidence cannot be accepted on the face value and has to be tested with touch stone of probabilities and her conduct.

BHARWADA BHOGINIBHAI HIRIBHAI v. STATE OF GUJARAT, which dealt with a similar incident of alleged rape on a 10 years girl, the observation made is that: "Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification: Corroboration may be insisted upon

when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune."

With regard to contradiction, in consistencies in evidence, in a similar matter of child rape, the Supreme Court in the case of BHARWADA BHOGINIBHAI HIRBHAI vs. STATE OF GUJARAT observed as under: "Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

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1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be human tape recorder.

5. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

6. Ordinarily a witness cannot be expected to recall accurately the sequences of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

7. A witness, though wholly truthful, is liable to be overweld by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. More so when the all important

"PROBABILITIES-FACTOR" ECHOES IN FAVOUR OF THE VERSION NARRATED BY THE WITNESSES".

Supreme Court observes as follows in STATE OF U.P. v. M.K. ANTHONY, . "While appreciating oral evidence of a witness, the approach must be whether the evidence of the witness read as whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in evidence as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief,"

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In SARDUL SINGH v. STATE OF HARYANA, . "There cannot be a prosecution case with a cast iron perfection in all respects and it is obligatory for the Courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seems to inspire confidence, too, in the mind of the Court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed out or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt".

In AMAN KUMAR v. STATE OF HARYANA, 2004 SCC (Cri) 1266. It is observed that: "Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The depth of penetration is immaterial in an offence punishable Under Section 376 I.P.C. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. At page 439 of the book, Medical Jurisprudence and Toxicology by Dr. K.S. Narayana Reddy, with regard to rape on children, the following information is given..... "In young children there are few or no signs of general violence, for the child usually has no idea of what is happening, and also incapable of resisting. The hymen is deeply situated, and as the vagina is very small, it is impossible for the penetration of the adult organ to take place. Usually, the penis is placed either within the vulva or between the thighs. As such, the hymen is usually intact and there may be little redness and tenderness of the vulva..... As the penis enters the genitals, it tends to compress the labia both anteriorly and laterally, producing bruising of both the labia minora and the labia majora. The amount of bruising will depend upon the force used".

Supreme Court in the case of STATE OF V.P. v. KRISHNA GOPAL, are as under: "A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this

standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust commonsense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uniformed legitimisation of trivialities would make a mockery of administration of criminal justice".

The following observations of the Supreme Court in the case of SHIVAJI SAHEBRAO BOBADE AND ANR. v. STATE OF MAHARASHTRA, need to be kept in mind by all Trial Courts while appreciating evidence in criminal trials. "Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thro: the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lost credibility with the community. The evil of acquitting a guilty person light- heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent..." In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

SEIZURE IN NARCOTICS CASE

STATE OF PUNJAB VS BALDEV SINGH DATE OF JUDGMENT: 21/07/1999 BENCH: A.S.ANAND CJI & S.B.MAJMUDAR & SUJATA V.MANO HAR & K.VENKATASWAMI & V.N.KHARE 1999 (6) SCC 172 Drug abuse is a social malady. While drug addiction eats

into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture. Anti-drug justice is a criminal dimension of social justice.

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There is indeed, a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed.

On the basis of the reasoning and discussion above, the following conclusions arise :

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is

seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case 1974 (1) SCC 345 and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case. The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part.

In the cases of State of Punjab v. Balbir Singh, 1994 (3) SCC 299, Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, 1994 (6) SCC 569, Saiyad Mohd. Saiyad

Umar Saiyad and others v. State of Gujarat, 1995 (3) SCC 610 and a number of other cases, it was laid down that failure to observe the safeguards, while conducting search and seizure, as provided by Section 50 would render the conviction and sentence of an accused illegal.

However, in State of Himachal Pradesh v. Pirthi Chand and Anr., 1996 (2) SCC 37, and State of Punjab v. Labh Singh, 1996 (5) SCC 520, relying upon a judgment of this Court in Pooran Mals case (supra), a discordant note was struck and it was held that evidence collected in a search conducted in violation of Section 50 of NDPS Act did not become inadmissible in evidence under the Evidence Act. The two-Judge Bench, therefore, on 15.7.1997, by the following order, referred the batch of cases to a larger bench : One of the questions that has been raised in these appeals/special leave petitions is whether compliance with Section 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985 is mandatory and, if so, what is the effect of the breach thereof.

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In State of Punjab v. Balbir Singh (1994 (3) SCC 299), a two-Judge Bench of this Court held that the above section is mandatory and it is obligatory on the part of the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. It was further held that non-compliance with the above section would affect the prosecution case and vitiate the trial.

This Judgment was affirmed by a three-Judge Bench in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat (1995 (3) SCC 610). In Ali Mustaffa Abdul Rahman Moosa v. State of Kerala (1994 (6) SCC 569) a submission was made on behalf of the State of Kerala to reconsider the judgment in Balbir Singh's case (supra) keeping in view the judgment of this Court in Puran Mal v. Director of Inspection (1974 (1) SCC 345). It was contended that even if the search and seizure of the contraband was held to be illegal and contrary to the provisions of Section 50, it would not affect the conviction because the seized articles could be used as evidence of unlawful possession of the contraband. In repelling the contention, the Court observed : The judgment in Pooran Mal case only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act.

RIGHT TO PRIVACY

The law was crystallized in the People's Union for Civil Liberties (PUCL) v. Union of India [(1997) 1 SCC 301], holding: "We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy,

Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

In State of Maharashtra v. Madhukar Narayan Mardikar [(1991) 1 SCC 57], this Court protected the Right to Privacy of a prostitute. It was held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

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COURT PROCEEDINGS DOES NOT BECOME WEAPON OF HARASSMENT

"which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice". [State of Karnataka Vs. L. Muniswamy (1977) 2 SCC 699]. We are conscious that inherent powers do not confer an arbitrary jurisdiction on the High Court to "act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases". [See: Kurukshetra University Vs. State of Haryana (1977) 4 SCC 451].

EVIDENCE OF EXPERT WITNESS

Supreme Court in State of H.P. v. Jai Lal and others, [(1999) 7 SCC 280] held as under :- " Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross- examination. Supreme Court in the case of Hazi Mohammad Ekramul Haq v. State of W.B. concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."

SENTENCING PRINCIPLES

Recently, this Court, in Gurmukh Singh v. State of Haryana, JT 2009 (11) SC 122 enumerated the various considerations which will be taken into account while

determining the sentence which read as under: "These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under: a) Motive or previous enmity; b) Whether the incident had taken place on the spur of the moment; c) The intention/knowledge of the accused while inflicting the blow or injury; d) Whether the death ensued instantaneously or the victim died after several days; e) The gravity, dimension and nature of injury; f) The age and general health condition of the accused; g) Whether the injury was caused without pre-meditation in a sudden fight; h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; i) The criminal background and adverse history of the accused; j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock; k) Number of other criminal cases pending against the accused; l) Incident occurred within the family members or close relations; m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment? These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."

NO PARALLEL PROCEEDINGS SECTION 145 & 133 CRPC PROCEEDINGS

Supreme Court in Ram Sumar Puri Mahant v. State of U. P. and others, AIR 1985 S. C. 472. "...When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated we see hardly any justification for initiating a parallel criminal proceeding under Section 145 of the Code. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the criminal Court in a matter like the one before us. ..."

After going through the provisions of Section 133 Cr.P.C, it is apparent that the provisions relate to public nuisance and provisions can be invoked only if the public at large faces inconvenience obstruction, or nuisance, or such obstruction, or nuisance is unlawful on account of the act of the person concerned, or conduct of any trade or occupation, or on account of construction, or disposal of any substance is dangerous to health, then initially a conditional order is to be passed causing such obstruction or nuisance, trade, or occupation to be removed or desist from carrying on, or to remove in a manner as directed. The explanation appended to Section 133(2) Cr.P.C. defines a "public place" which includes property belonging to the State camping grounds and grounds left unoccupied for sanitary or recreative purposes. Once the notice is issued, it is the power of the Magistrate to get a local investigation or examination of the area and pass appropriate orders.

In the present case, the proceedings were dropped after recording a satisfaction that the dispute appears to be between two parties and it does not call for interference under Section 133 Cr.P.C. In the case of Brij Kishore Rai (supra) relied upon by the counsel for the petitioner has no application to the facts of the present case. In the said case, after the notices were issued, there was a denial and after the Magistrate initiated the proceedings and was satisfied on the basis of local inspection that the petitioner has obstructed public path by raising construction as well as stopping flow of water of Nabdan, the conditional order was made absolute. So far the present case is concerned, the Magistrate has declined to proceed in the matter on the ground that it is a private dispute.

In the case of Vasant Manga Nikumba and Ors. v. Baburao Bhikanna Naidu and Ors. 1995 Supp (4) Supreme Court Cases, 54, the Apex Court ruled that the object and purpose of Section 133 Cr.P.C. is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately, irreparable damage would be done to the public at large. Similar view was expressed in the case of State of M.P. v. Kedia Leather & Liquor Ltd, and Ors. 2003 Cri. L.J., 4335. For a ready perusal, extract of paragraph 8 of the case of State of M.P. v. Dedia Leather & Liquor Ltd. And others is quoted below:

Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is apart of the heading 'public nuisance'. The term 'nuisance' as used in law is not a term capable of exact definition and it has been pointed out in Halsbury 's Laws of England that "even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort". In Vasant Manga Nikumba and Ors. v. Baburao Bhikanna Naidu (deceased) by Lrs. and Anr. (1995) Supp (4) SCC 54), it was observed that nuisance is an inconvenience which materially interferes stith the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapses etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time.

On the basis of what has been discussed above, it is clear that the power under Section 133 Cr.P.C. should be exercised to prevent public nuisance but not for private nuisance. It is condition precedent that the act should be offensive against the public at large. Kachrual Bhagirath Agrawal & Ors. Vs State of Maharashtra & Ors. AIR 2004 SC 4818 Nuisances are of two kinds, i.e. (i) Public; and (ii) Private. 'Public nuisance' or 'common nuisance' as defined in Section 268 of the Indian Penal Code, 1860 (in short the 'IPC') is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity.

'Private nuisance' on the other hand, affects some individuals as distinguished from the public at large.

Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience.

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In order to bring a trade or occupation within the operation of this Section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously. The word 'community' in Clause (b) of Section 133(1) cannot be taken to mean residents of a particular house. It means something wider, that is, the public at large or the residents of an entire locality. The very fact that the provision occurs in a Chapter with "Public Nuisance" is indicative of this aspect.

The guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present. "All power is a trust that we are accountable for its exercise that, from the people, and for the people, all springs and all must exist". The conduct of the trade must be injurious in presenti to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133.

In Vasant Manga Nikumba v. Baburao Bhikanna Naidu (1995 Supp (4) SCC 54) it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable danger would be done to the public.

IN Guidelines laid down by Supreme Court regarding non maintainable complaints in the matter of State of Haryana vs. Bhajan Lal [(1992) Supp. 1 SCC 335] Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

Apparent the nuisance is of two kinds, public nuisance and private nuisance. The test of private nuisance is:

- (1) Constant noise, if abnormal or unusual can be actionable nuisance if it interferes with one's physical comforts.
- (2) The test of a nuisance causing personal discomfort is the actual local standard of comfort, and not an ideal or absolute standard.
- (3) Generally, unusual or abnormal noise on defendants' premises which disturbs sleep of the occupants of the plaintiffs house during night or which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiff's house to which cannot allow the occupants of the plaintiff's house to carry on their ordinary work is deemed to be a noise which interferes with one's physical comforts.
- (4) Even in a noisy locality, if there is substantial addition to the noise by introduction of some machine, instrument or performance at defendants physical comforts of the occupants of the plaintiffs house, then also the noise will amount to actionable nuisance.
- (5) If the noise amounts to an actionable nuisance, the use of his own property will be ineffectual. No use of one's property is reasonable if it causes substantial discomfort to other person. "If a man creates a nuisance" said Kekewich J. in *Attorney General v. Cole & Sons* (1901) 1 Ch. 205 at p.207. "He cannot say that he is acting reasonably. The two things are self-contradictory".
- (6) If the defendant found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner according to rules framed in this behalf either by the Municipality or by the Government, the latter defence can be effective in a case of public nuisance, but not in that of a private nuisance.
- (7) If an operation on the defendant's premises cannot by any case and skill be prevented from causing a private nuisance to the neighbours, it cannot be undertaken at all, except with the consent of those injured by it.
- (8) The right to commit a private nuisance can in certain circumstances, be acquired either by prescription or by the authority of a statute.

In this regard, it is relevant to notice a decision of this Court in **MALKAPPA v. PADMANNA AIR 1959 Mysore 122** That was a case in which the parties had approached the Civil Court for adjudication of their rival claims to the suit property. In spite of that, the Magistrate initiated a proceeding under Section 145 of the Cr.P.C. The Court held as follows: "It seems to me that it is a misapprehension to consider this question from the point of view of the existence of otherwise of a jurisdiction in a Magistrate. Section 145 should not be understood as merely conferring a particular jurisdiction on a criminal Court to deal with a civil matter. It embodies or enjoins upon the Magistrate a certain duty and that duty is to see that parties who have a civil dispute do not take the law into their own hands and commit breach of peace. The duty is to see that the parties actually go to a Civil Court and not fight about the land. If the parties have already gone there, the Magistrate has no longer any duty to perform. It is also necessary to state that one of the pillars of public peace is the respect for orders of the Civil Courts and the proceedings before a Civil Court. If the criminal Courts should start

parallel proceedings in respect of a matter which is pending before a Civil Court, I have no doubt that it will have the effect of undermining respect for the authority of Civil Courts with the result that the very objective of Section 145 will be defeated. This is not saying that the Magistrate cannot proceed under Section 107 to bind over parties who, it is apprehended, might commit some offence or commit breach of the peace. Indeed that Section is more proper because it is exclusively a matter for a Magistrate to deal with, whereas Section 145 impinges upon the authority of Civil Courts. Where therefore, there is a choice between Section 145 and Section 107 before a Magistrate by reason of the pendency of Civil litigation, it seems to me perfectly obvious that he must choose Section 107 and not Section 145."

It also emerges from the record as well as from the impugned judgment that, the revisionist has filed Civil Suit No.1594/97 in respect of same right and sought injunction restraining the respondent from creating noise pollution. The learned Additional Sessions Judge has mentioned in the impugned judgment that no stay order or injunction order was passed by the Civil Court. Consequently, it can be said that the revisionist himself considered that the dispute raised by him was of civil nature, and for getting relief he approached the Civil Court but, without success. If the dispute is of civil nature then such dispute could not be entertained by the Executive Magistrate under sec. 133 of the Code of Criminal Procedure. Provisions of sec. 133 of the Criminal Procedure Code cannot be used for settlement of disputes between the private parties. Such provisions can be used only for settlement of dispute in relation to public right in the general interest of the public at large. If the dispute affects one individual but not the public at large, the jurisdiction under sec. 133 of the Code of Criminal Procedure could not be exercised. It may also be mentioned that, in this case number of persons have occupied other flats in the complex but, they are not feeling inconvenience due to running of electric motor or the electric pump. Consequently, it cannot be said that it was a case where nuisance was created at a public place, where public at large was affected or the residents at large of the complex were affected. Hence also, jurisdiction under sec. 133 of the Criminal Procedure Code was wrongly exercised by the learned Executive Magistrate.

Even one person who is aggrieved from such public nuisance at a public place may report the matter to the Executive Magistrate, and upon such information the Executive Magistrate can proceed under sec. 133(1) of the Criminal Procedure Code. Section 133(1) of the Code of Criminal Procedure provides that, "The Executive Magistrate can proceed under this section on receiving the report of Police Officer or other information." The word "other information" includes information given by any person who is aggrieved from public nuisance. So, what is provided under sec. 133 is that nuisance should be created at a public place. Public place is defined in explanation to sub-section (2) of sec. 133. It says that, "A public place includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes." The complex where the electric motor was installed is not a public place, either within the definition of explanation of public place as contained in sub-section (2) of sec. 133 of the Code of Criminal Procedure, nor it can be said to be a public place which is understood by an ordinary prudent man. The complex is not a place which is acceptable to public at large. There only the occupants of the flat, their relatives, friends and companions are entitled to enter the complex. Consequently, the place where the

electric motor is installed is not a public place. Assuming that the running of electric motor at odd hours or during 24 hours causes nuisance to the revisionist it cannot be said that the nuisance is being created at a public place. If this is so, the jurisdiction by the Magistrate under sec. 133 of the Code of Criminal Procedure was wrongly exercised.

It is obvious that the respondent no.1 appeared before the Executive Magistrate and denied that it was a case of public nuisance. In case of such denial, the Executive Magistrate was required to enquire into the matter about the existence of right in the nature of public nuisance or private nuisance. And, if in such inquiry the Executive Magistrate found that there was some reliable evidence, on such denial he was bound to stay the proceedings and he was further bound to direct the complainant or the parties to approach competent Civil Court for adjudication of their rights.

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Section 133 of the Code of Criminal Procedure provides that, "Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving a report of a Police Officer or other information, and on taking such evidence (if any) as he thinks fit, considers, inter alia that, any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public, such Magistrate may make a conditional order requiring the person causing such nuisance to remove such nuisance within a time fixed in that behalf, and if the person against whom such order is made, appears and objects so to do or to appear before the Executive Magistrate, show cause-notice is required to be issued and the order should not be made absolute.

In the judgment relating to *Kachrual Bhagirath Agrawal v. State of Maharashtra* [(2005) 9 SCC 36], the Supreme Court dealt with Chapter X of the Code of Criminal Procedure. Speaking for the Bench, Arijit Pasayat, J., in paragraphs 10 and 11, observed as follows: Para 10: ".... The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Sections 133 and 144 of the Code shows that while the former is more specific, the latter is more general. Therefore, nuisance specially provided for in the former section is taken out of the general provisions of the latter section. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature...." Para 11: ".... There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed...."

Even earlier in *Vasant Manga Nikumba v. Baburao Bhikanna Naidu* [1995 Supp (4) SCC 54], the same learned Judge had opined as follows in paragraphs 3 and 5: Para 3: "... The object and public purpose behind Section 133 is to prevent public nuisance that if the Magistrate fails to take immediate recourse to Section 133 irreparable damage would be done to the public. The exercise of the power should be one of judicious discretions objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record. The proceedings under Section 133 is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding under Section 133 is more in the nature of civil proceedings in a summary nature." Para 5: "... No action can be taken under this section where the obstruction or nuisance has been in existence for a long period and the only remedy open to the aggrieved party was to move the civil court. It was also held that Section 133 is attracted only in cases of emergency and immediate danger to the health or physical comfort of the community. Accordingly on the facts in that case, it was held that there was no immediate danger or emergency for the removal of the structure offending in that case. It is also settled law that recourse to Section 133 could not be a substitute for the civil proceedings and the parties should have recourse to the civil remedy available and should not be encourage (sic encouraged) to taking recourse to the provisions of Section 133 of the Code.

Once again, in the decision relating to *State of M.P. v. Kedia Leather & Liquor Ltd.* [(2003) 7 SCC 389], the Supreme Court dealt with the scope of Section 133 Cr.P.C. The relevant passage found in paragraph 8 of the judgment may be reproduced below:

Para 8: "Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquillity. It is a part of the heading Public nuisance. The term nuisance as used in law is not a term capable of exact definition and it has been pointed out in *Halsburys Laws of England* that: even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort. "... To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time...."

Thus, by a reading Sections 133 Cr.P.C. and as interpreted by this Court and the Supreme Court through the decisions referred to above, the following proposition of law emerges:-

- (a) The order under Section 133 Cr.P.C. must be based upon material factors;
- (b) The order should be reasonable restriction and it must not be arbitrary or excessive and the procedure and the manner of imposition of restriction must be fair and just;
- (c) Proceedings under Section 133 Cr.P.C. are not intended to settle private disputes between different members of public.

(d) Unless there is imminent danger to the physical comfort of the community, the order under Section 133 Cr.P.C. cannot be passed.

(e) No action can be taken when the obstruction has been in existence for a long period and Section 133 Cr.P.C. is attracted only in case of emergency and imminent danger.

(f) The proceedings under Section 133 Cr.P.C. is not a substitute for the civil proceedings.

(g) For invoking Section 133 Cr.P.C., there must be imminent danger to the property and consequential nuisance to the public. Page | 211

(h) The exercise of the power should be one of judicious discretion objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record.

(i) If it is a dispute over licence conditions, then, it only relates to a civil right between the parties and the parties ought to have been relegated to the Civil Court's jurisdiction.

(j) In the guise of exercising an emergency power under Section 133 Cr.P.C., the authorities cannot create new rights in favour of the so-called complainants.

(k) In any event, after the preliminary order was passed by the SDM and when an objection was raised in the form of an interim response that the property was a private property, the SDM should refer the matter for a Civil Court's decision under Section 137(2) Cr.P.C. and must stay his own proceedings.

(l) When a valuable right of a owner of a property is at stake, merely because there is a group demand or a mob desire, the power under Section 133 Cr.P.C. cannot be used or rather misused.

(m) The word 'public' in Section 133(1)(a) cannot be taken to mean as residents of a particular locality. It means something wider, that is, the public at large or the residents of an entire locality.

BAIL PRINCIPLES

The Apex Court in the case of State of U.P. Versus Amar Mani Tripathi (2005) 8 SCC 21, Kalyan Chandra Sarkar Versus Rajesh Ranjan alias Pappu Yadav and another (2004) 7 SCC 528, Ram Govind Upadhyay Versus Sudarshan Singh and others (2002) 3 SCC 598 and Anil Kumar Tulsiani Versus State of U.P. and another, Appeal (Crl.) 529 of 2006 decided on 5.5.2006 has laid down the considerations and circumstances to be considered while deciding the bail application which 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.